

THE SUSTAINABLE PLANNING BILL 2009

An introduction to Queensland's new planning legislation

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Introduction

The *Sustainable Planning Bill 2009* ("the Bill") was tabled in the Parliament on 16 June 2009, representing the culmination of the State government's reform agenda for planning and development in Queensland. The Bill seeks to supersede the *Integrated Planning Act 1997* ("the IPA") and achieve an improved and streamlined planning and development framework with reduced costs, improved development timeframes and greater efficiency, clarity, flexibility and responsiveness.

This paper is intended to provide a partial introduction to the Bill¹. It does not document every change which is contained in the Bill, nor does it discuss the sections of the Bill beyond the commencement of the Decision Stage of the Integrated Development Assessment System (IDAS)². Delegates of the Queensland Environmental Law Association should therefore read this paper in combination with the paper prepared by Rosanne Meurling of Allens Arthur Robinson which discusses the balance of the Bill.

This paper distils the key changes proposed by the Bill into the following ten categories to facilitate consideration and discussion:

- (i) prohibited development;
- (ii) compliance assessment;
- (iii) implications for planning schemes;
- (iv) 'properly made' provisions;
- (v) Development Applications (Superseded Planning Scheme);
- (vi) lapsed application revival provisions;
- (vii) changing development applications;
- (viii) referral agencies;
- (ix) State powers; and
- (x) other IDAS processes.

These ten categories best enable the discussion of key changes that will be of the most interest to professional practitioners, particularly town planners and planning and environment lawyers.

This paper also considers the Bill in the context of the following evaluative themes:

- (i) implications for performance-based planning;
- (ii) plan drafting consequences;
- (iii) efficiency gains and stakeholder benefits;
- (iv) state intervention in planning;
- (v) effect of future provisions; and
- (vi) complexity.

Readers should keep each of these six evaluative themes in mind when reading the paper and considering the changes that are proposed by the Bill. The paper will conclude by returning to these themes in discussing the implications of the Bill.

¹ The comments and conclusions in this paper are based on our opinion of the town planning issues that may arise from the Bill in its current form. The reader should only rely upon the advice of a professional legal representative with respect to matters of law.

² Chapter 6, Part 5

By way of a general introduction, the Bill benefits from an improved structure and clearer, more logical drafting than that which has plagued the IPA. The Bill however, is an evolution of the current IPA framework, as opposed to a revolutionary piece of legislation (such as the IPA represented upon its commencement in 1997).

The following sections of the paper summarise and discuss the key evolutions, both good and bad, that will be implemented by the Bill.

1. Prohibited Development

The Bill brings about the return of prohibited development in Queensland. A development application cannot be made for prohibited development³, despite whether a planning scheme identifies such development as assessable or exempt development.

Whilst the removal of development prohibitions was a cornerstone of the IPA, the legislative framework in Queensland has evolved to include a number of effective prohibitions, such as the clearing of particular vegetation under the *Vegetation Management Act 1999*. These 'prohibitions' have always remained in other Acts, rather than having been directly integrated into the IPA. Under the Bill, most of these have been consolidated into Schedule 1. However, existing prohibitions under a regulation (eg. regulatory provisions to the SEQ Regional Plan), have not been consolidated into Schedule 1.

The Bill also makes provision for particular development to be prohibited, in both part or all of the State, by prescription in a State Planning Regulatory Provision or the Standard Planning Scheme Provisions.

Prohibited development cannot be identified by a local government, either by definition or location, unless it has first been identified as prohibited development by the State in the Standard Planning Scheme Provisions.

Upon commencement, there is likely to be some confusion, or at least a lack of clarity, about whether development is prohibited or not, given the affect of the transitional provisions contained in the Bill⁴, as they relate to overriding instruments and the content of local government planning schemes.

Compensation is not available for prohibitions arising from Schedule 1, a State Planning Regulatory Provision or mandated by the Standard Planning Scheme Provisions⁵. Prohibitions do appear to attract compensation if included in a planning scheme, at the discretion of the local government under the authority of the Standard Planning Scheme Provisions⁶. Under these circumstances, the Bill⁷ provides for a Development Application (Superseded Planning Scheme) to be sought, in order to allow the development to be assessed under the superseded planning scheme.

The return of prohibited development under the Bill raises a number of important planning and equity issues:

- (i) Prohibition runs counter to the fundamental principle of a 'performance based' planning system, which is the cornerstone of the current IPA.
- (ii) Prohibition was sought principally by local government during the reform process, but the final form of prohibition is, no doubt, far from the tool that local government was seeking. Rather, it is a coarse tool that is outside the control of local governments.

The *Explanatory Notes* suggest that, although not a formal process provided by the Bill, local government will be able to approach the Minister and request that the Standard Planning Scheme Provisions be amended if the local government wishes to propose other limited prohibitions. This informal process is unlikely to satisfy either the local government, or the development industry and raises equity issues.

³ Section 239

⁴ Chapter 10, Part 2

⁵ Section 706

⁶ This is unclear because the Regulatory Provisions and Standard Planning Scheme Provisions are unavailable at the time of writing

⁷ Section 95

- (iii) It is our view that the prohibition of development is inappropriate for equity reasons, because no development is ever truly prohibited. In any planning system, a mechanism to step around a prohibition is always available - those mechanisms usually requiring higher political intervention. The fundamental issue then is, to whom are those political mechanisms available?
- (iv) Who determines what development should be prohibited where, when and for what reason?
- (v) Will the State appropriately consult on proposed prohibitions prior to their imposition?
- (vi) Can prohibitions apply meaningfully across Queensland, in all circumstances, so remote from local circumstances?

2. Compliance Assessment

In addition to prohibited development, the Bill introduces a second new category of development, Compliance Assessment. Compliance Assessment is intended to provide for a 'bounded assessment' of particular development. It will serve a dual purpose in that it will be available:

- (i) in the first stage of IDAS, to assess and authorise development to proceed by way of a *Compliance Permit*, and
- (ii) as the last stage of IDAS, as a procedure for assessing a development, document or work that has been carried out in accordance with a particular requirement, resulting in the issue of a *Compliance Certificate*. In practice, this application of Compliance Assessment will mostly manifest as a compliance mechanism for conditions of development approval; however, it is not limited to this function under the Bill.

(a) What development can be made Compliance Assessable?

It is intended that Compliance Assessment will provide an appropriate level of assessment for development in instances where:

- (i) clear technical standards are available;
- (ii) the exercise of broad discretion in determining compliance is not necessary; and
- (iii) integrated referral arrangements are unnecessary.

Beyond these guiding criteria, the Bill provides little restriction on the type of development for which Compliance Assessment will be appropriate. In fact, it seems to be the deliberate intention of the Bill to provide a wide scope of opportunity for the use of Compliance Assessment in appropriate circumstances. The Bill⁸ provides for any of the following instruments to require Compliance Assessment:

- (i) a regulation;
- (ii) a State Planning Regulatory Provision;
- (iii) a structure plan;
- (iv) a master plan;
- (v) a preliminary approval made under section 242 of the Bill;
- (vi) a Temporary Local Planning Instrument;
- (vii) a planning scheme; or
- (viii) a condition of development approval.

⁸ Sections 396 and 397

(b) Who will be Compliance Assessors?

The Bill⁹ provides for Compliance Assessment to be carried out by any of the following:

- (i) a public sector entity;
- (ii) a local government; or
- (iii) a nominated entity of a local government.

The Bill¹⁰ defines a nominated entity of a local government as “*a suitably qualified entity that, by resolution of the local government, is nominated to carry out compliance assessment for the local government*”. The Bill thereby provides the opportunity for a local government to elect to outsource compliance assessments to external resources. There will no doubt be a role for engineers as Compliance Assessors under the Bill, particular insofar as assessing compliance with technical conditions of development approvals. There is also the scope for the creation of new roles for town planners and possibly surveyors as Compliance Assessors, dependent upon the particular technical skills required.

The scope of Compliance Assessments that can be carried out by a nominated entity has been limited¹¹ to circumstances where a relevant instrument or a condition of the relevant development approval has specifically provided for a nominated entity to be the Compliance Assessor. The Bill¹² also enables a regulation to require a particular aspect of development be assessed by only local government and not a nominated entity.

There is no direct relationship between the ‘RiskSmart’ development assessment program and Compliance Assessment under the Bill; they are different processes. The ‘RiskSmart’ process has always entailed some form of minor qualitative assessment and relates to obtaining a Development Permit. On the other hand, Compliance Assessment can only result in obtaining a Compliance Permit (or Compliance Certificate) and is likely to involve a ‘black and white’ assessment against quantifiable provisions without the exercise of discretion. This distinction notwithstanding, it is likely that, with the introduction of the Compliance Assessment process, some development that has previously been identified for the assessment through ‘RiskSmart’ program is adapted for assessment under the Compliance Assessment procedures.

(c) What will be the decision rules for Compliance Assessment?

The decision rules for Compliance Assessment, including the limitation on what a Compliance Assessor can assess a development, document or work against, will be prescribed by a forthcoming regulation. We do know that Compliance Assessment will be a bounded assessment. The Bill¹³ provides that:

“The compliance assessor must assess the development, document or work only against the matters or things against which the development, document or work must be assessed under the regulation, State Planning Regulatory Provision, relevant instrument or condition requiring the compliance assessment”.

The Bill¹⁴ also requires that, if the Compliance Assessor is satisfied that the development, document or work achieves compliance (or would, through the imposition of conditions, achieve compliance), then the Compliance Assessor must approve the request.

The assessment timeframes for Compliance Assessments will also be prescribed by a forthcoming regulation.

3. Implications for Planning Schemes

The Bill has significant implications for the drafting of local government planning schemes, some of which are already known and others which will remain unclear until the future release of regulations and planning instruments. This section summarises the key implications that the Bill is expected to have on local government planning schemes.

⁹ Section 399
¹⁰ Section 399(3)
¹¹ Section 300(2)
¹² Section 402
¹³ Section 403
¹⁴ Section 405

(a) Introduction of the Standard Planning Scheme Provisions

The Standard Planning Scheme Provisions are a new State planning instrument that seek to establish a more prescriptive approach to the drafting of planning schemes across local governments. The State's rationale for the introduction of Standard Planning Scheme Provisions is "to facilitate consistency across schemes and greater certainty for users who interpret local planning schemes" and to provide a further opportunity to "effectively integrate State interests"¹⁵.

The Standard Planning Scheme Provisions will take the form of the "Queensland Planning Provisions", which are currently in draft form (Version 0.7) and recently underwent a round of limited consultation¹⁶.

The Standard Planning Scheme Provisions will prescribe a mandatory structure for planning schemes that will be consistent across all local government areas in Queensland. They will mandate planning scheme structure as well as substantial bodies of content within those schemes, including some standard strategic provisions, standard zones, standard overlays and standard definitions. At present, the Provisions do not include any mandatory codes, but could do so in the future under the provisions¹⁷ of the Bill. The Standard Planning Scheme Provisions can also prohibit particular development.

The inclusion of both mandatory and optional components seeks to enable each council to prepare a planning scheme which appropriately responds to the unique local dimensions of that local government area, whilst providing a response to State and regional dimensions consistently across the state. This approach was seen as a better solution to achieving a balance between standard scheme structure and the differing needs of local governments compared to the use of different scheme structures by small and large local governments.

It is anticipated that the Standard Planning Scheme Provisions will come into force upon the commencement of the *Sustainable Planning Act*. Initially, the transitional arrangements provided by the Bill¹⁸ will enable existing local planning instruments made under the IPA to continue without being amended to reflect the new Standard Planning Scheme Provisions. However, once the new Act commences and the IPA planning schemes come up for formal review, or new schemes are drafted, it will be a requirement of the Bill¹⁹ that those planning schemes are prepared in a way that is consistent with the Standard Planning Scheme Provisions. It will be from this point that standard format planning schemes will begin to roll out across the State.

The Bill²⁰ provides for the circumstance where a local planning instrument (prepared under the Bill) is inconsistent with the Standard Planning Scheme Provisions. In these circumstances, the Standard Planning Scheme Provisions not only prevail over the local planning instrument but actually take effect in place of the inconsistent part of the local planning instrument. The *Explanatory Notes* provide the example of a local government planning scheme including a definition of gross floor area that is inconsistent with the definition mandated by the Standard Planning Scheme Provisions. In this instance, the planning scheme definition would have no effect and that planning scheme would be read as if the definition of gross floor area under the Standard Planning Scheme Provisions applied.

The Bill²¹ therefore has the effect that a change to the Standard Planning Scheme Provisions (such as a change to the standard definition of gross floor area) will have immediate effect across all local governments in Queensland. The same situation could apply in respect of a change in the standard provisions for a particular zone or particular prohibited development. The implications of this dynamic situation could be significant, depending on decisions that are made during the plan-making process. To limit the extent of these implications, a high level of consistency in scheme drafting conventions and mechanics will need to be achieved across the State.

¹⁵ *Explanatory Notes to the Sustainable Planning Bill 2009*, page 33.

¹⁶ A detailed introduction to the *Queensland Planning Provisions* is provided in the recent paper *Creating A Standard Planning Scheme – The Queensland Planning Provisions*, also by Steve Reynolds and Matthew Schneider. It is available for download at: <http://www.hrppc.com.au/Publications.php>

¹⁷ Refer to Division 1 and Division 2 of Chapter 2, Part 5 of the Bill.

¹⁸ Section 777 and elsewhere

¹⁹ Section 55

²⁰ Section 53

²¹ Section 53

The process for making a planning scheme is not yet known, as it will be stated in a guideline made by the Minister and prescribed by a regulation.

In circumstances where a local government planning scheme is changed to reflect a mandatory part of the Standard Planning Scheme Provisions, the Bill²² provides that there is no opportunity for affected landowners to seek compensation for the reduced value of land.

(b) New process for making consequential amendments to a planning scheme to ensure consistency with the Standard Planning Scheme Provisions

The requirement that each local government planning scheme is consistent with the Standard Planning Scheme Provisions presents obvious logistical challenges in making consequential amendments to every planning scheme in order to reflect changes to the Standard Planning Scheme Provisions. The Bill provides two Ministerial powers which seek to address these challenges.

The Bill²³ provides for the Minister to take particular action about a local planning instrument, principally to facilitate a process by which all local planning instruments are amended to be consistent with the Standard Planning Scheme Provisions. The difference between the two Ministerial powers provided by the Bill is that, under Section 126, the Minister is required to give written notice to the local government, and then consider any representations made in response by the local government, prior to issuing a direction to take a particular action about the local planning instrument. The effect of Section 126 is not dissimilar to the existing Ministerial direction powers under the IPA.

However, Section 129 enables the Minister to take direct action about a local planning instrument without the need to provide a direction to the local government. Written notice of the Minister's intention to act under this power must still be provided prior to taking the action. Therefore, under Section 129, the Minister takes the action rather than the local government. The *Explanatory Notes* rationalise the power vested in Section 129 as the most appropriate and efficient manner in which one, or many local planning instruments need to be amended to reflect a change in the Standard Planning Scheme Provisions, such as a change in a standard definition. The utility of Section 129 is not limited to this function of maintaining consistency between local planning instruments and the Standard Planning Scheme Provisions. The Minister may also take urgent action under Section 129 if the Minister is satisfied that the action is necessary to protect or give effect to a State interest.

The expanded Ministerial powers provided by the Bill²⁴ should go a long way towards providing the amendment processes that will be necessary to maintain consistency between the Standard Planning Scheme Provisions and local planning schemes. Planning scheme users will, nevertheless, need to remain vigilant in monitoring the consistency between local planning instruments and the Standard Planning Scheme Provisions as some degree of plan lag remains inevitable. Effectively responding to these situations will require an understanding of the dynamic relationship between local planning instruments and the Standard Planning Scheme Provisions under the Bill. It will be a nuance that will, no doubt, elude many casual users of standardised planning schemes.

(c) Key changes to IDAS in the context of implications for planning schemes

The following key changes to the Integrated Development Assessment System (IDAS) proposed by the Bill are expected to have implications for planning schemes.

Deemed Approvals

The Bill introduces a deemed approval process for most Code Assessable development applications which are assessed by local government. The introduction of deemed approvals may result in a change to plan drafting, with local governments electing to make more development Impact Assessable under the planning scheme, rather than Code Assessable, to reduce the likelihood of deemed approvals. As an example of the impetus for local governments, the vast majority of development applications in the Brisbane City Centre are currently Code Assessable, as are regional shopping centres. The opportunity for deemed approvals would therefore be available to complex and major development applications in the

²² Section 706

²³ Sections 126 and 129

²⁴ Sections 126 and 129

Brisbane CBD and major centres. The level of exposure that this situation creates for Brisbane City Council is plainly obvious. Similar situations exist elsewhere in the State, particularly where local government has been encouraged to include as much development as code assessable as possible, on the basis it is a 'bound assessment' - sometimes referred to as the 'highest level of assessment'.

However, the widespread reliance on Impact Assessment (as a means of reducing exposure to deemed approvals) would be a poor planning outcome and contrary to the original objective of greater process efficiency sought by the deemed approval provisions. It is ironic that this implication arrives at the same time many local governments, including Brisbane City, are investigating ways to reducing regulation, including by reducing levels of assessment.

Compliance Assessment

The introduction of the Compliance Assessment category of development might result in changes to both the level of detail in development codes and the levels of assessment assigned to particular development types.

Removal of any presumption in favour of approval for Code Assessment

The Bill does not carry through the obligation that the IPA²⁵ places on the assessment manager to approve development that complies with the applicable codes. The removal of this obligation is a shift from a "presumption in favour of approval" to a "presumption in favour of the policy" that is discussed in both the preamble to the *Explanatory Notes* and the draft *Queensland Planning Provisions* (version 0.7).

In addition, the current version of the draft Standard Planning Scheme Provisions does not contain any statement which confirms that compliance with an Acceptable Solution is taken to be compliance with the relevant Performance Criterion. This compounds the shift away from a presumption in favour of approving code-compliant development towards a presumption in favour of policy.

Planning schemes seek to strike an appropriate balance between certainty and flexibility. This is necessary for the efficient operation of the planning system (a concept embodied in the purpose of the IPA and the Bill) and to clearly establish community expectations. This erosion of code assessable certainty represents, in our view, an unacceptable shift in balance toward flexibility. It will have implications for the construct and drafting of planning scheme provisions.

(d) The expansion of the obligations in advancing the Act's purpose to take account of contemporary imperatives such as climate change, urban congestion and housing diversity

The Bill²⁶ preserves the overarching obligation established by the IPA namely, the obligation that entities, in the performance of functions or the exertion of powers conferred by the Bill, perform those actions in a way that advances its purpose. The obligation to advance the Bill's purpose in carrying out all functions and powers conferred under the Bill, does not extend to situations involving either Code Assessment (as is presently the case under the IPA) or the new category of development created by the Bill, Compliance Assessment.

The outline of what "advancing the Act's purpose" involves has been the subject of notable amendments, some of which are likely to have significant implications. Climate change (along with urban congestion, housing choice and alternatives to non-renewable natural resources) has now been explicitly named as an environmental effect of development that decision-making processes must avoid (or, at least, lessen). This new requirement to assess the impacts of development on climate change potentially foreshadows a new era in the preparation of the planning instruments and development assessment, particularly in the guiding context of the precautionary principle. The application of the precautionary principle under the Bill (and the IPA) requires that a lack of full scientific certainty is not used as a reason for postponing a measure which would respond to and prevent a threat of serious or irreversible environmental damage. The combined effect of these amendments seems to be that the decisions of assessing authorities will need to involve an assessment of the effects of

²⁵ IPA s.3.5.13(2)

²⁶ Section 4

impact assessable development²⁷ on climate change and apply the precautionary principle in making those decisions, which sets the stage for some very complex planning assessments and appeals.

(e) Planning scheme review cycle increased from 8 years to 10 years

The planning scheme review cycle has been extended from 8 years to 10 years under the Bill²⁸. The extended review period is intended to promote strategic planning and to align the planning horizons of Priority Infrastructure Plans and Regional Plans.

The Bill²⁹ also requires that Priority Infrastructure Plans are reviewed every 5 years. The relationship between the review of Priority Infrastructure Plans and the review of planning schemes is critical as the Priority Infrastructure Plan forms part of the planning scheme and contains planning assumptions and policy intent against which Impact Assessable development applications will be assessed³⁰.

(f) Changes to the decision rules for Code Assessment and Impact Assessment

The decision rules for code and impact assessment are now combined. The ‘sufficient grounds’ test when a decision is in conflict with a scheme has been retained³¹, but with the following key differences:

- (i) conflict with any provision to which regard must be had in assessing an application must be overcome by sufficient grounds, not only a conflict with a planning scheme (as is the case under the IPA);
- (ii) there is no blanket provision that prohibits approval if there exists a ‘compromise’ with a Strategic Outcome (the new term for Desired Environmental Outcomes); and
- (iii) a conflict is justified if it best achieves the purposes of an instrument, where there are two or more conflicting instruments, or aspects of instruments.

These changes are relatively significant in the context of planning schemes and development assessment for reasons which include the following:

- (i) they ‘raise the bar’ for the approval of development by introducing more statutory instruments with which the application must not conflict, otherwise it must be refused;
- (ii) they shift the focus of the conflict test from an ‘approval’ to a ‘decision’. In doing so, it seems that any decision which conflicts with the planning scheme or another relevant instrument could potentially be justified by ‘sufficient grounds’. This change may have the effect of enabling the refusal of a fully compliant development application by reliance on ‘sufficient grounds’;
- (iii) they potentially alter the established principle of ‘positive betterment’ as ‘sufficient grounds’, to include either the absence of a negative (in ‘best’ achieving the ‘purpose’ of an instrument, such as to not cause environmental harm); or in justifying a refusal; and
- (iv) they abandon the unrealistically high test of ‘not compromising’ a Desired Environmental Outcome that exists under the IPA and which has led to some tortuous scheme drafting as Desired Environmental Outcomes were constructed in overly narrow terms in an attempt to regulate development.

4. ‘Properly Made’ Provisions

The Bill purports to ‘raise the bar’ in terms of what constitutes a properly made development application. Principally, the Bill³² enables the approved IDAS forms to require the submission

²⁷ The requirement of Section 4 to advance the Act’s purpose does not apply to Code Assessment or Compliance Assessment. The same obligation to assess the impacts of development on climate change and apply the precautionary principle are therefore not relevant for Code Assessable development assessment. Entities must however, advance the purpose of the Act in preparing a code for a planning scheme or a standard for compliance assessment.

²⁸ Section 91

²⁹ Section 628

³⁰ Section 314

³¹ Section 326

³² Sections 260(1) and 261

of mandatory supporting information, without which an application would not be properly made. Whilst this was not an impossibility under the IPA, it is now expressly required by the Bill. It is unknown what the future IDAS forms may include but if the rate at which the IDAS forms have been continuously amended over recent years, without public consultation, is any indication, the new IDAS forms may well impose 'properly made' requirements that are uncertain and regularly subject to change.

There is also little doubt that applications will be challenged on qualitative bases as to whether the supporting information which was required at the time of lodgement was provided in such a way that enables the application to be correctly deemed 'properly made' under the Bill.

In our view it is unnecessary to have a development application potentially fail at lodgement simply due to the absence of particular information sought by a form. The IDAS does, after all, include an Information Request period in which assessing authorities can request additional information. Instead, the Bill³³ requires that the assessment manager gives a notice to the applicant advising that the application is not properly made and setting out the actions that must be taken to rectify the application's deficiencies. That notice must be given by the assessment manager within 10 business days of having received the application³⁴.

The 10 business day period in which an application must be received, reviewed and assessed for compliance with the 'properly made' requirements of the Bill seems to be very short given the assessment that will be necessary to make that determination. Furthermore, what will be the implications for the assessment manager, and the applicant, if the properly made determination is incorrectly made within that 10 business day period? The reality is that such determinations would be challenged by third parties via declaratory proceedings, leading to delays and additional Court procedures. It would perhaps have been more appropriate to include a provision that expressly provided for the assessment manager to refuse an application if insufficient information is available.

(a) The removal of the assessment manager's discretion in relation to 'properly made' development applications

Under the IPA³⁵, the assessment manager had a discretionary power to accept an application that was not properly made as a properly made application. The only limitation on the assessment manager's discretionary power under the IPA³⁶ is in instances where the required owner's consent or evidence of resource entitlement has not been provided, or the proposed development was contrary to a State Planning Regulatory Provision. The assessment manager therefore had quite broad discretionary powers in relation to accepting applications as 'properly made'.

The Bill contains no such provisions. Instead the Bill³⁷ states:

"If the application is not a properly made application, the assessment manager must give the applicant a notice stating –

- (a) that the application is not a properly made application; and*
- (b) the reasons the assessment manager is satisfied the application is not a properly made application; and*
- (c) the action the assessment manager is satisfied the applicant must take for the application to comply with section 261".*

Whilst the requirement for higher quality development applications was an objective sought by local government throughout the reform agenda, it is unlikely that local government will be satisfied with the removal of the assessment manager's discretionary powers in place of a more onerous 'properly made' assessment process that must be completed within 10 business days of receipt of each application.

³³ Section 266

³⁴ Section 266(2)

³⁵ ss.3.2.1(8) and 3.2.1(9)

³⁶ s.3.2.1(10)

³⁷ Section 266

(b) No change in respect of Resource Entitlement requirements

There is no change to the rules governing Resource Entitlements³⁸. This is a significant oversight and one which ought to have been addressed in the Bill given the imposition these requirements place upon process and the complexity of IDAS.

5. Development Applications (Superseded Planning Scheme)

The Bill³⁹ preserves the opportunity for Development Applications (Superseded Planning Scheme) to be lodged after the amendment of a planning scheme to enable development to be assessed under the superseded planning scheme or to trigger compensation procedures. However, the Bill does propose significant changes to the procedures associated with Development Applications (Superseded Planning Scheme). These changes relate only to Development Applications (Superseded Planning Scheme) that are made as a result of a change to a planning instrument if that change is made after the commencement of the Bill⁴⁰.

Most significantly, the Bill⁴¹ reduces the timeframe within which a Development Application (Superseded Planning Scheme) can be lodged from two years to one year. This process remains linked to the compensation provisions, but now has an extra purpose of enabling an application to be potentially decided when development has been made prohibited development by new planning scheme provisions⁴².

In addition, the process for lodging a Development Application (Superseded Planning Scheme) is different under the Bill⁴³. Within one year after the amendment of a planning scheme, a notice is to be submitted to the local government requesting the superseded planning scheme to be applied. The local government has 30 days to make the decision⁴⁴. If the local government fails to meet that timeframe, the request for assessment under the superseded planning scheme is deemed to have been approved⁴⁵. The applicant then has only six months from the day they were given a decision on the request to lodge the Development Application (Superseded Planning Scheme)⁴⁶.

The information that is required to accompany the initial notice requesting assessment under the superseded planning scheme is either a description of the proposed development or a copy of the proposed application. If the former, local government will no doubt have difficulty in determining whether to apply the superseded planning scheme or not, in terms of determining the compensation implications of that decision.

There are also questions around the implications of an applicant describing a development in a particular way as part of the initial notice to local government, but changing the nature or description of that development in lodging the subsequent Development Application (Superseded Planning Scheme). It is foreseeable that such a situation could unfold relatively often and the Bill does not appear to address such circumstances.

For major development projects, the preparation and lodgement of a Development Application (Superseded Planning Scheme) within six months, allowing for 'properly made' procedures to be completed, is perhaps an unrealistic timeframe.

In our view, the revised, two-stage Development Application (Superseded Planning Scheme) process is clumsy, arising as a consequence of the intent to shorten the compensation 'window'. This reduction from two years to one year continues the erosion of property rights which started when the IPA commenced and was then limited further via regulatory provisions (such as those tied to the statutory Regional Plans). It will not be surprising when compensation rights disappear altogether in due course, consistent with all other States in Australia.

³⁸ Section 264

³⁹ Section 95

⁴⁰ Section 805

⁴¹ Section 95(2)

⁴² Refer to Section 1 of this paper for limitations

⁴³ Section 95(3)

⁴⁴ Section 96(1)

⁴⁵ Section 96(5)

⁴⁶ Section 99(2)

6. Lapsed Application Revival Provisions

The Bill includes a number of provisions to make the lapsing of development applications less likely, albeit only marginally. Specifically, the Bill provides a five business day window at a number of points along the IDAS process during which an application that has lapsed can be 'revived' by the applicant. The three most notable 'revival' opportunities available to the Applicant during the IDAS process are:

- (i) within five business days of an application lapsing as a consequence of the applicant failing to provide a referral agency with a copy of the development application, the Acknowledgement Notice and any applicable fee⁴⁷;
- (ii) within five business days of an application lapsing as a consequence of the applicant failing to respond to an Information Request⁴⁸; and
- (iii) within five business days of an application lapsing as a consequence of the applicant failing to commence public notification, or failing to give the assessment a notice of compliance, within the required period⁴⁹.

The opportunities afforded by these five day 'reviving' provisions cover a momentary lapse in project management process, but not a situation where the statutory timeframe is simply not understood or is forgotten. There is still a 'drop dead' date on which an application will lapse; it now just happens five business days later. The inclusion of the five day revival periods is a small improvement on the existing IDAS provisions, but does little to solve the issue of applications lapsing inadvertently (particularly in the case of casual users of IDAS and planning schemes, which was one of the key objectives of the reform agenda).

(a) Application revival provisions offset by reduction in IDAS timeframes for applicants

In each of the instances where the Bill provides the opportunity for an applicant to revive a lapsed development application, the Bill contains other changes to the IDAS process which serve to counterbalance the small gain afforded to applicants. Specifically:

- (i) the period in which the applicant must refer the application to all referral agencies has been reduced from three months under the IPA to 20 business days under the Bill⁵⁰;
- (ii) the period in which the applicant must respond to an Information Request has been reduced from 12 months under the IPA to six months under the Bill⁵¹; and
- (iii) there is a new requirement under the Bill⁵² that the applicant gives notice to the assessment manager advising that public notification has commenced within five business days of commencing public notification.

These changes to the IDAS represent the only significant reduction in the statutory assessment timeframes under the Bill and, interestingly, are borne by the applicant rather than the assessing authorities. Apart from the deemed approval procedures, which will only be available to Code Assessable applications, the Bill achieves little, if any, real reduction in the assessment timeframes for development applications.

Whilst the deemed approval provisions will likely result in quicker decisions for most Code Assessable development, those decisions are likely to include more refusals and onerous condition packages. In either case, a subsequent process of Negotiated Decision Notice or appeal will likely follow, extending the time to obtain an approval past the decision stage, with the likely consequence of longer overall timeframes to get development 'on the ground'.

⁴⁷ Section 272

⁴⁸ Section 278

⁴⁹ Sections 297(1) and 301 respectively

⁵⁰ Section 272

⁵¹ Section 279

⁵² Section 300

7. Changing Development Applications

The opportunity for an applicant to change a development application during the IDAS process has been preserved under the Bill⁵³, subject to some significant amendments.

(a) The new ‘minor change’ test for changing development applications

The Bill⁵⁴ provides for an applicant to make a ‘minor change’ to an application during the assessment of the application without having to restart the IDAS process. A ‘minor change’ is defined as follows:

- (1) *“A **minor change** in relation to an application, is any of the following changes to the application:*
 - (a) *a change that merely corrects a mistake about the name or address of the applicant or owner, or the address or other property details of the land to which the application applies, if the assessment manager is satisfied the change would not adversely affect the ability of a person to assess the changed application;*
 - (b) *a change of applicant, if the assessment manager is satisfied the change would not adversely affect the ability of a person to assess the changed application;*
 - (c) *a change that merely corrects a spelling or grammatical error;*
 - (d) *a change that—*
 - (i) *does not result in a substantially different development; and*
 - (ii) *does not require the application to be referred to any additional referral agencies; and*
 - (iii) *does not change the type of development approval sought; and*
 - (iv) *does not require impact assessment for any part of the changed application, if the original application did not involve impact assessment.*
- (2) *In deciding whether a change is a minor change under subsection (1)(d), the planning instruments or law in force at the time the change was made apply (the applicable law).*
- (3) *Application of the applicable law does not stop a change mentioned in subsection (1)(d)(ii) or (iv) from being a minor change only because the applicable law, if applied to the application as originally made, would require referral to any additional referral agencies or involve impact assessment”.*

These provisions⁵⁵ provide a more flexible means to change a development application, without having to restart the IDAS process or restart public notification. Under the IPA these provisions fall within section 3.2.9. Under the Bill⁵⁶, a ‘minor change’ to an application does not stop IDAS and does not require public notification to restart. Even if a change is not a ‘minor change’, it still may not stop IDAS under certain circumstances⁵⁷.

It should be noted that, under the Bill, a ‘minor change’ relates to changing a development *application* whereas a ‘permissible change’ relates to changing a development *approval*. Under the IPA⁵⁸, the terminology ‘minor change’ related to changing development approvals whereas, under the Bill, a ‘minor change’ relates to changing a development application. Nevertheless, the tests for both a ‘minor change’ and a ‘permissible change’ are similar.

The tests for determining a ‘minor change’ to an application under the Bill shares similar concepts with the current test under the IPA for a ‘minor change’ to an approval, in that:

- (i) no additional referral agencies can arise. It is however now clarified that this test relates to additional referral agencies arising as a consequence of the change itself, not simply because the development as a whole now triggers an additional referral agency under the Bill;
- (ii) no change to the type of development approval can result; and
- (iii) no increase in level of assessment (to impact assessment) can result.

⁵³ Section 351(1)

⁵⁴ Section 353

⁵⁵ Sections 350 - 355

⁵⁶ Section 353

⁵⁷ Section 354

⁵⁸ Section 3.5.24

In addition, the Bill⁵⁹ contains a new test in that the change must not result in a 'substantially different' development. This will be the crux of the new test for determining minor changes to development applications; it is unclear yet whether it means 'substantially different' in scale, intensity or character. The *Explanatory Notes*⁶⁰ foreshadow the preparation and release of a statutory guideline by the Minister in order to assist in the determination of a 'substantially different' development, possibly including measures to guide determination relating to floor area and height. This raises the prospect of a return to something like the old 'minor change' criteria in s4.15 of the *Local Government (Planning and Environment) Act 1990*, but we will have to wait and see. Either way, the meaning of 'substantially different' is likely to be influenced by the change to the definition of Material Change of Use, whereby reductions in intensity or scale are not development⁶¹.

(b) Making a change, other than a minor change, in response to an Information Request or properly made submission

The Bill⁶² also provides for an applicant to change an application (other than a 'minor change'), generally without having to restart the IDAS process, if that change is made in response to either an Information Request or a properly made submission. This is a significant and welcome change which provides more flexibility in the IDAS process. It deals with anomalies under the current system in which a change may be positive and result in better outcomes, but is unable to be facilitated within the mechanics of the IDAS.

8. Referral Agencies

The Bill proposes a number of notable changes in relation to referral agencies for development applications.

(a) Period in which an applicant must refer an application to referral agencies reduced from three months to 20 business days

Under the IPA⁶³, the applicant is required to give each referral agency for an application a copy of the application, a copy of the Acknowledgement Notice and any prescribed fee, within three months of receiving the Acknowledgement Notice. Under the Bill⁶⁴, this three month referral period has been shortened to 20 business days.

In reality, this reduced timeframe will achieve little in the way of time savings as applicants typically carry out referral requirements expeditiously and well within even 20 business days from receiving the Acknowledgement Notice.

(b) Wider scope of assessment considerations for referral agencies

The Bill expands the matters against which a referral agency must assess an application. Under the IPA⁶⁵, referral agencies are required to assess development applications, within the limits of its jurisdiction, against the laws and policies which are administered by that referral agency (having regard to the planning scheme and any relevant State planning instruments). These assessment requirements have been carried through in the Bill⁶⁶.

However, in addition, the Bill⁶⁷ requires that referral agencies also have regard to State planning instruments that are not applied by that particular referral agency, but applied by others, along with any relevant Structure Plan, Master Plan, Temporary Local Planning Instrument, planning scheme or designation.

Depending on your position, the expanded scope of referral agency assessment considerations is either a good, or a very bad, thing because it enables an increased role for State agencies in the assessment process. It also has real potential to confuse the assessment process and lead to conflicting referral advices.

⁵⁹ Section 350(1)(d)(i)

⁶⁰ Page 185

⁶¹ Refer to Section 10(a) of this paper

⁶² Section 354

⁶³ Section 3.2.12(2)(a)

⁶⁴ Section 272

⁶⁵ Section 3.3.15

⁶⁶ Section 282(1)

⁶⁷ Section 282(2)

(c) Process to rectify missed referrals before an application is decided

The Bill⁶⁸ includes a new process for rectifying a missed referral. Notices are given and the IDAS timing is altered to enable the missed referral to occur. Significantly, a missed referral that becomes apparent after the notification period has been completed, does not require the recompletion of the notification period, if resolved through this process.

The opportunity to rectify missed referrals is, for the most part, a sensible inclusion in the Bill. However, it does not enable an applicant to resolve a missed referral after a development application has been decided. The dubious status of such a decision remains.

There are also some questions as to the true breadth of the scope of these missed referral provisions. It is unclear whether they will apply to applicants who failed to correctly identify all of the relevant referral agencies on the IDAS referral checklist but were accepted as 'properly made' by the assessment manager. If not, the provision will only be available to an applicant who has correctly identified all referral agencies on the IDAS application forms but failed to carry out the referral to one or more of those agencies after the application has been lodged.

9. State Powers

The Bill substantially expands the powers available to the State government.

(a) Ministerial intervention powers expanded

The Ministerial IDAS powers provided under the IPA⁶⁹ have been expanded under the Bill⁷⁰ and now, amongst other things, provide for:

- (i) the Minister to direct an assessment manager to decide, or not to decide, a development application within a certain period of time⁷¹. The Ministerial IDAS powers under the IPA⁷² have been carried through to the Bill⁷³. In addition to those existing powers, the Bill⁷⁴ gives the Minister the power to direct a local government to either decide or not decide an application involving a State interest for a stated period. These expanded direction powers are intended to serve as an alternative to the Minister having to exercise the call-in powers that have also been retained under the Bill⁷⁵;
- (ii) the Minister, in exercising the call-in powers⁷⁶, to assess the application only against State interests and require the local government assessment manager to assess the balance of the application on behalf of the Minister⁷⁷.

(b) Expansion of the power to make State Planning Instruments to other eligible Ministers

Under the IPA, the Planning Minister had relatively broad powers to make State planning instruments, including State Planning Regulatory Provisions, Regional Plans and State Planning Policies. However, those powers do not extend to Ministers responsible for jurisdictions that had been integrated within the planning system. The Bill⁷⁸ expands the Ministerial power to make a range of State planning instruments to other 'eligible Ministers' in cooperation with the Planning Minister.

An eligible Minister and the Planning Minister have the power to jointly make a State Planning Regulatory Provision, State Planning Policy or Temporary State Planning Policy in particular circumstances. The powers to prohibit development, prescribe a particular level of assessment and otherwise regulate development, amongst others, will be available to eligible Ministers acting under these powers.

⁶⁸ Section 357

⁶⁹ Chapter 3, Part 6

⁷⁰ Chapter 6, Part 11

⁷¹ Section 418

⁷² IPA s.3.6.1

⁷³ Section 418

⁷⁴ Section 418

⁷⁵ Section 424

⁷⁶ Section 424

⁷⁷ Section 431

⁷⁸ Section 20(3) in relation to State Planning Regulatory Provisions; Section 44(2) in relation to State Planning Policies; and Section 46(2) in relation to Temporary State Planning Policies

The expansion of Ministerial powers in making State planning instruments may significantly broaden the scope of matters which are addressed by State planning instruments (to include, for example, vegetation management, habitat protection, heritage protection or traffic management). The expansion of these powers, whilst unlikely to make significant practical difference, illustrates the increasing involvement of the State in planning in both policy and process.

(c) Clarification of the operational hierarchy of State Planning Instruments

The Bill⁷⁹ includes provisions which clarify the hierarchal relationship between State planning instruments. For the purposes of development assessment, State Planning Regulatory Provisions prevail over all other planning instruments, plans, policies and codes to the extent of any inconsistency. Regional Plans prevail over all State Planning Policies and local planning instruments, whilst State Planning Policies prevail over local planning instruments to the extent of any inconsistency. The Standard Planning Scheme Provisions also prevail over any local planning instrument to the extent of any inconsistency, with any inconsistent part of the local planning instrument having no effect and the Standard Planning Scheme Provisions applying in its place.

These provisions, which clarify that all State planning instruments prevail over local planning instruments, will have an increasingly significant effect over time, as State planning instruments continue in the trend of becoming more specific and detailed. For example, the draft SEQ Regional Plan contains very specific provisions for centres planning (such as percentages for active frontages and floor space limits). The effect of the Bill seems to be that these increasingly prescriptive requirements of State planning instruments will override those of local planning instruments which could have significant implications for the interpretation of planning schemes and development assessment.

(d) Development remains not assessable against Regional Plans and State Planning Policies that have been ‘appropriately reflected’ in the relevant planning scheme

The Bill⁸⁰ preserves the requirement that planning schemes ‘appropriately reflect’ Regional Plans and State Planning Policies, after which those instruments fall away and cannot be separately applied in the assessment of development applications⁸¹. The inherent problem caused by the ‘appropriately reflected’ requirements is that State Planning Policies and in particular Regional Plans, provide integrated planning policy⁸² which cannot always be ‘reflected’ in a planning scheme in a way that captures their true policy intent. As the Bill⁸³ carries forward the IPA’s restriction on assessment managers assessing development against ‘appropriately reflected’ Regional Plans and State Planning Policies, there is then no opportunity for these high level planning instruments to be taken into account.

It is obviously necessary that local government planning schemes reflect and advance the policy intent of all state planning instruments, including Regional Plans and State Planning Policies. However, it has been proven over the life of the IPA that achieving the full integration of the Regional Plans and State Planning Policies into planning schemes is a false hope. Furthermore, as State planning instruments contain increasingly more specific requirements, the opportunities for inconsistency between the provisions of those instruments and planning schemes are increasing rapidly. This is a particular concern where State planning instruments contain coarse development standards that override more specific local development requirements.

Once amended, it is unclear whether a Regional Plan or State Planning Policy remains ‘appropriately reflected’ in a planning scheme – in whole or in part. Further, the relative weight to be applied to a State interest, as opposed to a local interest, becomes obscured once ‘appropriately reflected’ into a planning scheme. In particular, the determination of ‘sufficient grounds’, in the event of a conflict with the planning scheme, is compromised and can result in a lack of policy integration.

⁷⁹ Section 19 in relation to State Planning Regulatory Provisions and Section 26 in relation to Regional Plans. The relationship between both State Planning Policies and the Standard Planning Scheme Provisions and local planning instruments is also clarified at Section 43 and Section 53 respectively.

⁸⁰ Section 29(2) in relation to Regional Plans

⁸¹ Section 313(2) in relation to Code Assessment and Section 314(2) in relation to Impact Assessment

⁸² The definition of a Regional Plan has been amended at Section 23 of the Bill to acknowledge that a Regional Plan advances the Act’s purpose by ‘providing an integrated planning policy’ for the designated region.

⁸³ Section 313(2) in relation to Code Assessment and Section 314(2) in relation to Impact Assessment

Further, the 'falling away' provision for 'appropriately reflected' Regional Plans and State Planning Policies has been an impediment to State agencies implementing their objectives via those instruments. Rather, they have opted for 'satellite' legislation or regulatory provisions, which continue to have 'teeth' during referral procedures. This has fuelled the disintegration of the planning system, which will no doubt continue under the Bill. Most referral agencies would prefer to retain and grow their powers under a State Planning Regulatory Provision or separate legislation, rather than have those powers fall away once 'appropriately reflected'.

Given the importance of Regional Plans and State Planning Policies in Queensland's planning framework, it would be far more appropriate if Regional Plans and State Planning Policies were drafted to identify whether components are to only be integrated when making planning schemes, or have ongoing policy implications during the life of a planning scheme. The Bill ought to enable the latter to apply during development assessment.

(e) Introduction of a single process for making, amending and repealing all State Planning Instruments

The IPA created three State planning instruments and prescribed a separate process for the making, amending and repealing of each of those instruments. Under the Bill⁸⁴, those three separate processes have been replaced by a single process which is standard across all four categories of State planning instruments. The process set down by the Bill⁸⁵ is relatively standard and maintains the consultation periods established under the IPA for both making and amending particular instruments.

The ability for the Minister to make minor amendments to a State planning instrument has been preserved in the Bill, albeit reworked to accommodate both 'administrative amendments' and 'minor amendments'⁸⁶. The new concept of a minor amendment (as separate to an administrative amendment) principally facilitates consequential amendments to related State planning instruments where the Minister is satisfied that appropriate public consultation has taken place previously.

(f) State Planning Regulatory Provisions can apply to the whole State, can respond to a greater breadth of issues and can prohibit development

State Planning Regulatory Provisions were introduced under the IPA but have been the subject of an expansion in scope and application. Firstly, under the IPA, State Planning Regulatory Provisions could only apply to part of the State. The Bill⁸⁷ now enables a State Planning Regulatory Provision to apply to all of part of the State. In addition, the Bill⁸⁸ has expanded the scope of matters for which a State Planning Regulatory Provision can be made by providing that they can be made to, amongst other things, protect planning scheme areas from adverse impacts, without any qualification of those adverse impacts needing to be 'serious' or 'significant' (as was necessary under the IPA). State Planning Regulatory Provisions can now also specifically prohibit development under the Bill⁸⁹.

At present, four State Planning Regulatory Provisions apply to parts of the State. The opportunity to prohibit development, prescribe particular levels of assessment and otherwise regulate development under State Planning Regulatory Provisions (which are the highest order planning instruments in the State) is likely to prove very attractive to the State as it seeks to implement key policy directives across Queensland.

(g) State Planning Policies have a maximum life of 10 years (but 12 years by exception)

The Bill⁹⁰ limits the duration of a State Planning Policy to a period of 10 years as a general rule. However, the opportunity to extend the life of a State Planning Policy to a maximum of 12 years is provided (by way of prescription under a regulation).

The IPA does not contain any requirement that State Planning Policies be reviewed in the same way the review periods are prescribed for planning schemes and other planning

⁸⁴ Section 56
⁸⁵ at Chapter 2, Part 6
⁸⁶ Section 68
⁸⁷ Section 20
⁸⁸ Section 16
⁸⁹ Section 21
⁹⁰ Section 45

instruments. The Bill, whilst limiting the duration of a State Planning Policy, still does not require the scheduled review of these instruments. Whilst the Bill contains no review provisions, the *Explanatory Notes*⁹¹ state that “it is intended that a review of the relevant State planning policy be commenced 8 years after the day the State planning policy took effect”.

The limitation of a 10 year duration on State Planning Policies aligns with the 10 year planning scheme review cycle imposed by the Bill and should assist in avoiding State Planning Policies being left to become redundant or outdated.

(h) Formalisation of Temporary State Planning Policies

The Bill⁹² introduces a new State Planning Instrument in the form of Temporary State Planning Policies. Whilst the IPA provided for the making of interim State Planning Policies (which had a maximum life of one year and were not subject to public consultation prior to adoption), the power to make interim SPPs was buried in Schedule 4 of the Act and was not particularly obvious to users of the legislation. The Bill formalises the opportunities previously provided under the IPA into a new and well defined statutory instrument in the form of Temporary State Planning Policies.

Temporary State Planning Policies can be made by either the Planning Minister or an eligible Minister if the policy is required to urgently protect or give effect to a State interest. The Bill also seems to slightly broaden the definition of a State interest⁹³. Temporary State Planning Policies are not subject to the public consultation ordinarily required as part of the preparation of State Planning Instruments, assumedly because they are intended to provide the opportunity for the State to respond to urgent issues. The Bill⁹⁴ provides that the maximum effective life of a Temporary State Planning Policy is one year.

(i) Changes to Master Plan and Structure Plan provisions

The Bill⁹⁵ carries through Master Plans and Structure Plans as planning instruments. The following list documents the key changes in the Bill relevant to Master Plans and Structure Plans:

- (i) references to the requirement for a Structure Plan and a Master Plan to be consistent with Schedules 8 and 9 have been replaced with “a regulation made under section 232(1) or (2)”;
- (ii) the introduction of provisions⁹⁶ which set down that State planning instruments prevail to the extent of any inconsistency between a Structure Plan or a Master Plan and a State planning instrument;
- (iii) the ability for a Structure Plan to state that development is prohibited development, providing that the Standard Planning Scheme Provisions state the development may be prohibited development⁹⁷;
- (iv) changes in the process for the preparation of a Structure Plan. Under the IPA, a Structure Plan must be prepared as required by any guidelines prescribed under a regulation and be made under Schedule 1A of that Act. Under the Bill⁹⁸, a Structure Plan must now be prepared as required by a guideline (not yet available) made by the Minister and prescribed under a regulation;
- (v) the requirements⁹⁹ for the content of a Master Plan have been amended to introduce the requirement that a master plan must appropriately reflect the Standard Planning Scheme Provisions (this is a different test to that for a planning scheme – which must be ‘consistent’ with those provisions);

⁹¹ Page 46

⁹² Section 46

⁹³ to specifically include sustainable development as an interest of the State, and to include an interest that affects the interest of ensuring there is an efficient, effective and accountable planning system. The scope of an interest that affects an interest is significantly broader than that of an interest considered individually.

⁹⁴ Section 49

⁹⁵ Chapter 4

⁹⁶ Section 139 in relation to Structure Plans and Section 153 in relation to Master Plans

⁹⁷ Section 142

⁹⁸ Section 145

⁹⁹ Section 155

- (vi) the introduction of ‘revival’ provisions in certain circumstances where an application for a Master Plan has lapsed; and
- (vii) confirmation that the notation of a Master Plan on the planning scheme is not an amendment to the planning scheme¹⁰⁰.

10. Other IDAS Processes

The following sections summarise miscellaneous changes which are relevant to the IDAS processes under the Bill.

(a) Definition of Material Change of Use amended to capture increases only

The definition of a Material Change of Use under the IPA was not limited to material increases in the scale or intensity of a use and could therefore also capture material reductions in the scale or intensity of uses. The Bill¹⁰¹ amends the definition of Material Change of Use to limit its scope to material increases in the intensity or scale of the use.

Whilst it is the case that in most cases, a reduction in intensity or scale will result in improved planning outcomes, it is not necessarily always the case. For example, if a planning scheme regulates character via material change of use and not building work, then the change to the definition will see reductions (demolition etc) in use falling outside planning control. Similarly, there may be circumstances where a mix of uses is acceptable, but the reduction of that mix to a single use may not. That change may also now fall outside planning control. In any event, these are likely to be exceptional circumstances that ought to be able to be dealt with via appropriate scheme drafting.

On balance, there was little benefit in capturing reductions in the scale or intensity of a use as assessable development and doing so generated significant cost and resourcing implications for all parties involved. The binding of Material Change of Use to only material increases in scale or intensity is a welcome amendment.

(b) IPA s.3.1.6 Preliminary Approvals preserved as Section 242 Preliminary Approvals

The provisions of section 3.1.6 of the IPA relating to Preliminary Approvals (overriding the planning scheme) have been carried through to the Bill¹⁰². However, s242 Preliminary Approvals no longer ‘override’ a planning scheme, but rather ‘affect’ them. The implications of this change are unclear. In practice, it perhaps has no significance as one kind of ‘affect’ could be to ‘override’? On the other hand, perhaps an ‘affect’ on a planning scheme is narrower in scope – such that a s242 Preliminary Approval cannot ‘remove’ or ‘supplant’ a planning scheme provision?

The Bill¹⁰³ now also provides that a s242 Preliminary Approval can “*identify and include*” a code, rather than just “*include*” a code as is the case under the IPA¹⁰⁴.

The Bill¹⁰⁵ changes the default currency period for a s242 Preliminary Approval to five years. This change will have little practical impact given such applications often seek a longer currency period in order to facilitate development.

(c) Provision made for electronic applications (e-IDAS)

The Bill¹⁰⁶ establishes authority for some on-line services to be a legitimate part of the planning process, through an “*electronic system approved by the chief executive*”¹⁰⁷.

(d) Information Request response period reduced from 12 months to six months

The period in which the applicant must respond to an Information Request has been reduced from 12 months under the IPA to six months under the Bill¹⁰⁸. The ability to extend this period by agreement between the applicant and the assessment manager has been retained¹⁰⁹. The

¹⁰⁰ Section 197

¹⁰¹ Section 10

¹⁰² Section 242

¹⁰³ Section 242(3)(b)

¹⁰⁴ Section 3.1.6(3)(b)

¹⁰⁵ Section 343

¹⁰⁶ Section 259

¹⁰⁷ Section 262

¹⁰⁸ Section 279(1)(b)

¹⁰⁹ Section 277

reduction in the Information Request response period will tighten file management procedures in local government and place an onus on applicants to progress their applications through the IDAS process. On balance, it is appropriate.

The Bill¹¹⁰ also provides that Information Requests from the assessment manager may include advice as to how the application may be changed. This is not a prerequisite if an application is proposed to be changed in response to an Information Request. This differs slightly from the existing situation under the IPA.

(e) Public Notification

The Bill¹¹¹ requires that an applicant notifies the assessment manager within five days of commencing public notification, in addition to notifying them of completion of the public notification¹¹². This adds an additional procedure to the IDAS process and introduces another way in which an application can lapse. The new provision is of questionable benefit.

Conclusions

In respect of the six key themes that were raised at the commencement of this paper, it is our view, on the basis of our initial review of the Bill, that:

- (i) The Bill represents an erosion of the performance-based planning system that the IPA sought to establish in Queensland. It introduces prohibitions without any ability to evaluate performance. It introduces deemed approvals with potential to result in approvals or refusals without a full evaluation of performance. It reduces the capacity to provide certainty for code assessable development. The introduction of Compliance Assessment restores some certainty but will, in practice, have only limited application.
- (ii) The Bill will have significant implications for the drafting of local government planning schemes, particularly as a consequence of the introduction of the Standard Planning Scheme Provisions and deemed approvals for most Code Assessable development applications. The 'toolkit' will be smaller, with a defined template and more 'mechanised' decision rules. These will need careful consideration when drafting scheme provisions, to maintain an appropriate balance between certainty and flexibility and an efficient planning system.
- (iii) The Bill has achieved some success in improving the efficiency of the planning and development assessment system; however, those improvements come at the cost of additional procedures and reduced timeframes for actions that need to be undertaken by applicants. There will no doubt be efficiency benefits arising from the deemed approval provisions, but these are likely to be offset by additional post-decision procedures.
- (iv) The Bill empowers the State to intervene in the planning and development system to a greater degree. Whether the State elects to utilise these new powers remains to be seen, but in our view, this is a likely outcome. Given past performance, it will be critical for the State to improve its coordination and implementation of State agency referrals. The State needs to also consolidate its policies and controls into a more narrow suite of planning instruments, intended under the Bill, as opposed to the plethora of separate legislation, planning instruments and guidelines that have evolved over the past number of years.
- (v) The Bill provides for a number of significant 'unknowns' in the future planning and development system, including the nature and scope of regulations and statutory guidelines (such as the revised 'Schedule 8' from the IPA); the new plan making provisions; and the Standard Planning Scheme Provisions. These will have implications upon the matters raised in this paper, in ways not yet known.

¹¹⁰ Section 276(6)

¹¹¹ Section 300

¹¹² Section 301

- (vi) Perhaps most importantly, the Bill fails in its objective to simplify the planning and development system in Queensland. Not only has the opportunity for some problematic processes to be resolved been missed, but additional procedures and requirements have been introduced. For example, there are new procedures; additional notices under IDAS; additional categories of development; new obligations to synchronise standard planning provisions across the State; and a hierarchy of planning instruments which will have different implications in different circumstances. It contains transitional provisions, not addressed by this paper, to manage these changes together with the existing system. It is more complex and likely to result in a system that is even more elusive to the casual user.

The *Sustainable Planning Bill 2009* will result in numerous improvements to the planning system in Queensland. The legislation is better structured and more logically drafted. It addresses a range of deficiencies in the current legislation in an effective way. However, the Bill introduces additional complexity to an already complex system. Like the IPA before it, the Bill provides a planning framework for Queensland following an unwavering quest for integration. Like the IPA before it, this might be a promise which is, in practice, hard to keep.
