

# IMPLEMENTING ESD UNDER THE SPA

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## Preamble

Imagine this scenario. It is the year 2016.

*A Development Application is lodged under the SPA for a quarry expansion 25 kilometres inland from Rockhampton. The quarry has been operating for 82 years and the expansion is to enable another 70 year supply of much needed hard rock. The site is grassland and used for grazing.*

*The application is referred to 9 Advice Agencies and 12 Concurrence agencies, including the Queensland Department of Carbon Sequestration, which uses their external power under the Carbon Act 2012 to impose Carbon Charges to the value of \$6.2m.*

*The Local Government is enthusiastic about the development and approve the application, subject to Infrastructure Charges for Coastal Revetment Works totalling \$3.4m.*

*Soon after the approval, the Federal government make their separate decision under the EPBCGWEN Act (Environmental Protection, Biodiversity Conservation, Global Warming and Everything Nasty Act). The development is a Taxed Action and the government imposes the increasingly unpopular 'Reef Tax', which applies to all development within 250 km of the coastline north of Bundaberg.*

*The applicant is thrilled. He starts preparing for his Subterranean Works Application (or 'sub works').*

*But alas, the development is not to be. A Swiss schoolboy lodges an Online Declaration, being a recent addition to the e-DA system. This results in the approval being deemed 'Invalid' by the Online Assessor, being a computer program running on the new 'Smartstate™' computer by Beattie Industries. It decides that no application is able to be lawfully made over that part of the site which is mapped within 3.6 kilometres of the Black Cockatoo's median potential flight path. It also determines that the Vegetation Re-establishment Act 2014 does apply to the balance of the land, due to the unique combination of zoning, soil type and distance from a busway.*

*Four months later, the applicant joins 'Applicants Anonymous'.*

You may think this fanciful, but I'm not so sure.

In the past, Queensland had few controls over environmental management. Queensland lacked significant and basic data, which over time has improved with technology and research. We have come a long way.

Now, the pendulum has swung and Queensland has potent environmental management systems. But are they focussed? Has the pendulum swung too far?

It seems to me the 'balance' sought by the *Sustainable Planning Act 2009* (the "SPA") and other legislation is now difficult to pursue, given the complexity of process, the powers which exist under external, single-focussed legislation and the quality of bureaucratic decision-making which has emerged from this context.

Looking forward, Federal and State controls will continue to proliferate to, legitimately, address emerging environmental considerations. Statutory weight will continue to shift and complexity will inevitably increase.

So, how will the 'balance' sought by the SPA be struck?

## Introduction

On 18 December 2009 the SPA replaced the *Integrated Planning Act 1997* (the "IPA") as the principal piece of planning legislation for the state of Queensland. The SPA was heralded as the mechanism by which to deliver sustainable outcomes, as well as increase accountability, coordination, integration, effectiveness and efficiency, through the planning and development framework<sup>1</sup>. Ecological sustainability remains an overarching requirement of the SPA, consistent with the Minister's message that the SPA is "evolutionary, not revolutionary"<sup>2</sup>. However, there have been some changes to how the purpose of the Act is to be advanced and how ecological sustainability is to be achieved, which are likely to have significant implications for the implementation of the purpose of the Act.

The purpose of this paper is to examine how ecological sustainability will be implemented under the SPA, particularly in light of these changes. The paper will consider whether the SPA strikes a balance between protecting the environment whilst maintaining social wellbeing and economic development, or whether the pendulum has swung too far in favour of the environment and precaution to become both unrealistically protective of the environment and unworkable. Some practical issues that are likely to arise as a result of the changes to SPA, and the underlying tensions caused by a multi-tiered approach to planning will be considered.

## Context

The term "sustainable development" was defined in the *Report of the World Commission on Environment and Development* ("the Brundtland Report") as "development which meets the needs of the present without compromising the ability of future generations to meet their own needs"<sup>3</sup>.

Australia's response to the Brundtland Report was the *National Strategy for Ecologically Sustainable Development* (1992), which sought to refine the concept of sustainable development to suit Australia's unique circumstances through the term 'Ecologically Sustainable Development' (ESD). ESD was relevantly defined as "using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained and quality of life for both present and future generations is increased"<sup>4</sup>. The texture of the principle includes a balance between ecological, economic and social considerations, which has been explicitly incorporated into the IPA and the new SPA. Other Queensland legislation also embraces the concept, including the *Environmental Protection Act 1994*<sup>5</sup> and the *Coastal Protection and Management Act 1995*<sup>6</sup>. At the national level the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) embraces the principle, providing a national framework for environmental regulation.

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<sup>1</sup> Hinchliffe, SJ, 2009, "Sustainable Planning Bill: Second Reading Speech" 19/06/09 in Queensland Legislative Assembly 2009, *Official Record of the Debates of the Legislative Assembly (Hansard)*, Government Printer 1157

<sup>2</sup> *ibid*

<sup>3</sup> World Commission on Environment and Development (1987), *Report of the World Commission on Environment and Development: Our Common Future*, Geneva: World Commission on Environment and Development, viewed online at <http://www.un-documents.net/wced-ocf.htm> on 11 May 2010

<sup>4</sup> Commonwealth of Australia (1992), *National Strategy for Ecologically Sustainable Development*, Canberra: Australian Government, viewed online at <http://www.environment.gov.au/esd/national/nsesd/strategy/intro.html#WIESD> on 11 May 2010

<sup>5</sup> s.3 Object of Act

<sup>6</sup> s.3 Main Objects of Act; s. 16 Meaning of Ecologically Sustainable Development

### ***Integrated Planning Act 1997***

In Queensland, the IPA introduced the concept of “ecological sustainability”, the achievement of which was to be the overarching purpose of the Act through coordinated and integrated planning, the management of the development process and its effects on the environment<sup>7</sup>. Ecological sustainability was defined under the IPA as a three-limbed concept, being “*a balance that integrates—*

- (a) *protection of ecological processes and natural systems at local, regional, State and wider levels; and*
- (b) *economic development; and*
- (c) *maintenance of the cultural, economic, physical and social wellbeing of people and communities*<sup>8</sup>.

Ecological sustainability was a cornerstone of IPA<sup>9</sup>. It was designed to provide a balance to encourage better planning outcomes. Ecological sustainability under the IPA was intended to be broader than that contemplated under the *National Strategy for Ecologically Sustainable Development* because it sought to combine ESD concepts with traditional planning concepts, such as amenity, character and the quality of the natural and built environment<sup>10</sup>. However, the concept was heavily criticised because the protection of the environment was to be given no greater weight in decision-making than economic development or cultural and social wellbeing. That is, the IPA lacked an environmental bottom line<sup>11</sup>. But that was the point. A ‘balance’ requires ‘flexibility’.

Local governments were obliged to perform their functions and exercise their powers in a way that advanced the Act’s purpose<sup>12</sup>. The means by which the purpose of the IPA was to be advanced included ensuring decision-making processes were accountable, coordinated and efficient, taking the environmental effects of development into account and applying the precautionary principle. Renewable natural resources were to be used sustainably and non-renewable natural resources used prudently. The adverse environmental effects of development were to be avoided, or otherwise lessened<sup>13</sup>.

### ***Sustainable Planning Act 2009***

The SPA retains ecological sustainability as the overarching purpose which is sought to be achieved by the Act<sup>14</sup>. The definition of ecological sustainability also remains unchanged<sup>15</sup>. However the SPA does change the means by which ecological sustainability is to be achieved and how the purpose of the Act is to be advanced.

In order to balance the three limbs of ecological sustainability, the development process must be managed to ensure it is accountable, effective and efficient and delivers sustainable outcomes<sup>16</sup>.

The outline of what “advancing the Act’s purpose” involves has been amended in a way which is likely to have significant implications. For example, to advance the purpose of the Act, decision-making processes must now take into account the effects of development on climate change<sup>17</sup>. Climate change, along with urban

<sup>7</sup> IPA s.1.2.1

<sup>8</sup> IPA s.1.3.3

<sup>9</sup> The other being performance based/outcome oriented planning

<sup>10</sup> McCauley, D, 1997, “Integrated Planning Bill: Second Reading Speech” 30/10/97 in Queensland Legislative Assembly 1997, *Official Record of the Debates of the Legislative Assembly (Hansard)*, Government Printer 4087

<sup>11</sup> Bragg, J, 1998, “Will IPA Protect the Environment?” *Procedural Evolution and Integration – Queensland Environmental Law Association Annual Conference*, QELA, Sanctuary Cove

<sup>12</sup> IPA s.1.2.2(1)

<sup>13</sup> IPA s.1.2.3(1)

<sup>14</sup> SPA s.3

<sup>15</sup> SPA s.8

<sup>16</sup> SPA s.3(a)

<sup>17</sup> SPA s.5(1)(a)(ii)

congestion and the adverse effects on human health, have been explicitly named as environmental effects of development which must be avoided or, at least, lessened<sup>18</sup>. The impacts of development on climate change are to be addressed through sustainable development, including sustainable settlement patterns and urban design<sup>19</sup>. Sustainable development and climate change are not otherwise defined in the SPA. Consideration must also be given to alternatives to the use of non-renewable natural resources, housing choice and diversity, and economic diversity<sup>20</sup>.

### **'Green' legislation and policy**

Since the commencement of IPA, 'green' legislation, regulation and policy has increased, in terms of volume and scope, at both State and Commonwealth level.

In Queensland, legislation, policies and plans regulate such broad topics as national parks, marine parks, forests, water supply, climate change, environmental management, wildlife and ecosystems, vegetation, coastal management and heritage conservation. Some of this is legislation which sits wholly outside the planning system; some externally affects the operation of the planning system; whilst some is policy embedded into the planning system.

The number of referral agency triggers has also changed. For example, when the IPA commenced, the Environmental Protection Agency<sup>21</sup> was triggered as a referral agency for six types of activity, which can be broadly summarised as Environmentally Relevant Activities and contaminated land matters. Under the SPA, there are now 34 triggers requiring referral to DERM. Whilst it must be accepted that the jurisdiction of other referral agencies was to be rolled into the IPA following its commencement, the number and scope of 'green' triggers under the SPA demonstrates the environment is receiving greater attention than ever before.

Nationally, the level of Commonwealth Government intervention into areas traditionally within the domain of State and local governments is also increasing. The recommendation for a new climate change trigger in the EPBC Act to enable the Environment Minister to assess and approve significant greenhouse gas emitting projects<sup>22</sup>, is a recent example.

### **State planning instruments**

The SPA reveals an intention on the part of the State Government to take a greater role in planning and development in Queensland.

State planning instruments include State planning regulatory provisions (SPRP), regional plans, State planning policies (SPP) and standard planning scheme provisions<sup>23</sup>. They are statutory instruments, which have the force of law<sup>24</sup> and apply to both forward planning and development assessment.

Since the commencement of the IPA, a number of State planning instruments have been created which primarily have an environmental focus. This trend is expected to continue under the SPA, given the expansion of the obligations in advancing the Act's purpose to take account contemporary imperatives (such as climate change, urban congestion and housing diversity).

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<sup>18</sup> SPA s.5(1)(c)

<sup>19</sup> SPA s.11(c)(iv)

<sup>20</sup> SPA s.5(1)(b), (d)

<sup>21</sup> Referral triggers for the Department of Natural Resources (as it was then called) had not been rolled in to the IPA at commencement

<sup>22</sup> Department of the Environment, Water, Heritage and the Arts (2009), *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* viewed online at

<http://www.environment.gov.au/epbc/review/publications/pubs/final-report.pdf> on 11 May 2010

<sup>23</sup> SPA s.15

<sup>24</sup> SPA s.17(1), 24, 41, 51

Of particular relevance to the balance underpinning ecological sustainability is the force of these State planning instruments. Some contain planning guidance to assist decision-making, whilst others contain external regulatory powers which override other mechanisms. The former enable a balance to be sought by the decision authority, taking into account ecological, social and economic considerations but guided by the State policy. The latter can have the effect of shutting out two of the three limbs of sustainability. These have generally been blunt tools which ought to have been the precision instruments of the planning toolkit. In many cases they have relied on mapping that has attained legendary status for its inaccuracy. I say 'legendary' not because it is inaccurate, but because of the implications of the law which flow from that mapping as well as the recalcitrance of some of the officers who seek to justify it.

The elevated importance of State planning instruments and the role they are to play in achieving ecologically sustainable outcomes is formalised under the SPA through a hierarchy of instruments and changes to the assessment and decision rules.

### **Hierarchy of 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<sup>25</sup>.

The implication of this hierarchical system is that the 'balance' that integrates the elements of sustainable development is, in the main, carried out on George Street, in advance of development being proposed. Each government department uses the 'integrated' planning system to achieve their separate focussed objectives, in some cases introducing new legislation outside the planning system. Without appropriate balance, those objectives can (and do) skew the development assessment process. This can lock out development with unintended consequences.

The problem lies in philosophy. Ever since the commencement of the IPA, the government has promoted the idea that with enough care, any planning assessment can be facilitated through the planning system in advance. The buzzword for this is planning scheme 'calibration'. It is the idea that the planning system can be designed as a 'sausage machine', pumping out predetermined results with consistency. But the philosophy is too simplistic. How can a 'balance' be struck when most of the criteria are unknown?

And what of democracy? I would suggest that few voters would have any understanding of the implications of these State processes and actions upon local outcomes. The system is simply too complex to see the link. But, State agencies are having a real influence upon local decisions, by hard wiring the 'balance' in ecological sustainability, in advance of local development proposals.

The philosophy is too simplistic. The irony is that it makes the planning system too complex.

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<sup>25</sup> SPA ss. 19, 29, 43, 53

## Assessment and Decision Rules

Under the SPA, the decision rules for code and impact assessment are now combined. The 'sufficient grounds' test when a decision is in conflict with a scheme remains<sup>26</sup>, 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 was 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.<sup>27</sup>

These changes are relatively significant in the context of planning schemes and development assessment. They confirm the hierarchy of statutory instruments and the importance of State planning instruments in development assessment. As outlined earlier, the number of statutory instruments with which an application must not conflict has increased. Unless the conflict can be overcome by sufficient grounds, the application must be refused. Furthermore, any 'decision' (as opposed to 'approval' under the IPA) which conflicts with the planning scheme or another relevant instrument could potentially be justified by 'sufficient grounds', thus enabling the refusal of a fully compliant development application by reliance on 'sufficient grounds'. Given the emphasis being given to environmental matters by State planning instruments, the ecological considerations have been afforded a significantly greater level of protection, particularly as many of the latest State planning instruments are yet to be 'appropriately reflected' in planning schemes.

The 'balance' is also made more complex, by each referral agency only being bound to have regard to the purpose of the Act<sup>28</sup>. Under the IPA and SPA a referral agency is obliged to assess and decide a matter 'within the limits of its jurisdiction'<sup>29</sup>. That is, referral responses are rarely 'pre-balanced' and referral agencies have no obligation to do so. Under the SPA, in addition to statutory instruments within its own jurisdiction, referral agencies must also have regard to the jurisdiction of other agencies in the assessment of development applications<sup>30</sup>. This may lead to some 'double weighted' assessments, balancing narrow issues rather than those underpinning ecological sustainability. Assessment managers will need to be particularly vigilant in considering these responses, and act where necessary as a counterweight seeking to strike the appropriate balance for ecological sustainability. Of course, there is less flexibility to strike that balance with concurrence agency responses compared to advice agencies.

## Consequences of the increased role of the State

The increasing opportunities for the involvement of the State to influence planning and development at local government level, through State planning instruments, raises questions about the State's capacity to do so. State planning instruments provide strategic direction through policies which are directed at higher order impacts

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<sup>26</sup> Section 326

<sup>27</sup> A detailed introduction to, and commentary on, the *Sustainable Planning Bill 2009* is provided in a recent paper entitled *The Sustainable Planning Bill 2009 – an introduction to Queensland's new planning legislation*. The paper was prepared by Steve Reynolds and Matthew Schneider and is available for download at: <http://www.hrppc.com.au/Publications.php>

<sup>28</sup> IPA s. 1.2.2(1)(b)(c); SPA s. 4(1)(b)(c)

<sup>29</sup> IPA s.3.3.15(1)

<sup>30</sup> SPA, s.282(2)

and, in the case of many of the current statutory instruments, higher order *environmental* impacts. State planning instruments, by their very nature, lack the level of detail required for fine grain planning at the local level. It is this lack of detail which creates increased tension and inconsistency in their application.

The broad scope of matters for which a State planning instrument can be made increases the number of agencies that may be involved in the process. The involvement of many agencies creates issues with interfacing, both within and between agencies, and often revolving around competing interests and objectives. Multiple agencies also increase the likelihood of two or more State planning instruments of the same type being created with competing interests. The result may be applications will be refused unless the conflict can be overcome by sufficient grounds. Alternatively, development proposals may be 'dumbed down' so as to be uncontroversial in order to secure an approval, losing beneficial elements which may be contrary to the purpose of the Act.

### **Application of the Precautionary Principle**

The requirement under SPA to take account of the impacts of development on climate change, urban congestion and housing diversity during decision-making processes, in the context of the precautionary principle, is likely to become increasingly problematic in the preparation of planning instruments and development assessment.

The application of the precautionary principle under the SPA (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<sup>31</sup>.

For example, decisions of assessing authorities may need to involve an assessment of the effects of impact assessable development<sup>32</sup> on climate change and apply the precautionary principle in making those decisions<sup>33</sup>. The implication of this requirement is likely to be significant, particularly in Queensland where increasing numbers of people live in coastal areas which are increasingly vulnerable to the effects of storm surge and sea level rise. Planning assessments may become very detailed, complex and time-consuming as applicants and assessing authorities grapple with the science of climate change and seek to identify and address the impacts of development.

For policy makers and scheme drafters, preparing planning instruments which minimise or lessen the effect of climate change, affordable housing and urban congestion will be problematic, particularly given the technical complexity and continuing level of uncertainty about these issues. The SPA recognises that these issues require a planning response and due consideration in the decision-making process. However, there remains an underlying uncertainty about how to achieve it.

### **Presumption in favour of the policy**

The SPA removes the obligation that the IPA<sup>34</sup> placed on the assessment manager to approve development that complies with the applicable codes. The removal of this

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<sup>31</sup> SPA ss.5(1)(a)(iii), 5(2)

<sup>32</sup> SPA s.4(2)

<sup>33</sup> Recent decisions of the Victorian Civil and Administrative Tribunal have required applicants to undertake coastal hazard vulnerability assessments for proposed coastal development, following the application of the precautionary principle. See: *Cooke & Ors -v- Greater Geelong CC* [2010] VCAT 60, viewed online at <http://www.austlii.edu.au/au/cases/vic/VCAT/2010/60.html> on 11 May 2010

<sup>34</sup> IPA s.3.5.13(2)

obligation has been described as a shift from a “presumption in favour of approval” to a “presumption in favour of the policy”<sup>35</sup>.

Planning schemes seek to strike an appropriate balance between certainty and flexibility, which is necessary for the efficient operation of the planning system and to clearly establish community expectations. The shift in presumption is an erosion of development certainty and has occurred in context with increased certainty for ecological protection, described earlier. This represents a shift in balance, with the implication that the construction of planning scheme provisions will need to be carefully drafted, to provide the necessary certainty removed by the legislative shift. However, tightly drafted codes protect mediocre outcomes and discourage innovation through performance solutions, which is the very cornerstone of a performance-based planning system.

## The Future

Because Queensland has an integrated planning system, it is inevitable that the planning system will increase in complexity.

The involvement of the State in “top down” planning through the use of State planning instruments is expected to increase, given the State’s determination to integrate State agency regulation through the Integrated Development Assessment System (“IDAS”). The coarseness of these instruments for local planning is expected to continue and cause tension in their application.

State government ought to better design the mechanisms, mapping and powers that accompany State agency environmental measures so they are better balanced (or able to be balanced) in terms of ecological sustainability. The key agency to facilitate this is the Department of Infrastructure and Planning. There ought to be less focus on ‘calibration’ (which suggests a predetermined end-state) and more focus on facilitating responsive and adaptable decision-making.

New or upgraded issues will continue to emerge. It is anticipated that climate change mitigation and adaptation will become a topical and vexing question for all stakeholders in the planning and development industry. This may not just be limited to coastal areas. There remains a great deal of uncertainty about the anticipated sea level rise, and consequentially the most appropriate mechanism to address it. What is clear is that climate change is a complicated and complex problem, requiring a great deal of technical knowledge and expertise. Planning assessments may require an assessment by the applicant of a project’s anticipated carbon emissions and the impact of that project on climate change.

Furthermore, given the requirement under the SPA to apply the precautionary principle in decision-making, it is not beyond the realms of possibility that decision makers may be refusing applications where the effects of impact assessable development on climate change are uncertain.

## Conclusion

The SPA seeks to strike a balance between protecting the environment, maintaining social wellbeing and economic development. This paper suggests the pendulum has swung too far in favour of the environment, as a consequence of process and complexity. As a result, the environment now enjoys greater levels of protection than ever before, through the increased scope and application of legislation and policy at

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<sup>35</sup> *Sustainable Planning Bill 2009 Explanatory Notes*, viewed online at [http://www.austlii.edu.au/au/legis/qld/bill\\_en/spb2009222/spb2009222.html](http://www.austlii.edu.au/au/legis/qld/bill_en/spb2009222/spb2009222.html) on 11 May 2010

all levels of government. This is a good thing, but not when it unreasonably skews outcomes to the detriment of social and economic considerations.

Changes to the assessment and decision rules give greater weight to State planning instruments and require a decision maker to refuse an application that conflicts with a relevant instrument, unless the conflict can be overcome by sufficient grounds. Prescriptive drafting of State planning instruments removes flexibility in implementation which otherwise encourages innovation in a performance-based planning system. Greater levels of protection make the system unduly complex and practically unworkable, due to the layers of legislation and policy to be navigated and the number of competing agencies involved in the process. Increased complexity, reduced flexibility and greater uncertainty reinforce mediocre planning outcomes.

There is no easy or obvious solution. It would be naïve to suggest the answer is as simple as preparing SPRPs which explicitly seek to protect economic development and social and cultural wellbeing, or mandating 'Go Zones' and 'No Go Zones'. One approach only increases the existing level of complexity, while the other reinforces the return of prescriptive planning rather than performance-based planning.

Heavy reliance remains on assessment managers to be the bastions of balance, sometimes in the face of inflexible State agencies who slavishly apply their policies and codes. Assessment managers, and more particularly local governments, need the support, capacity and power to enforce the balance for ecological sustainability. State policy-makers should also recognise that flexibility in policy drafting is fundamental to the delivery of sustainable outcomes. Otherwise applicants will be seeking balanced and fair outcomes through the appeal process, rather than the IDAS process. Few would agree that is a desirable solution.

Balance is at the heart of the purpose of the SPA, not process and complexity. But these issues represent the most significant impediment to the delivery of ecological sustainability in Queensland.

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