

SHOPPING CENTRE

COUNCIL OF AUSTRALIA

26 June 2008

Department of Infrastructure,
Transport, Regional Development
and Local Government
GPO Box 594
CANBERRA ACT 2601

Dear Sir/Madam

Issues Paper Towards A National Aviation Policy Statement

The Shopping Centre Council of Australia (SCCA) would like to offer the following comments on section 2.1 of the Issues Paper - *Airport planning and development* - addressing the following questions in particular:

- *Are the planning and development mechanisms under the Airports Act working effectively?*
- *Could the regulatory regime better facilitate genuine long term cooperation between airport operator companies and state and local governments on land use planning?*
- *How can we better integrate investment in airports with the funding and construction of improved road and rail links to and from our airports?*
- *How should the potential commercial impact for off-airport competition be taken into account in planning on-airport non-aeronautical development?*

The SCCA represents the owners and managers of shopping centres. Our members have a clear interest in ensuring there is a level playing field between retail developments on airport land and those on non-airport land. Over the past five years, the SCCA has lodged a number of submissions on individual airport master plans and major development plans (MDPs) as well as to the 2003 review of the Airports Act and the Airport Amendment Bill 2006.

The SCCA considers that commercial non-aviation development on airport land should be subject to the same level of scrutiny, community consultation, planning assessment and developer contributions as similar developments under state or local planning laws. We can see no public interest justification for exempting non-aviation development on airport land from the state and local planning laws that apply to every other development. While Commonwealth control of aviation development at airports may be warranted, given their national significance, there is no similar justification for exempting non-aviation development from local planning laws.

As the SCCA Chairman commented in an address to the Australian Mayoral Aviation Council in 2005:

- *Is it in the public interest that development of large tracts of land in our major cities is exempt from the planning laws that apply to every other development in those cities?*

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- *Is it in the public interest that tax payers and rate payers must meet the cost of any extra infrastructure required as a result of these developments because state and local governments cannot force airports to pay rates or infrastructure contributions?*
- *Is it in the public interest that major new retail and commercial centres can be imposed on local communities without their say so?*

The SCCA certainly does not think so, especially given that the Government requires its own government businesses to comply with local planning laws and yet exempts private businesses from these laws simply because they lease Commonwealth land.

In the two years 2003 to 2005 we are aware of at least 20 master plans and major development plans approved by the Minister for Transport. Many of these developments involved hundreds of thousands of square metres of retail and commercial floor space – the equivalent of several regional and sub-regional shopping centres. If the airports were subject to state and local planning laws, detailed investigations would be required for the development of such large areas of additional retail floor space in an out-of-centre location. Yet new airport centres can sidestep this process, regardless of the impact on the local community or the viability of surrounding centres.

Perhaps one of the greatest shortcomings in the Airports Act is the absence of any obligation on airport lessees to meet the infrastructure costs of their developments. At present an airport lessee can develop a large commercial or retail centre that generates a lot of extra traffic but – unlike any other development – tax payers and rate payers, not the developer, have to meet the cost of any necessary road and traffic upgrades. This is clearly not in the public interest. It is also a matter of great concern to members of the Shopping Centre Council because it delivers a windfall advantage to airport lessees over other developers who are required to pay developer contributions.

There is also a huge loophole in the Airports Act when it comes to buildings (other than passenger terminals) costing less than \$20 million. Provided the building is consistent with the airport master plan – and master plans generally provide for every conceivable development to ensure that any future development will be not be inconsistent with them – no development approval is required at all. The airport just needs to get building approval from the local Airport Building Controller and start building. There is no need to publicly advertise the proposal. There is no need to invite submissions or consult the community. There is no need for local government, state government or Federal Ministerial approval.

The advantages given to commercial developments on airport land are not confined to planning and development control. Although airport lessees pay stamp duty and payroll tax under 'mirror' tax arrangements between the Federal and State Governments, they pay no land tax. Nor do they have to pay some other state taxes, including motor vehicle taxes or parking levies. Again, this delivers airports a windfall gain vis-à-vis other (competing) commercial property owners.

Retail developments on airport land are also exempt from state trading hours laws. The DFO centre at Brisbane Airport for example, can stay open late at the weekend while every other large retailer in South East Queensland must close at 5 pm on Saturdays and 6 pm on Sundays. The SCCA believes that retailers and shopping centres should be able to decide when they open but why should a shopping centre at Brisbane Airport be exempt from the Queensland Trading

(Allowable Hours) Act when every other shopping centre in Queensland has to comply with this Act?

Our longstanding concerns with the planning controls in the Airports Act were first detailed in our 2003 submission to the Airports Act review (a copy is **attached**). The 2006 Airport Amendment Bill flowing from that review made only minor improvements and in some areas actually made the problems worse. For example, the Bill doubled the threshold for MDPs from \$10 million to \$20 million which made a complete mockery of the development approval process – what other consent authority would allow construction of a \$20 million building with no development approval?

In summary, the fundamental problems with the airport planning regime are:

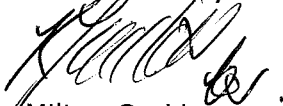
- the continued exemption of commercial development at airports from state and local planning (and other) laws ;
- the absence of a developer contributions regime to ensure that airports pay the infrastructure costs of their developments, not tax and ratepayers;
- the lack of transparency and public accountability in the building approval process for buildings worth less than \$20 million. (Unlike other consent authorities, the Airport Building Controller is not required to give any public notice of building approvals sought and approved.);
- the deemed *approval* of an airport master plan or MDP if the Minister does not make a decision within the required time frame – not a deemed *refusal* as is normally the case. So for example, a \$300 million shopping centre could proceed by default because the Minister and the Department did not complete their assessments of the MDP within the required time frame;
- the absence of any publicly available aggregate information on master plans and MDPs that have been approved by the Minister.

The SCCA believes that the exemptions the airports currently enjoy - from state and local planning laws, from state taxes, from trading hours restrictions and so on - should be abolished for non-aviation development so that these developments have to comply with the same laws as everyone else.

We are not saying there should be no commercial or retail development on airport land. What we are saying is that, if there is to be commercial or retail development on land that has previously been set aside for aviation purposes, it should be subject to the same level of public scrutiny, community consultation, planning assessment, and developer contributions as similar developments under state or local planning laws.

The members of the Shopping Centre Council are: AMP Capital Investors, Brookfield Multiplex, Centro Properties Group, Colonial First State Property, Dexis Property Group, GPT Group, ISPT, Jen Retail Properties, Jones Lang LaSalle, Lend Lease Retail, Macquarie CountryWide Trust, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Stockland, Westfield Group and the Yu Feng Group.

Yours sincerely



Milton Cockburn

Executive Director

REVIEW OF AIRPORTS ACT 1996

Submission by the Shopping Centre Council of Australia

1. Executive Summary

This submission is concerned with the land use, planning and building controls contained in Part 5 of the Airports Act 1996, as they relate to non-aviation related development on airport land.

Specifically, the submission is responding to two of the review terms of reference, namely:

- 1) *Whether legislative changes to the operation of the current regulatory arrangements for core and non-core regulated airports would be appropriate.*
- 3) *Having regard to the Government's response to the recommendations from the Senate Inquiry into the Brisbane Airport Master Plan:*
 - *the effectiveness of the provisions related to Airport Master Plans (MP) and Major Development Plans (MDP) including: the triggers for the lodgement of an MDP and the practicality of Precinct MDPs: and*
 - *what obligations should be placed on airports with respect to public consultation.*

The Shopping Centre Council of Australia (SCCA) is concerned that the Act's primary focus on aviation-related development such as runways and terminals has resulted in an inadequate planning and assessment regime for non-aviation development on airport land.

These inadequacies have been recently highlighted in the case of Brisbane Airport where it appears that the airport-lessee believes it can undertake major commercial development without any scrutiny, consultation or planning approval.

These inadequacies are also providing airport-lessees with an unfair advantage in developing land over developers of non-airport land who are subject to local planning laws. This is clearly contrary to the Commonwealth Government's own competition policy which identifies anti-competitive legislation as that which provides "advantages to some firms over others".¹

The Act is also inconsistent with the Government's commitment to competitive neutrality principles. These principles require government businesses to comply with the same regulations that apply to private businesses, including planning and environmental laws. There seems to be no justification for requiring government businesses to comply with state planning laws, but exempting private companies from these laws, simply by virtue of their lease of government land.

The SCCA therefore considers that there needs to be a much more rigorous and professional planning and assessment process for non-aviation development on airport land, that:

¹ Commonwealth National Competition Policy, Annual Report 1999-2000, p.14

- provides a level of scrutiny, community consultation and planning assessment equivalent to that applying to developments under state and local planning systems;
- establishes a 'level playing field' between commercial development on airport and non-airport land;
- draws on planning principles that have been accepted by the courts; and
- ensures that non-aviation developments on airport land are consistent with state and local planning strategies for the area.

The need to address these issues will become more pressing as more airport-lessees seek to develop their quite substantial land holdings.

2. The Shopping Centre Council of Australia

The Shopping Centre Council of Australia is the retail property policy arm of the Property Council of Australia. It represents a large number of owners and managers of shopping centres in Australia. The Council's members are AMP Henderson Global Investors, Centro Properties Group, CFS Gandel Retail Trust, Deutsche Asset Management, FPD Savills/Byvan, Intro International, Jones Lang LaSalle, Leda Holdings, Lend Lease Retail, Macquarie CountryWide Trust, McConaghy Holdings, MCS Property, Perron Group, Queensland Investment Corporation, Stockland Trust Group, Westfield Holdings, and the Yu Feng Group.

3. Airport Master Plans

The SCCA has a number of concerns with the Act's provisions relating to airport master plans.

First, we consider that there is no justification for exempting non-aviation development on airport land from relevant state and local planning laws. While Commonwealth control of aviation related development at airports is warranted, given their national significance, there is no similar justification for completely exempting commercial, retail, and residential development from state and local planning laws.

We consider that such development should be required to be consistent with relevant state and local planning instruments to ensure that broader strategies to ensure sustainable urban development are not undermined. Otherwise, the community will be faced with lower quality developments that are incompatible with the local area and which have an unacceptable impact on local and regional infrastructure such as roads.

Second, the SCCA also considers that the status of airport master plans needs to be clarified. The Federal Court stated in *Brisbane Airport Corporation Limited v Wright* that "A master plan is part of a business plan for an existing airport. It is not a town planning document." If so, this means there is effectively no planning regulation of developments on airport land which do not trigger the requirement for a major development plan. This is of serious concern given the apparent ease with which airport-lessees can avoid the need to submit a major development plan, as discussed later.

The SCCA therefore recommends that the Act be amended to provide that airport master plans include an object and purpose statement (as recommended by the Senate Committee's *Report on the Inquiry into the Development of the Brisbane Airport Corporation Master Plan*) and also clarify that master plans are intended to provide planning control, at least at a strategic level.

Third, the Senate Committee report also identified "major deficiencies" in the Act, including a lack of detail about the interrelationship between planning documents and a lack of prescriptive information regarding consultation (summarised on pp xii-xiii of the report). In terms of public consultation, the Senate Committee considered that the *Airports Act* allows airport authorities to restrict consultation to a level which had given rise to a "strong community perception that the consultation with the public had been inadequate", and the Committee did not accept that this represented "responsible or desirable corporate behaviour" (pxiii). The Committee recommended that the Act be amended to include more prescriptive requirements for community consultation by airport owners and airport-lessees.

The SCCA supports these recommendations.

4. Major Development Plans

Section 89 of the Act sets out the circumstances in which an airport-lessee must submit a major development plan to the Minister for approval. In relation to non-aviation related development, section 89(1)(e) requires a major development plan to be submitted where any proposed 'building' is not a passenger terminal and the cost of construction exceeds \$10 million.

This provision is presumably intended to implement the Government's stated policy that "there can be no major developments occurring on (an) airport site without the community being fully consulted."² However the provision fails to achieve this objective.

On the contrary, it is providing a loophole under which airport-lessees can avoid having to submit their development proposals to public scrutiny and Ministerial consideration - by artificially splitting a development into \$9.9 million stages or constructing several separate but adjoining buildings each costing less than \$10 million. Such tactics would be unacceptable under any state or local planning system where a consent authority would require information on the complete development proposal before considering or approving individual stages of it.

In addition, the current provision allows airport-lessees to exclude the cost of site preparation works (such as excavation and filling) from the cost of a development. Again, this would not be possible under state planning legislation which defines a 'development' as including site preparation works. This is common practice - earth works and excavation are not undertaken for their own sake but to prepare a site for further development. They therefore form part of the ultimate development. It is normal practice in the development industry to include the site preparation costs in the total costs of any major development.

² Minister for Transport and Regional Services, 25 June 2002, statement announcing the sale of Sydney Airport.

The SCCA recommends the words “new building” in s.89(1)(e) be replaced with the term “development”. This would encompass such things as the use of land, the subdivision of land, the erection of a building, the carrying out of a work, and the demolition of a building or work³ and would bring the Airports Act into line with state planning legislation in Australia.

In addition, we recommend that the cost threshold for requiring a major development plan be replaced with a threshold based on the total gross floor area for all relevant new buildings, similar to the current triggers for major development planning of passenger terminals.

The SCCA also considers that there is a need for greater transparency and public accountability in relation to the role of the Airport Building Controller. Unlike other consent authorities under state planning legislation, such as democratically elected local councils and state governments, the Building Controller is not required to give public notice of development and building approvals sought and approved, nor is he/she required to take into account local planning authorities or community views.

We therefore recommend that the Airport Building Controller be required to notify the local council and publish notices in the local newspaper of any development or building approvals sought and given.

5. Deemed Approval of Master Plans and Major Development Plans

Section 81(5) of the Act provides that if the Minister has neither approved nor rejected a draft master plan within 90 days, the Minister is deemed to have approved the plan. Similarly, section 94(6) provides that a major development plan is deemed to be approved, if no decision is made within 90 days.

This is completely contrary to consent procedures in state planning laws which provide that a plan or proposed development are deemed to be *refused* if no decision is made by a consent authority within a specified time period. This ensures timely consideration but prevents the possibility of an unacceptable plan or project proceeding without proper approval.

The SCCA therefore recommends the Airports Act be amended to bring it into line with other Australian planning legislation by providing that a master plan and a major development plan are deemed to be refused if the Minister has not made a decision within 90 days.

6. Developer Contributions

It is inequitable that non-aviation developments on airport sites have to make no contribution to the cost of additional infrastructure (such as roads, water, sewerage, and electricity) required as a result of a development. All states and territories have a developer contributions regime to ensure that developers contribute to these infrastructure costs and they are not borne solely by ordinary taxpayers.

It is clearly inequitable for taxpayers to be subsidising non-aviation commercial developments on airport land because of the lack of a developer contributions scheme under the Airports Act. It is also inequitable that developers across the road from an airport site have to pay a developer contribution (under the local contributions plan) while a similar development on airport land on the other side of the road does not.

³ Environmental Planning & Assessment Act 1979 (NSW), s.4.

Allowing airport-lessees to commercially develop airport land without adequately addressing infrastructure needs also runs the risk of compromising an airport's core role of air transport. For example, a shopping centre could be built on airport land generating high levels of car traffic on roads funded by taxpayers to accommodate transport to and from the airport. Such development could ultimately inhibit future expansion of the airport's operations unless taxpayers funded further road upgrades.

The SCCA therefore recommends that a mechanism be established by which non-aviation related development on airport sites are required to contribute to the cost of extra infrastructure. This could be done by either establishing a contributions scheme under the Airports Act or by providing that any non-aviation related development on airport land is subject to the relevant state or local developer contributions regime.

7. Conclusion

The SCCA is strongly of the view that non-aviation developments on airport land should be subject to the same level of scrutiny, community consultation and planning and assessment that applies to developments under state and local planning laws. There should be a level playing field. The Act therefore needs to be amended to ensure that it does not provide unfair advantages to some firms over others, consistent with National Competition Policy.

8. Summary of Recommendations

1. Non-aviation related development on airport land should be required to be consistent with relevant state and local planning instruments.
2. The Airports Act be amended in relation to airport master plans as recommended by the Senate Committee's *Report on the Inquiry into the Development of the Brisbane Airport Corporation Master Plan*, and also clarify that master plans are intended to provide planning control, at least at a strategic level.
3. The words "new building" in s.89(1)(e) of the Act be replaced with the term "development" which would encompass the use of land, the subdivision of land, the erection of a building, the carrying out of a work, and the demolition of a building or work.
4. The cost threshold for requiring a major development plan be replaced with a threshold based on the total gross floor area for all relevant new development, similar to the triggers for major development planning of passenger terminals.
5. The Airport Building Controller be required to notify the local council and publish notices in the local newspaper of any development or building approvals sought and given.
6. The Airports Act be amended to bring it into line with other Australian planning legislation by providing that a master plan and a major development plan are deemed to be refused if the Minister has not made a decision within 90 days.
7. A mechanism be established by which non-aviation related development on airport sites are required to contribute to the cost of extra infrastructure - either by establishing a developer contributions scheme under the Airports Act or by providing that any non-aviation related development on airport land is subject to the relevant state or local developer contributions regime.
