

APPENDIX THREE

LEGAL ADVICE ON PROVISIONS OF THE *AIRPORTS ACT 1996*

- Legal advice provided to the Committee by Professor Dennis Pearce, dated 27 March 2000.
- Legal advice provided to the Brisbane Airport Corporation by Mallesons Stephen Jaques, dated 18 November 1999.
- Legal advice provided to the Department of Transport and Regional Services by the Senior General Counsel, Australian Government Solicitor, dated 18 December 1999.

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27 March 2000

Trish Carling
Research Officer
Rural and Regional Affairs and Transport Committee
The Senate
Parliament House
Canberra ACT 2600

Dear Ms Carling

Inquiry into the Development of the Brisbane Airport Corporation Master Plan

Advice sought

1 You have sought my advice on the question whether s 94(5) of the Airports Act 1996 has the effect of preventing changes to an Airport Master Plan after its approval by the Minister for Transport and Regional Services.

Short Answer

2 Section 94(5) prevents changes being made to a Master Plan by means of a major development plan but a Master Plan may be changed by being replaced using the procedure set out in s 78 of the Airports Act.

Background facts and legislation

3 Division 3 of Part 5 of the Airports Act provides for the drafting and approval after a consultative procedure of a master plan for each airport. The plan comes into force on approval by the Minister (s83). A master plan is to be in force initially for 5 years but may continue in force thereafter until it is replaced (s 77(1)). Section 78 permits the replacement of a master plan. The section does not place any time limit on when this can occur so it would be possible for a master plan to be replaced within the 5 year period

referred to in s 77(1). It should be noted that s 77(2) says that s 77(1) which specifies the duration of the plan is subject to s 78.

4 Division 4 of Part 5 of the Act provides for the drafting and approval after consultation of major development plans. Such plans can deal with significant issues affecting an airport. Section 89 specifies the developments that can be dealt with in a major development plan and includes such things as constructing a new runway, extending the length of a runway and constructing a new building. However, s 94(5) reads:

"(5) If a final master plan is in force for the airport, the Minister must not approve the draft major development plan unless it is consistent with the **final master plan.**"

5 The effect of this provision has been raised in evidence given to the Committee by Mr Wayne Swann MP and Mr Kevin Rudd MP. Both Members have asserted that the effect of the section is to prevent the amendment of a master plan. Once made it becomes "set in concrete".

6 This issue has arisen in the course of an inquiry by the Committee into the development of the Brisbane Airport master plan. In particular, reference has been made to the siting of a proposed third runway. The direct question that has been canvassed is whether it is possible for the master plan to be changed to resite the runway.

Reasons for Answer

7 The provisions of the Act are clear as to their meaning. Section 94(5) prevents a major development plan making provision for developments that are inconsistent with a final master plan. What will be "inconsistent" will depend on the detail that is included in the master plan. For example, the mere fact that a master plan provides for a single runway at an airport does not mean that a major development plan cannot propose the construction of another. Section 89 expressly provides that such action falls within the description of major development. But the position would be different if the master plan itself provided that there was to be one and only one runway. A proposal to construct another would be inconsistent with this prescription.

8 Applying this reasoning to the matter in hand, the fact that the master plan specifies the site of the proposed third runway would appear to prevent a major development plan proposing a different site. So to provide would be inconsistent with the master plan and would breach s 94(5).

9 However, none of this prevents a proposal for a replacement of the final master plan pursuant to s 78 being brought forward by the airport lessee. Such a proposal could include a new site for the proposed third runway

10 Accordingly, Mr Swann and Mr Rudd were correct in their assertion that a master plan is set in concrete insofar as its amendment by a major development plan is concerned. However, they were not correct in claiming that the master plan could never be altered. Section 78 allows the replacement of the Brisbane airport master plan and this can occur before the 5 year life of the present plan has expired.

11 The legal advices from the Australian Government Solicitor and Mallesons Stephen Jacques copies of which have been furnished to the Committee are consistent with the views that I have set out above.

Yours sincerely

A handwritten signature in cursive script that reads "Dennis Pearce". The signature is written in dark ink and is centered horizontally below the text "Yours sincerely".

Emeritus Professor Dennis Pearce

Mallesons Stephen Jaques

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Confidential communications

18 November 1999

Mr Koen Roeijmans
 Managing Director & Chief
 Executive Officer
 Brisbane Airports Corporation
 Limited
 Fax (07) 3406 3112

Dear Mr Rooijmans

Opportunities for further discussion and review of plans under the Airports Act 1906 (Ctb) ("the Act")

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On Monday 15 November 1999, Mr Wayne Swan MP, the Federal member for Lilley, gave evidence to the Rural & Regional Affairs & Transport Senate References Committee Inquiry into the Brisbane Airport Corporation Master Plan. He said that he had received legal advice to the effect that a Master Plan, once approved by the Minister for Transport & Regional Services, was "set in concrete." His point, as we understood it, was that there was little or no future opportunity for review or revocation of things (such as the second runway) contained in a Master Plan once it was approved by the Minister. Specifically, he referred to section 94(5) of the Act.

The purpose of this advice is to comment on the correctness of the legal advice that Mr Swan has received. In short in our opinion, Mr Swan's legal advice is not correct.

This letter is in 3 parts. Part A gives a general outline of the Act's operation in relation to master plans, environmental strategies and major development plans. Part B details the opportunities for review of final master plans. In Part C the requirement contained in sub-section 94(5) of the Act (that a major development plan must be consistent with a final master plan) is discussed.

A Overview of the Act's operation in relation to master plans, environmental strategies and major development plans...**1 Introduction - master plans and environmental strategies**

- 1.1 Division 3 of Part 5 of the Act addresses master plans, while Division 2 of Part 6 sets out the legislative regime for environmental strategies. These two divisions have a similar form and are discussed together for the purpose of this overview. In the subsequent discussion in this Part A, statements made in relation to master plans should be taken as true of environmental strategies as well. Where section numbers of the Act are given in brackets, the first reference gives the relevant section in relation to master plans, the second reference gives the relevant section in relation to environmental strategies.
- 1.2 The two Divisions mentioned in 1.1 apply to Brisbane Airport by virtue of the fact that it is a core regulated airport as defined in section 7 of the Act (s 68, s 114),
- 1.3 For each such airport there has to be both a final, master plan (s 70) and a final environmental strategy (s 115). A final master plan/environmental strategy is one that has been approved by the Minister (s 83, s 128).

2 Discussion prior to approval of final master plan: *or final environmental strategy

- 2.1 Both Divisions provide for a stage of "consultation" (s 80, s 125) with state/territory governments, state/territory authorities, local government, an airline or other airport user and any other person. The draft master plan submitted to the Minister must list the names of those consulted and summarise their views.
- 2.2 There then follows a stage in which a preliminary version of the draft master plan is released for "public comment" (s 79, s 124). A notice is to be placed in the papers advising that a preliminary version of the master plan is available for inspection, and will remain open for inspection for 90 days after publication of the notice. Where members of the public supply written comment in accordance with the notice, the draft plan submitted to the Minister must list the names of those members of the public, summarise their comments, and state that the company has had due regard to those comments in preparing the draft plan.

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3 Opportunities for submission of a new draft master plan or environmental strategy

- 3.1 In relation to both master plans and environmental strategies, three circumstances are contemplated in which a draft master plan will be submitted to the Minister:
- (a) Where a company acquires or is granted an airport lease and there is no final master plan in place for the airport at the time of the acquisition or grant, a draft master plan is to be submitted (s 75, s 120). In this situation, the company is required to give the Minister a draft master plan for the airport within 12 months of the acquisition or grant, although this time may be extended if the Minister gives written notice to this effect to the company.
 - (b) The second circumstance contemplated in which a draft master-plan may be submitted is when the final master plan currently in force is due to expire (s 76, s 121). Final master plans remain in force for five years (s 75, s 122). The airport-lessee company must give the Minister a draft master plan before the expiry of the original plan. Where a 'fresh' final master plan does not come into force before the original plan's 5 years have run, the original plan remains in force until a fresh plan comes into force (subs 77(1)).
 - (c) Thirdly, and most relevantly for present purposes, a draft master plan intended to replace an existing final master plan may be submitted to the Minister at any time. The replacement plan may be submitted at the initiative of the airport-lessee company (subs 78(1), subs 123(1)) or it may be submitted following a written notice from the Minister that directs the company to submit a replacement plan (subs 78(2), subs 123(2)). The operation of section 78 and pertinent related provisions is discussed more fully in Part B.
- 3.2 Additionally, where only minor variations to a master plan are required, an expedited procedure to secure Ministerial approval is provided (s 84, s 129). Where the Minister approves such a variation, the master plan is varied accordingly (subs 84(6)).

4 Major Development Plans

- 4.1 Major development plans are addressed in Division 4 of Part 5. Major airport developments, as defined in s 89, must not be carried out except in accordance with an approved major development plan (s 90). Subsections 89(1)(a) and (b) state that the construction of a new runway and the extension of the length of a

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runway respectively, both constitute a 'major airport development' for the purposes of s 89 and so require a major development plan (s 90).

- 4.2 As with master plans and environmental strategies, a draft is to be submitted to the Minister for approval.
- 4.3 The provisions relating to discussion preceding Ministerial approval of a major development plan mirror those relating to master plans and environmental strategies. There is provision for a consultation stage (s 93) followed by release of a draft version of the major development plan for public comment (s 92). The provisions regarding consultation and public comment in relation to major development plans contain the same requirements as those discussed in relation to master plans and environmental strategies at point 2 above.
- 4.4 As major development plans relate to discrete projects, as opposed to the ongoing operations of the airport as with a master plan or environment strategy, there are no provisions equivalent to those discussed in relation to master plans and environmental strategies (point 3) regarding the renewal and/or replacement of major development plans. However, provision is made for minor variation to a major development plan (s 95).

B Opportunities for further discussion and review of final master plans

- 5 Procedures for the replacement of a final master plan can be initiated at any time by the airport-lessee company (subs 78(1)) or the Minister (subs 78(2)). Subsection 78(2) provides that:

“if a final master plan (the original master) plan for an airport is in force, the Minister may, by written notice given to the airport-lessee company for the airport, direct the company to give the Minister a draft master plan that is expressed to replace the original plan ...” [my emphasis].

The subsection's reference to 'a final master plan' clearly means that the Minister can direct that *any* final master plan be redrafted. Section 78 is not confined to the submission of a redraft the first master plan, as, indicted by section 75 (which provides for submission of a draft master plan after acquisition or grant of an airport lease) and section 76 (which provides for submission of a draft master plan where the final master plan currently in force is due to expire). Further, section 78 places no limit on the time at which the Minister can issue a written notice to the airport-lessee company requiring it to submit at any time is supported by subsection 77(2) which provides that the duration of a final master plan is subject to section 78.

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6 Under s81 it is open to the Minister to either approve or refuse to approve a draft master plan (subs 81(2)). Where the Minister refuses to approve a draft master plan, he/she may direct the company to give the Minister a fresh draft master plan (subs 81(8)). A company that fails to comply with the request for a fresh draft master plan commits an offence (subs 81(9)). There is not limit on the number of times a Minister may refuse to approve a draft master plan and require a fresh one. Each airport is to have a final master plan (s 70) and must therefore persist until it obtains the Minister's approval.

7 In addition to the stated requirements of subsections 7(2) and (3) on the contents of a draft or final master plan, it is possible to further define and refine the contents of a draft master plan through regulations. Subsection 71 (5) states that:

"The regulations may provide that, in specifying a particular proposal, forecast or other matter covered by subsection (2) or (3), a draft or final master plan must address such things as are specified in the regulations."

The Act leaves it open as to what can be specified in the regulations, subsections 71(2)(j) and 71(3)(j) (relating to 'airports other than joint-user airports' and 'joint-user airports' respectively) stating:

"In the case of [an airport], a draft or final master plan must specify:...(j) such other matters (if any) as are specified in the regulations."

Currently, further specification of the contents of a draft or final master plan is given in regulation 5.02 of the Airports Regulations 1997 (s 84).

8 Minor variations can be made to a final master plan under an expedited procedure separate from that relating to replacement of one plan with another (s 84).

C The requirement that master plan and major development plan be consistent.

9 Subsection 94(5) states that:

"If a final master plan is in force for the airport, the Minister must not approve the draft major development plan unless it is consistent with the final master plan."

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That is, the Minister must not approve a draft development plan that is inconsistent with the airport's final master plan. Read literally this provision means that the Minister must not approve a draft development plan where there is *any* inconsistency between it and the final master plan. However, it is possible that a court will preclude approval of a major development plan.

10. There are a number of ways in which the 'inconsistency' bar in subsection 94(5) might be addressed if it arises in practice. A minor inconsistency can be remedied either by administrative amendment of the major development plan or a minor variation to the final master plan under section 84. Where the inconsistency is more substantial, the draft major development plan could be administratively amended to remove the inconsistency, or the section 78 process could be followed to replace the existing, final master plan with another.
11. Therefore, section 94(5) does not operate to entrench, the Master Plan, which can always be amended under section 78.

Conclusion

In summary therefore, neither a Master Plan nor a Major Development Plan is "set in concrete" once approved by the Minister, and changes (including substantial changes) to such documents can be initiated by the airport-lessee company or required by the Minister.

Yours sincerely

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Your ref: H98/0904

Our ref: 98069893

18 December 1998

Mr Simon Clegg
Aviation Legal
Department of Transport and Regional Services
GPO Box 594
CANBERRA ACT 2601

Dear Mr Clegg

Legal Status of Master Plan

1. I refer to your facsimile transmission of earlier today seeking advice on a proposition advanced by Mr Kevin Rudd MP, Federal Member for Griffith, that all major development plans must be automatically approved where the development is identified in an approved final master plan under the *Airports Act 1996*, ('the Act').

2. In my opinion, there is no foundation for Mr Rudd's proposition.

3. Mr Rudd claims that his proposition is based on 'legal advice received from the Queensland Department of Transport'. However, he has not provided your Department with a copy of that advice. It is thought that Mr Rudd's claim may stem from a particular view of subsection 94(5) of the Act, which provides as follows:

'If a final master plan is in force for the airport, the Minister must not approve the draft major development plan unless it is consistent with the final master plan.'

It is thought that Mr Rudd has interpreted this provision to mean that, if a final master plan is in place, the Minister has no choice but to approve major development plans that are consistent with the master plan.

4. In my opinion, there is no basis for that interpretation. There is nothing in subsection 94(5) of the Act to suggest that the existence of a final master plan requires the Minister to approve major development plans that are consistent with it. What the subsection does is prevent the Minister from approving a draft major development plan where it is inconsistent with the final master plan.

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5. It may be noted that paragraph 91(1)(d) of the Act provides that a major development plan, or a draft of such a plan, must set out, if a final master plan for the airport is in force, whether or not the development is consistent with the final master plan. Subsection 94(2) gives the Minister a discretion to approve a draft major development plan or to refuse to approve the plan. Thus, even where a draft major development plan has indicated that the development is consistent with the final master plan, the Minister clearly has a discretion to refuse to approve the draft major development plan.

6. Please let me know if you require any further assistance in relation to this matter.

Yours sincerely

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