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Contents

INDEX ii

TABLE OF LEGISLATION v

TABLE OF CASES vii

Infrastructure planning and IPA 1

Practical issues in the making and enforcement of local laws 28

Critical issues in municipal law (Queensland): Drafting and enforcement of local laws – Recent legislative and policy changes and implementation 35

Review of recent developments in planning law at both State and Commonwealth level 42

No 'duty' of Councils to enforce planning laws 49

North Queensland Conservation Council Inc seeking judicial review of a permit to develop a harbour and associated works within a marine park 51

The legal and technical principles in drafting decision notices 53

The introduction of the Brisbane City Plan 2000: How it impacts local plans in the development assessment process 64

Local plans under the Brisbane City Plan 2000 – Some legal issues 69

Recent developments to planning law focussing on asbestos law, corporate environmental reporting, cultural heritage and the law of negligence 74

Infrastructure charges plans – Proposed changes to IPA and perceptions 79

Proposed reform of IPA's infrastructure charging system 85

Plan making and development assessment under Queensland's Integrated Planning Act – Implications for the public and private sectors 92

Review of recent developments in planning law including infrastructure contributions, community infrastructure and ministerial call in powers 104

Summary of recent developments in planning law focussing on the Prostitution Act 1999 and Liquor Act 1992 108

Review of the impact of 'restricted dogs' legislation and how local laws are made and enforced 113

On-site sewerage treatment systems – A local government problem 117

Summary of recent developments in planning law including rezoning conditions, management of the Brisbane river catchment and fraudulent planning submissions 123

Policy and legislative framework of IPA 129

IPA Planning Scheme Training Workshop No. 1 151

Infrastructure planning and charges – Levying charges on approvals and land 156

Master planned communities – Legal and policy issues 163

Demystifying development assessment and IDAS 171

Analysing the impact and role of infrastructure charges on property developments 182

Advising clients about the legality of conditions and infrastructure charges 189

Index

Absence of need 55
Actual acid sulphate soils 42
Alternative methods of funding infrastructure 84, 90
Amended by SDOLA 106
Amenity and community infrastructure 124
Applications for development approvals for brothels 108
Asbestos 74
Assessable development 44
Assessment of the preliminary approval application 169
Australian Industry Group 75
Brisbane City Plan 2000 ..... 64, 69
Brisbane River Catchment 126
Code of Conduct Compliance Report 75
Code provisions under the Maroochy Plan 149
Common law tests for lawful conditions 189
Common procedures 94
Community infrastructure 156, 162, 182, 188
Community participation 95
Conditioning powers 84
Conditions of development approval 54
Coty principle 153
Coty Principle 151, 152, 154
Defined timelines 95
Deleterious effect on the environment 55
Designation of land for community infrastructure 106
Desired environmental outcomes 66
Development assessment framework 171
Development assessment process 66
Development standard provisions 65, 69, 147, 148, 149
Devolution 95
Documents should be drafted in gender neutral language 62
Dog attacks 113
Drafting of a refusal decision notice 54
Economic environment 132
Emerging issues arising from the IPA 92
Enforcement of local laws 28, 34
Enforcement order 37, 38, 40
Enforcement order or fine option order 37
Environmental Licence 138
Environmental Protection (Water) Policy 1997 (Water EPP) 119
Environmental Protection Agency 76, 105
Environmentally Relevant Activities 138
EPA licence for a level 1 activity 138
Extra territorial operation 30
Focus on policy issues 95
Four parts to a legal obligation 57
Four types of local laws 140
Franchise legislation 165
Fundamental legislative principles 33
Good rule and government 30
IDAS 171, 176, 180
Impact on amenity 55
Implied constitutional prohibition 31
Infrastructure charges 189
Infrastructure charges for roads 84, 90
Infrastructure charges plan 8, 10, 11, 12, 14, 16, 17, 18, 19, 26
Infrastructure charging system under IPA 80, 86
Infrastructure conditions 189
Infrastructure contributions 104
Infrastructure funding 156, 158, 159, 161, 182, 184, 185, 186, 188
Infringement notice 35, 36, 37, 38, 40
Infringement notice forms 36
Instrumental planning 97, 130
Integrated Development Assessment System (IDAS) 32, 53, 95, 132, 135
Integrated Dispute Resolution System 171
Integrated planning system 171, 172

Index (cont'd)

Integration of government interests 94
Interim local laws 114, 140
IPA does not prescribe a plan 134
IPA is a visionary piece of legislation 103
IPA reflects a paradigm shift 103
IPA represents a radical shift 92
IPA test for lawful conditions 189
IPA's conditioning powers 90
Judicial review 51, 52
Lang Park development application 107
Legislative and executive roles of local government 135
Legislative making powers 29
Legislative package 48
Lifecycle costs of infrastructure 84, 90
Local councils 49
Local government area 1, 4, 12, 15, 29, 30
Local governments cannot override State laws 32
Local governments to review their local laws 116
Local growth management strategy 164
Local law cannot override a State policy matter 33
Local law making powers 114, 140
Local laws contain a number of different mechanisms 140
Local plans under the City Plan 70
Low-impact facilities 46
Management of places of cultural heritage significance 76, 105
Maroochy Plan 2000 146
Maroochy's local law framework 141
Master planned community 163
Minimalist model of planning 97, 130
Ministerial Call in Powers 111
Model local laws 114, 140
National Environmental Significance 78
Necessary requirements for making a valid local law 34
Negotiated decision notice 105
Non-Derogation or Coty principle 55
Non-relaxable provisions in transitional planning schemes 125
Number of gaming machines in hotels had been capped 77
Offender appeals against the conviction 38
Offender must be of good behaviour 40
On-site Sewerage Code 118, 119
On-site sewerage treatment 117
Other local laws 114, 140
PEA was repealed when the IPA commenced 137
Person aggrieved 51
Physical environment 132
Plan for infrastructure 82, 88
Plan making system 134
Planning instruments which may be varied by a preliminary approval 167
Planning laws 49
Planning scheme 151, 152, 153, 154, 155
Planning scheme policies 65, 70, 136, 139, 149
Planning scheme policies under the 1985 Planning Scheme 149
Planning scheme policies under the City Plan 70
Planning scheme policies under the Maroochy Plan 149
Potential acid sulphate soils 42
Power to impose conditions on a development approval 54
Priority service area 88
Private benefit infrastructure 1, 156, 162, 182, 188
Process by which a local law is to be made 115
Properly made submission 127
Property developments 182
Public notification of a preliminary approval application 169
Public recreational land 83, 90
Public sector reform 94
Public sector reform was a mantra of the 1990s 131

Index (cont'd)

Recording of the preliminary approval 169
Reduction in legislation 94
Referral coordination 168
Reform of State and local government laws 136
Reform of the town planning appeals system 48
Regulatory alternatives 95
Regulatory framework for the telecommunications industry 46
Relevant and reasonable 54
Relevant planning grounds 55
Restricted dogs 113
Restrictions on the State's legislative power 31
Rezoning application 123
Rezoning approval 123, 124
Rezoning conditions 123
Scope of the preliminary approval 167
SDOLA 107
Separate regulatory and service functions 95
SETONS Court 35
Shared financing arrangements 84, 90
Single approval system 95
Social environment 132
Social infrastructure 1
Special interest 51, 52
Specific procedural restriction on amending legislation 31
Specific processes for the making of local laws 34
Standard Sewerage Law 118
State law prevails over the local law 32
State Penalties Enforcement Registry 28, 34, 35
State planning and environmental laws enjoyed by Telstra 45
State Planning Policy 1/00 42
Statutory powers 49
Strategic plan provisions 149
Strategic planning provisions 65, 66, 69, 70, 146, 149
Subordinate local laws 114, 140
Technical requirements in respect of infrastructure agreements 112
Telecommunications Code of Practice 1997 45
Telecommunications Industry Ombudsman 47
Telecommunications Low-impact Facilities Determination 1997 46
Telecommunications network construction activity 45
The Great Lakes cases 121
The sustainability framework 132
Theoretical basis for IPA 129
Timing of the preliminary approval 167
Type of development approval 167
Unlawful development 55
User pays 95
Water quality of the Brisbane River 126
Zoning provisions 65, 69, 70, 148, 149

Table of Legislation

Commonwealth

Australian Heritage Commission Act 1975 48
Australian Heritage Council (Consequential and Transition Provisions) Bill 2000 48
Australian Heritage Council Bill 2000 48
Corporate Code of Conduct Bill 2000 75
Environment and Heritage Amendment Bill (No. 2) 2000 48
Environment Protection and Biodiversity Conservation Act 1999 ..... 48, 78, 102
Health Act 1973 122
Telecommunications Act 1991 45
Telecommunications Act 1997 ..... 31, 45

New South Wales

Clean Waters Act 1970 121
Environmental Planning and Assessment Act 1979 ..... 18, 49
Local Government Act 1993 ..... 4, 28, 29, 30, 31, 32, 33, 34, 49, 68, 72, 114, 127, 135, 138, 139, 141

Queensland

Acts Interpretation Act 1954 115
Beach Protection Act 1968 ..... 126, 127, 137
Body Corporate and Community Management Act 1997 ..... 165, 166
Building Act 1975 ..... 53, 136, 137, 143
Building and Integrated Planning Amendment Act 1998 138
Canals Act 1958 137
Casino Control Act 1982 137
City of Brisbane Act 1924 115
City of Brisbane Town Planning Act 1964 ..... 92, 129
Coastal Protection and Management Act 1995 ..... 126, 127, 136, 137
Constitution Act 1867 ..... 30, 31
Environmental Protection Act 1994 ..... 106, 111, 118, 119, 120, 122, 127, 136, 137, 138
Environmental Protection and Other Legislation Amendment Bill 2000 138
Fisheries Act 1994 ..... 126, 127
Food Act 1981 136
Forestry Act 1959 137
Harbours Act 1955 137
Health Act 1937 ..... 119, 120, 122
Integrated Planning Act 1997 ..... 4, 28, 32, 33, 42, 53, 58, 64, 65, 68, 69, 70, 72, 76, 77, 79, 80, 81 82, 85, 86, 87, 88, 92, 97, 104, 106, 108, 111, 115, 116, 119, 120 125, 129, 130, 138, 141, 149, 163, 166, 167, 168, 169, 170, 171, 189
Integrated Planning Regulation 1998 45
Integrated Resort Development Act 1987 165
Judicial Review Act 1991 ..... 51, 109
Jupiters Casino Agreement Act 1983 ..... 94, 132
Justices Act 1886 ..... 35, 36, 37, 40
Justices Regulation 1993 35
Land Act 1994 ..... 126, 127, 137
Land Title Act 1994 102
Legislative Standards Act 1992 ..... 33, 115, 141
Liquor Act 1992 ..... 108, 109, 136
Local Government (Planning and Environment) Act 1990 ..... 4, 54, 64, 65, 69, 79, 85, 92, 97, 104 123, 125, 129, 130, 149, 166, 167
Local Government (Robina Central Planning Agreement) Act 1992 ..... 13, 166
Local Government Act 1936 ..... 9, 25, 29, 32, 34, 92, 120, 129, 167
Local Government Act 1943 32
Local Government and Other Legislation Amendment Act 1999 5
Local Government and Other Legislation Amendment Bill (No. 2) 2001 113
Local Government Regulation 1994 ..... 28, 31, 33, 34
Mineral Resources Act 1989 ..... 12, 94, 132
Mixed Use Development Act 1993 166
Nature Conservation Act 1992 127

Table of Legislation (cont'd)

Queensland (cont'd)

Penalties and Sentences Act 1992 ..... 36, 37
Plumbing and Drainage Bill 2002 120
Plumbing and Drainage Act 2002 118
Prostitution Act 1999 ..... 77, 108, 136
Prostitution Amendment Act 2001 108
Queensland Heritage Act 1992 138
Rural Lands Protection Act 1985 126
Sanctuary Cove Resort Act 1985 165
Sewerage and Water Supply Act 1949 ..... 136, 137, 138
South Bank Corporation Act 1989 166
Standard Building Regulation 1993 ..... 33, 53
State Development and Other Legislation Amendment Act 2001 ..... 106, 111
State Development and Public Works Organisation Act 1971 ..... 106, 107, 111
State Penalties Enforcement Act 1999 ..... 28, 35, 36, 37, 38, 39, 40, 116, 141
State Penalties Enforcement Regulation 2000 ..... 36, 116, 141
Statutory Instruments Act 1992 ..... 16, 32, 114, 115, 139
Stock Act 1915 138
Transport Infrastructure Act 1994 ..... 14, 25, 137
Transport Operations (Road Use Management) Act 1995 28
Vegetation Management Act 1999 ..... 28, 32, 68, 72, 136
Water Act 2000 ..... 42, 44, 136, 137
Wet Tropics World Heritage Protection and Management Act 1993 138
Workplace Health and Safety Regulation 1997 74

South Australia

Environment Protection Act 1993 28

Table of Cases

AG (NSW) v Trethowan (1931) 44 CLR 394 31
Alan J Fox Pty Ltd v Redland Shire Council [1976] 33 LGRA 36 22
Alberton Investments Pty Ltd v Pine Rivers Shire Council (1994) QPLR 60 8
Aldred v Beaudesert Shire Council [1978] 37 LGERA 404 56
Alexcal Pty Ltd v Brisbane City Council [1985] QPLR 111 22
Allen v Atherton Shire Council [1977] 4 QL 266 56
Anderson v Mareeba Shire Council [1998] QPELR 355 56
Arana Hills Property Pty Ltd v Townsville City Council (Unreported Qld Supreme Ct No. 881 of 1994) 6
Arpedco Pty Ltd v Beaudesert Shire Council [1977] 35 LGRA 103 22
Aspley Gardens Pty Ltd v Brisbane City Council [1968] 15 LGRA 232 22
Aust Capital Television Pty Ltd v The Commonwealth (No. 2) (Political Advertising Ban) (1992) 177 CLR 106 30
Baglow v Livingstone Shire Council [1983] QPLR 352 56
Body Corporate "Greatwood" CTS 19855 v Maroochy Shire Council [2001] QPEC 3 ..... 67, 71, 72
Bonton No. 1 Pty Ltd v Brisbane City Council [1984] QPLR 297 21
Brennan v The King (1936) 55 CLR 253 33
Briggs v City of Mt Gambier 49 LGR.A 177 16
Brown v Idofill Pty Ltd [1987] 64 LGRA 218 at 227 ..... 67, 71
Capricorn Survey Constructions Pty Ltd & Anor v Livingstone Shire Council [1983] QPLR 347 22
City of Collingwood v Victoria (No. 2) (1994) IVR 652 30
Cobar Investments Pty Ltd v Douglas Shire Council [1989] QPLR 152 55
Colonial Sugar Refining Co Ltd v Sydney City Council [1959] 4 LGRA 1 55
Comiskey v Pine Rivers Shire Council [1996] QPLR 158 ..... 67, 72
Consolidated Abalone Divers Group Inc v Department of Fisheries, Supreme Court New South Wales 16
Coral Sea Developments Pty Ltd v Cairns City Council [2000] QPEC 13 ..... 67, 72
Coty (England) Pty Ltd v Sydney City Council [1957] 2 LGRA 117 55
Craig v Brisbane City Council [1998] QPLR 281 ..... 67, 72
Cullinanes Pty Ltd & Ors v Maryborough City Council & Anor [1986] QPLR 322 22
Cunliffe v Commonwealth (1994) 68 ALJR 791 30
Degree v Brisbane City Council [1998] QPLR 287 ..... 66, 67, 71
Dennis & O'Neill Pty Ltd & Ors v Mulgrave Shire Council [1982] QPLR 394 21
Dennis v Parramatta City Council [1981] 43 LGRA 71 55
Douglas Shire Council v Fabcot Pty Ltd [1999] 103 LGERA 195 ..... 67, 71
Duncanson & Brittain (Quarries) Pty Ltd v Brisbane City Council [1986] QPLR 330 56
Ecovale v Gold Coast City Council [1997] QPLR 344 ..... 67, 72
Evans v Caboolture Shire Council [1995] QPLR 28 ..... 67, 72
Everson v Beaudesert Shire Council [1992] QPLR 129 55
First Steps Childrens Centre v Gold Coast City Council [1992] QPLR 4 56
Fitzgibbon's Hotels Pty Ltd v Logan City Council [1997] QPELR 208 ..... 67, 71, 72
Fortier Pty Ltd v Noosa Shire Council [2000] QPEC 64 ..... 67, 72
Garnet Lincoln & Associates & Anor v Fitzroy Shire Council [1985] QPLR 311 21
Gold Coast Carlton Pty Ltd & Anor v Beaudesert Shire Council & Anor [1985] QPLR 343 22
Good Mix Concrete Pty Ltd v Brisbane City Council [1985] QPLR 38 56
Gore v Brisbane City Council [1996] QPELR 276 55
Graham Barclay Oysters Pty Ltd v Ryan [2000] FCA 1099 ..... 117, 121
Grant v Pine Rivers Shire Council [1991] QPLR 160 21
Gregory Charles Copley v Beaudesert Shire Council & Anor [1994] QPLR 216 22
Grosser v Council of the City of the Gold Coast [2001] QCA 423 125
GWF Gelatine International Limited v Beaudesert Shire Council (1993) QPLR 342 8
Harburg Investments Pty Ltd v Brisbane City Council [2000] QPEC 32 ..... 67, 71, 72
Hickey Lawyers v Gold Coast City Council [2005] QPEC 22 190
Hilcorp Pty Ltd v Logan City Council [1993] QPLR 199 55
Hollingsworth & Ors v Brisbane City Council & Anor [1975) 31 LGRA 429 22
Houghton v Brisbane City Council (1992) 14 QCLR 278 6
Indooroopilly Golf Club v Brisbane City Council [1981] 7 QL 287 56
Ingram v Maroochy Shire Council [1983] QPLR 139 56
Jenner v Maroochy Shire Council [1993] QPLR 285 55
Jesberg & Ors v Hervey Bay Shire Council [1989] QPLR 190 ..... 21, 22
Keenbill Pty Ltd v Redland Shire Council [2001] QPEC 004 104
Kelly v Toowoomba City Council [1995] QPLR 3 55
Kennedy & Ors v Redland Shire Council [1985] QPLR 28 21
Kentucky Fried Chicken v Gantidis [1979] 140 CLR 675 55
Knox v Brisbane City Council [1975] 31 LGRA 108 22
Kriecbergs Developments Pty Ltd v Logan City Council, LGA No. 227 of 1990 ..... 67, 71
Kwiksnax v Logan City Council (1993) QdR 452 34
Lange v Australian Broadcasting Corporation (1997) 145 ALR 96 30

Table of cases (cont'd)

Leichhardt Municipal Council v Daniel Callaghan Pty Ltd [1981] 46 LGRA 29 ..... 66, 71
Leisuremark (Aust) Pty Ltd v Noosa Shire Council [1988] QPLR 132 56
Levy v State of Victoria (1997) 146 ALJR 248 30
Lewiac Pty Ltd v Gold Coast City Council [1983] QPLR 133 21
Lewiac Pty Ltd v Gold Coast City Council [1994] 83 LGERA 224 at 230 ..... 67, 71
Logan City Council v Harderan Pty Ltd [1989] QPLR 11 ..... 22, 23, 24
Mackay Port Authority v Mackay City Council [1992] QPLR 125 56
Malvern Development Company Pty Ltd v Burnett Shire Council (1996) QPLR 122 8
Maroochy Shire Council v PF Wise and D M Wise (Appeal 349 of 1998) 9
McCawley v The King (1920) Act 691 31
MEPC Australia Limited v Westfield Limited [1998] 100 LGERA 204 ..... 67, 72
Mery McKeown Carpets Pty Ltd v Brisbane City Council [1977] QPLR 20 54
Mimehaven Pty Ltd v Cairns City Council (P & E Application 5 of 2001, unreported, 12/12/01) 123
Mingara Pty Ltd v Brisbane City Council [2001] QPEC 052 ..... 105, 110
Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council (1994) 85 LGERA 4 ..... 8, 155
Nagy v Cairns City Council [1981] QLPR 148 56
Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 30
Newbury District Council v Secretary of State for the Environment [1981] AC 578 54
North Coast Quarries Pty Ltd v Pine Rivers Shire Council [1976] 33 LGRA 1 22
North Queensland Conservation Council Inc v The Executive Director, Queensland Parks and Wildlife Service [2000] QSC 172 51
Pacific Seven Pty Ltd v The City of Sandringham [1982] VR 157 ..... 66, 71
Palmwoods Residents and Ratepayers Association Inc v Maroochy Shire Council & Anor [1997] QPLR 331 22
Parramatta City Council v Pestell (1972) 27 LGRA 72 4
Payne v Mosman Municipal Council [2000] NSWLEC 25 49
Peel & Anor v Brisbane City Council [1982] QPLR 251 21
PF & DM Wise v Maroochy Shire Council (Appeal No 4028 of 1997) 8
Phil Fletcher Planning & Investment Services Pty Ltd v Brisbane City Council [1991] QPLR 16 ..... 67, 71
Ponton v Brisbane City Council [1970] 25 LGRA 73 56
Port Macdonnell Professional Fishermans Association Inc. v South Australia (1989) 168 CLR 340 30
Project Blue Sky Inc. v Australian Broadcasting Authority (1998) 72 ALJR 841 34
Provincial Picturebuses Ltd v Wednesbury Corporation [1948] 1KB 223 54
QM Properties Pty Ltd v Council of the Shire of Maroochy & Ors [1992] QPLR 186 22
Queensland Investment Corporation Pty Ltd v Toowoomba City Council [2000] QPEC 36 ..... 67, 72
Reilly v Kilkivan Shire Council [1994] QPLR 366 21
Robinson v Brisbane City Council [1987] QPLR 71 56
Ryan v Great Lakes Council [1999] FCA 177 ..... 117, 121
Ryde City Council v Echt (2000) NSWCA 108 49
Samuel Wood v Sydney City Council 6 LGRA 288 55
Shilling v Cairns City Council [1988] QPLR 243 54
Shire of Perth v O'Keefe [1964] 110 CLR 529 ..... 67, 71
Stephens v West Australian Newspapers Ltd (1994) 68 ALJR 765 30
Suncorp Insurance & Finance v Logan City Council & Ors [1987] QPLR 112 22
Tainui Pty Ltd v Brown [1988] 65 LGRA 22 ..... 67, 71
Tasker v Fullwood (1978) 1 NSW LR 20 34
Telstra Corporation Ltd v Pine Rivers Shire Council & Ors [2001] QPEC 14 77
Theophenous v Herald & Weekly Times (1994) 68 ALJR 713 30
Thomas & Anor v Brisbane City Council & Ors [1982] QPLR 309 21
Transtate Developments Pty Ltd v Brisbane City Council [1994] QPLR 258 22
Tulle v Toowoomba City Council [1986] QPLR 199 21
Union Steamship Company of Australia Pty Ltd v King (1988) 166 CLR 1 30
Victoria v Commonwealth and Connor (1975) 134 CLR 81 34
Vynotas Pty Ltd v Brisbane City Council [2001] 1 Qd R 108 125
Walker v Noosa Shire Council [1983] 2 QPLR 86 55
Weightman v Gold Coast City Council & Anor [2002] QCA 234 125
West Coast Developments Pty Ltd v Caboolture Shire Council [1990] QPLR 404 55
Western Stores Ltd v Orange City Council (1973) 26 LGRA 1 4
Wilson v Logan City Council [1990] QPLR 197 56
Yu Feng Pty Ltd v Maroochy Shire Council [1996] 92 LGERA 41 ..... 67, 71, 72
ZW Pty Ltd v Peter Hughes & Partners Pty Ltd [1992] I QDR 352 ..... 67, 71

Infrastructure planning and IPA

Ian Wright

This article discusses the funding and application of infrastructure and recent changes made to the funding powers of local governments

February 2001

Introduction

Background

Local governments are faced with the onerous responsibility of satisfying the private and community infrastructure needs of society. Funding is critical in the provision of this infrastructure. It determines the financial independence of local governments as well as the rate and type of development within local government areas.

In the last decade, the sources and methods of funding infrastructure have been placed under increasing pressure. The powers provided for funding infrastructure have been found to be too limited to satisfy the needs of local governments. Increasing demands have been imposed on local government in relation to the adoption of higher standards of infrastructure provision and greater levels of accountability. These requirements, however, until recently, have not been able to be met. Instead the limited availability of funding has resulted in poor infrastructure services and inhibited the ability of local governments to participate in forward planning.[1]

Due to the problems confronted with funding infrastructure, legislative changes have recently been made to the powers of local governments in relation to the provision of infrastructure. The adoption of infrastructure charges under the Act and the expansion of the power of local governments to levy rates have now provided the potential to create a dynamic improvement in the provision of infrastructure services in both private and community domains.

This paper considers existing mechanisms for funding infrastructure, the application of these mechanisms and the recent changes made to the funding powers of local governments.

Key concepts

Infrastructure consists of the land, facilities, services and works used for supporting economic activity and meeting environmental needs.[2] Infrastructure can be divided into two categories:

- *Private Benefit Infrastructure* – infrastructure which supports the physical functioning of a community, including water supply, sewerage, roads, flood mitigation works etc.
- *Social Infrastructure* – infrastructure which supports community activity or is available for community use, including public open space, community centres, libraries, schools etc.

Private benefit infrastructure is funded on a user pays basis where the users of the infrastructure are responsible for the costs. Whilst social infrastructure is funded by government through general rates or taxes where the infrastructure is believed to benefit the community as a whole.

In practice infrastructure items are not always easily classified into one of these categories.[3] Rather, there is a continuum of infrastructure items from those that involved 100% user subsidy (such as schools, shops and prisons) to those where all cost recovery from users may be appropriate (such as power supply, sewerage connections and water supply). A notional continuum is shown in Figure 1 – The Infrastructure Continuum.

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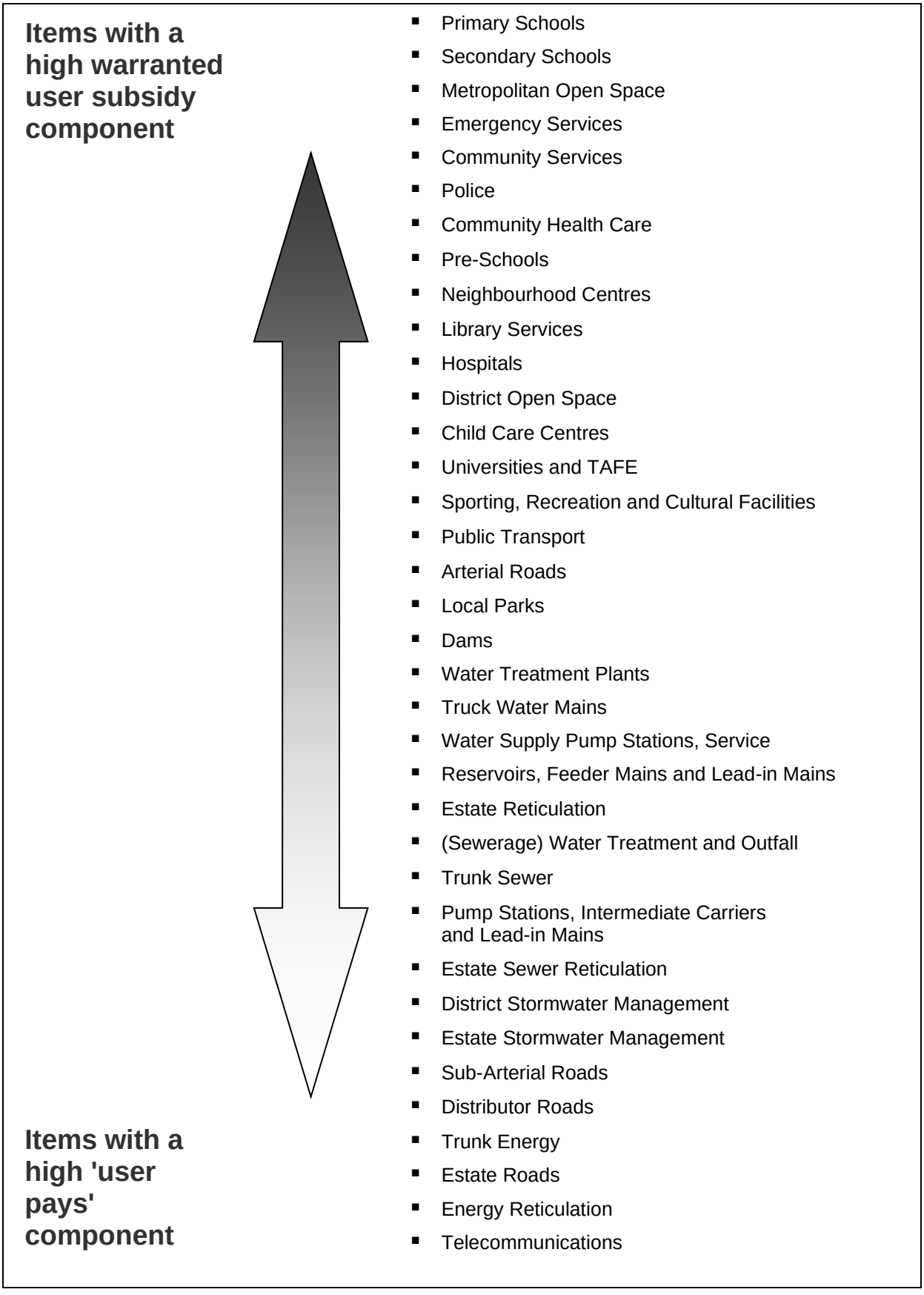
1 Gutteridge Haskins and Davey Pty Ltd BBC Consulting Planners, *Indicative Planning Council Infrastructure Program Wesroc Case Study*, 1995, s6.3.
2 Schedule 10 of IPA.
3 Spiller, M., *Strategies for Funding Urban Infrastructure – A Response to the Industry Commission Agenda*, 3(2) Urban Futures Journal, 1.

Figure 1 Infrastructure continuum



Source: Better Cities Program 1993 – 27-28

What this means is that in reality infrastructure which is provided on a user pays basis also provides a community benefit. Where this occurs the local government must decide what proportion of the costs for the infrastructure should be recovered from the developer. This complicates what is already a difficult task for the local government – the manner and source of funding infrastructure.

Traditional funding mechanisms

Traditionally infrastructure has been funded by local government through a variety of mechanisms, these include:

- rates;
- fees and charges;
- grants;
- borrowing and loans;
- securities;
- trading; and
- developer contributions.[4]

In recent times these sources have been found to be inadequate. These sources are insufficient to provide the level of funding which is necessary for the current rates of development found within Queensland. Restrictions on public sector debt and borrowing for community infrastructure, the increasing costs of infrastructure and higher levels of community expectation have all contributed to an urgent need to identify other means for funding infrastructure.[5]

Problems of traditional funding mechanisms

Reliance upon existing funding mechanisms has resulted in a number of problems:

- Infrastructure provision has often been subsidised where existing mechanisms have prevented local governments from recovering the full costs of the infrastructure from the users of the infrastructure. In these circumstances the balance of the costs has often been made up by levying rates on non-users.[6]

  The subsidisation of developers is appropriate where a particular type of development is to be encouraged or the contributions required would be otherwise excessive. However, there must be a logical rationale for offering a subsidy. The subsidies provided and the reasons behind them must be made explicit.[7] This does not always occur.
- Residents have often been charged twice for infrastructure. This is known as double dipping and occurs most often where rates are levied on residents for infrastructure for which they paid an infrastructure contribution at the time of development.[8] This has resulted in inequitable distribution of costs between generations of users.
- Forward planning has often been constrained due to uncertainty regarding the acquisition of funds required for supplementing developer contributions.[9]
- Excessive reliance upon developer contributions for funding infrastructure has increased the cost of housing and created a windfall gain for existing landowners.[10]
- Insufficient funding, as a result of limited funding mechanisms, has meant that the community expectations of infrastructure have not always been met. Many areas have been developed with minimal facilities or poor quality infrastructure. Delays have often occurred between the occupation of an area and the provision of basic infrastructure services such as sewerage and water supply services.
- Insufficient funding has also meant that although infrastructure may initially be provided, insufficient resources then remain for the maintenance and replacement of that infrastructures.[11]
- Funding has not been able to be acquired to address existing backlogs where infrastructure has already been provided.[12] Until the Act commenced, most infrastructure funding mechanisms were aimed at providing funding for infrastructure being or going to be provided, as opposed to pre-existing infrastructure.

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4 Office of Local Government, Commonwealth Department of Human Services and Health, *Strategic Local Government Approaches to Infrastructure*, January 1994, 11.
5 Ibid.
6 Kirwan, R., *Financing Urban Infrastructure: Equity and Efficiency Considerations*, (1990) 8(4) Urban Policy and Research, 2.
7 Barnes, N., Dollery, B, *Financing Urban Infrastructure in New South Wales: An Evaluation of the Section 94 Contributions Plan*, (1996) 21 Urban Futures Journal, 23.
8 Id at 25.
9 Office of Local Government, Commonwealth Department of Human Services and Health, *Strategic Local Government Approaches to Infrastructure*, January 1994, 17.
10 Kirwan, R., *Financing Urban Infrastructure: Equity and Efficiency Considerations*, (1990) 8(4) Urban Policy and Research, 1.
11 Kirwan, R., *Financing Urban Infrastructure: Equity and Efficiency Considerations*, (1990) 8(4) Urban Policy and Research, 1.
12 Office of Local Government, Commonwealth Department of Human Services and Health, *Strategic Local Government Approaches to Infrastructure*, January 1994, 17.

- Development conditions requiring an infrastructure contribution have often been challenged. The now repealed *Local Government (Planning and Environment) Act 1990* (**PEA**) provided little guidance as to which infrastructure items could attract contributions.[13] Conditions were consequently often imposed where an insufficient nexus existed between the infrastructure to be provided and the 4 developments from which contributions were sought.

Funding infrastructure outside the Integrated Planning Act 1997 (IPA)

Local Government Act 1993

The *Local Government Act 1993* (**LGA**) provides local governments with power to fund infrastructure through the levying of rates and charges. Section 963(1) of the LGA states the a local government may make and levy:

- general or differential general rates;
- minimum general rate levies;
- separate rates and charges;
- special rates and charges; and
- utility charges.

Local governments also have the power to fix general charges for services and facilities supplied by it.[14] These charges may be in the form of licence fees, road tolls, information service fees, application fees, entrance fees, registration etc.

Rates have traditionally been regarded as the most acceptable mechanism for acquiring funds for infrastructure provision.[15] The most common form of rates is a general rate which is a rate made and levied by the local government equally on the unimproved value of all rateable land in its area.[16] However, increasing attention has recently been paid to the possibility of expanding the powers available to local government to acquire funding through the imposition of special rates and differential general rates.

Section 971 of the LGA allows the local government to levy a rate for infrastructure on land, where in the government's opinion, the land or the occupier of the land will receive special benefit from the infrastructure or has directly contributed to the need for the infrastructure.

Section 976 of the LGA allows the local government to levy a differential general rate of land within the local government area. The levying of a differential general rate involves the application of different rates to different categories of land, where the land within each category shares at least one similar characteristic.

Special rates

Section 971 of the LGA

Special rates are different to general rates in that traditionally they have financed benefits to specific land through the use of community infrastructure and are proportionate to the benefit the landowner receives.[17] Special rates may be relied upon to fund infrastructure such as bike paths, landscaping, security surveillance etc. or to recover operational and maintenance costs from the users of infrastructure.[18]

Under section 971 of the LGA a "special rate" was, until recently, a rate or charge for a service, facility or activity which, in the local government's opinion, would specially benefit the land. A special benefit has been defined as an additional or further or particular benefit to be derived by residents from the specified area over and above the general effect of expenditure (*Parramatta City Council v Pestell* (1972] 27 LGRA 72).[19] The application of this definition has resulted in much uncertainty, as little guidance was previously provided in the legislation for ascertaining the existence of special benefits. Section 971(2) of the LGA did not provide any further guidance by stating that the rate may be made and levied on the basis the local government considers appropriate.

On June 16 1999, the *Local Government and Other Legislation Amendment Act 1999* expanded section 971 of the LGA to apply to a rate or charge for a service, facility or activity where, in the local government's opinion:

- the land or the occupier of the land, has or will specially benefit from, or has or will have special access to, the service, facility or activity; or

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13 Hansard, *Second Reading Speech*, 20 November 1997, 4544.
14 Section 963(2) of the LGA.
15 Office of Local Government, Commonwealth Department of Human Services and Health, *Strategic Local Government Approaches to Infrastructure*, January 1994, 11.
16 Section 3 of the LGA.
17 Taylor, M., (1998) 15(2) *Finding Alternatives to Compulsory Developer Contributions under Section 94 of the Environmental planning and Assessment Act 1979*, Environmental Planning and Law Journal, 110.
18 Department of Local Government & Planning, *IPA Guideline 4/98 – Infrastructure Charging*, 1998, 9.
19 Although the expenditure does not need to be exclusively for the residents of the specified area (*Western Stores Ltd v Orange City Council* (1973) 26 LGRA 1).

- the occupier of the land, or the use made or to be made of the land, has or will, specially contribute to the need for the service, facility or activity.

Expansion of Section 971 of the LGA

The changes to the local governments' powers to levy special rates have resulted in two important variations, both of which involve the user pays principle.

The amendments have extended the application of special rates and charges to circumstances where the occupiers of land receive a benefit. This means that the benefit does not have to be one associated with the value of the land and may instead be related to the use of the land. Previously the most common forms of special rates were imposed where the special benefit was an increase in the value of land. Under the amendments it is no longer necessary for the local government to determine whether the special benefit or special access is received by the land or the occupier of the land.[20] In addition, the occupier of land need not receive a personal benefit from the infrastructure, provided it is reasonable to form the opinion that the land has or will specially benefit or acquire special access eg where ten parcels of land will acquire special access to an ungraded road all parcels will be considered to have received a special benefit even if the occupier of one lot does not own a motor vehicle.[21]

The second variation is that a special benefit does not need to be accrued as a result of the infrastructure or services provided. It will be sufficient for the purposes of levying a V special rate or charge if the occupiers of the land or the use of land have directly contributed to the need for the infrastructure. An example of this would be where a shop is part of a strip development and the local government decides to create parallel parking for the strip development. In such circumstances the shop could be reasonably considered to have directly contributed to the need for parking, and consequently the local government would be able to levy a special rate on the shop for the purpose of recovering costs incurred in providing the parking spaces. It would not matter if the occupiers of the shop did not receive increased profits as a result of these parking spaces.

These amendments have provided local governments with greater power to fund infrastructure through levying special rates. A special rate may now be levied where a special benefit is acquired in respect of the use of the property or the use of the property has directly contributed to the need for the special rate, even if the owner/occupier will not receive a special benefit from the infrastructure provided.

However, in order to regulate these expanded powers a further requirement has been imposed on local governments. Under section 971(4A) of the LGA local governments are now required to prepare an overall plan which must be adopted by resolution either before or at the same time the local government makes the special rate or charge. The adoption of an overall plan will ensure that a local government does not arbitrarily levy special rates. Under section 971(4A) of the LGA an overall plan must:

- identify the rateable land to which the rate applies;
- describe the infrastructure; and
- state the estimated cost and time for implementing the plan.

Consequently, although the local government has been given greater power to levy special rates, it is now under a responsibility to justify why, in the local government's opinion, a special benefit has been received from the infrastructure or the use of the land has directly contributed to the need for the infrastructure.

Section 971A has also been inserted as part of the amendments to ensure that local governments are directly accountable for funds acquired through the imposition of a special rate or charge. If a special rate or charge is levied on land to which a special benefit is not received or which does not directly contribute to the need for the infrastructure or services to be provided, the local government must return the funds to the person on whom the rate or charge was levied.[22] If the rate or charge is correctly levied but there are funds remaining after the overall plan is implemented or the local government decides not to fully implement the overall plan; the local government must pay the remaining funds to the current owners of the land in the same proportions in which the rate or charge was levied.[23]

Differential general rates

Definition

Differential general rates may be levied by the local government on rateable land if:

- there are two or more categories of rateable land for levying the rates;[24]
- the categories of rateable land are defined by set criteria;[25] and

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20 Explanatory Notes for section 971(1)(6) of the *Local Government and Other Legislation Amendment Act 1999*.
21 Explanatory Notes for section 971(1)(6) of the *Local Government and Other Legislation Amendment Act 1999*.
22 Section 971A(3) of the LGA. However, where a rate or charge is levied on land to which a special benefit is not received or which does not directly contribute to the need for the infrastructure or services to be provided this does not invalidate the rate or charge (section 971A(2) of the LGA).
23 Section 971A(4) of the LGA.
24 Section 966 of the LGA.
25 Section 977 of the LGA.

- the categories to which all parcels of rateable land belong to have been identified by application of the criteria.[26]

The levying of a differential general rate involves the application of different rates to different categories of land, where the land within each category shares at least one similar characteristic.[27] These characteristics will be determined by the criteria which is adopted for each category.

The adoption of criteria for the purpose of defining differential rate categories has created some concern for local governments, as no legislative description or guidelines exist for determining such criteria. The importance of adopting an explicit and logical procedure for adopting and applying criteria for the purpose of categorising land for a differential general rate was, however, emphasised in *Arana Hills Property Pty Ltd v Townsville City Council* (Unreported Qld Supreme Ct No. 881 of 1994). In this case the Supreme Court found a differential general rate to be invalid on the basis that the criteria relied upon to levy the rate merely consisted of real property descriptions as opposed to criteria or characteristics shared by the land.[28]

Few cases have considered the types of criteria which may be adopted for the purpose of differential general rates. However, it is considered that such criteria could include:

- land use;
- infrastructure and services available;
- location;
- economic circumstances; and
- environmental issues affecting the land etc.

Regardless of the criteria adopted, local governments must be able to justify the adoption of criteria on the basis of a rational process and the information considered at the time the criteria was considered.

Funding infrastructure within IPA

Policy basis

Infrastructure planning is a key component of the integrated planning system established by IPA.

Infrastructure planning is integrated into the planning system in three main ways:

- The statement of intentions which is to be issued by a local government before it prepares a planning scheme must include a statement as to how infrastructure is to be addressed (Schedule 1).
- Planning schemes must co-ordinate and integrate infrastructure (which is defined as a core matter in Schedule 1) including its State and regional dimensions (s 2.1.3(1)(a)).
- IPA requires infrastructure to be supplied in a co-ordinated, efficient and orderly way and urban development to be encouraged in areas where adequate infrastructure exists or can be provided efficiently (s 1.2.3(1)(a)).

Types of mechanisms

IPA provides a number of specific mechanisms which address the co-ordination and funding of infrastructure. These mechanisms are:

- development conditions and benchmark development sequencing;
- infrastructure charges;
- notice for the dedication of land for infrastructure for local community purposes;
- infrastructure agreements; and
- community infrastructure designations.

In addition, the LGA provides additional mechanisms for funding of infrastructure.

Table 1 sets out the funding mechanisms that are available to different types of infrastructure.

Community infrastructure designations have been considered earlier and will not be separately addressed here.

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26 Section 978 of the LGA.
27 *Arana Hills Property Pty Ltd v Townsville City Council* (Unreported Qld Supreme Ct No. 881 of 1994).
28 However it has been held that it is acceptable to define criteria by reference to zoning or land use codes (*Houghton v Brisbane City Council* (1992) 14 QCLR 278).

Table 1 Types of infrastructure

Category of infrastructure	Type of infrastructure[1]	Charging mechanisms						
		Infrastructure agreement (IPA)	Community infrastructure designations (IPA)	Infrastructure charges plan (IPA)	Development conditions (IPA)	Dedication notice (IPA)	Special charges (LGA)[2]	Differential general rates (LGA)[2]
Social infrastructure	State schools infrastructure (s 3.5.35(1)(b))	✓	✓	X	✓	X	X	X
	Public transport infrastructure (s 3.5.35(1)(b))	✓	✓	X	✓	X	X	X
	State-controlled roads infrastructure (s 3.5.32(3), s 3.5.35(1)(b))	✓	✓	X	✓	X	X	X
	Police or emergency road infrastructure (s 3.5.35(1)(b))	✓	✓	X	✓	X	X	X
	Other State social infrastructure (see Schedule 5 – community infrastructure)	✓	✓	X	X	X	X	X
Private benefit infrastructure	Urban water cycle management infrastructure (s 5.1.1(1))	✓	✓	✓	✓	X	✓	✓
	Local transport infrastructure (s 5.1.1(1))	✓	✓	✓	✓	X	✓	✓
	Infrastructure for local community purposes (s 5.1.1(1); Schedule 10)	✓	X	✓	✓	✓	✓	✓
	Other private benefit infrastructure (eg gas, electricity, telecommunications)	✓	X	X	X	X	✓	✓

Notes:

(1) Appendix 1 – Glossary of Infrastructure Terms.

(2) Special charges and general differential charges can be levied under the LGA if this infrastructure is provided by the Local Government.

Conditions of development approvals

Types of regime

The Act established three different regimes in respect of the imposition on development approvals of conditions requiring infrastructure contributions. These regimes are:

- the regime established by the PEA;
- a modified IPA regime; and
- the IPA regime.

PEA regime

Application

Local governments are required to apply the regime established under the PEA in respect a of the following development applications:

- development applications lodged before the commencement of the Act (s 6.1.25);
- development applications lodged under a transitional planning scheme which has a provision, which was inserted prior to the commencement of IPA, requiring monetary contribution for specified infrastructure (s 6.1.31);

- development applications lodged under a transitional planning scheme which has a planning scheme policy about infrastructure (s 6.1.31);
- development applications lodged before 30 March 2003 under an IPA planning scheme-which has a planning scheme policy about infrastructure (s 6.1.31); and
- development applications for a re-configuration of lot lodged before 30 March 2000 under an IPA Planning Scheme which has an infrastructure charges plan (s 6.1.33).

The legal tests

The PEA regime is set out ins 6.1(1) which provides that a local government must not subject its approval of an application to a condition that is not relevant or reasonably required in respect of the proposal to which it relates.

This section has been the subject of much judicial consideration. The tests enunciated by the court can be summarised as follows:

- A condition must be imposed for a planning purpose, not for some other purpose which may be socially or morally acceptable but unconnected with town planning: *Malvern Development Company Pty Ltd v Burnett Shire Council* (1996) QPLR 122; *Alberton Investments Pty Ltd v Pine Rivers Shire Council* (1994) QPLR 60.
- A condition must fairly and reasonably relate to the development permitted, (ie there must be some nexus, identification or relationship between the development and the condition). The cases suggest that for there to exist a nexus between a condition and the proposed use or development of the land:
  - the proposed use or development of the land must result in a change in the circumstances as they existed prior to that application;
  - the relationship between the proposed use or development of the land and the alteration in existing circumstances must not be too remote; and
  - the use or development of the land must be benefited by the condition.
- A condition must be "reasonable". That is, not so unreasonable that a reasonable assessment manager would not require it. It must not be manifestly arbitrary, unjust or exhibiting partiality.
- A condition must be reasonably certain.
- A condition of approval must be final: *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council* (1994) 85 LGERA 4.
- A condition of approval must not require excessive Council supervision: *GWF Gelatine International Limited v Beaudesert Shire Council* (1993) QPLR 342.

Section 6(1) of the PEA is also complimented by specific provisions in relation to sewerage and water supply headworks (s 6.2 of the PEA) and parkland (s 5.6 of the PEA) which empower local governments to impose conditions on approvals requiring contributions for those specific infrastructure items.

Scope of legal tests

Whether local governments have power to impose conditions requiring contributions in respect of other type of infrastructure is a matter which has not been finally determined.

There are two schools of legal thought:

- *Literal approach* – this approval argues that since the PEA specifically authorises the imposition of conditions requiring contributions in respect of some types of infrastructure (such as sewerage and water supply headworks and parks) the imposition of conditions requiring contributions in respect of other types of infrastructure such as roadworks and community facilities is not lawful. This was the approach adopted by the Planning and Environment Court in the case of *PF & DM Wise v Maroochy Shire Council* (Appeal No 4028 of 1997), unreported decision of 12 March 1998 of Quirk DCJ. In that case the court stated:

  > *A perusal of those provisions indicates the careful control that is imposed upon the manner in which contributions are fixed and the circumstances in which they may be required. In my view this indicates that the legislature accepts that it is not appropriate that contributions in respect of infrastructure items which are not directly necessitated by a particular proposal be sought under the general conditions power (s 4.4(5) governed as it is by s 6.1). I believe that there is substance in the submission (made on the appellants' behalf that the "plan or policy" of the Act is that, where contributions in respect of infrastructure works are to be required, specific legislative provision in respect of the matter is called for.*

- *Purpose approach* – this approach argues that the power to impose conditions under the PEA is a general power and provided that the condition satisfies the test ins 6.1 of the PEA the condition would be lawful. This approach also argues that the specific provisions in respect of contributions for sewerage and water supply headworks and parkland should be seen as reinforcing s 6.1 of the PEA in that conditions which impose infrastructure contributions that are calculated in accordance with these provisions are deemed to be lawful. Accordingly, those provisions do not set up a separate and independent head of power for charging

infrastructure contributions. Rather they compliment the general powers contained in the PEA to impose conditions provided they fall within the ambit of s 6.2 of the PEA. This was the position taken by the Court of Appeal in respect of the appeal from the decision of Quirk DCJ. In *Maroochy Shire Council v PF Wise and D M Wise* (Appeal 349 of 1998), unreported decision of 3 November, 1998 the Court stated:

> *Speaking generally, the effect of s.6.2 is to define the powers of a local government to require contributions towards water supply and sewerage works as a condition of granting approval to, among other things, a rezoning application. Reliance was placed on the details which s.6.2 contains, but it does not appear to us that anything material can be derived from them, so far as this appeal is concerned, other than that they make elaborate provision for the subject with which they deal. That subject is the power to require of developers contributions towards water supply and sewerage works; this is regulated in some detail, leaving the Council's power (if any exists) to require contributions towards works of another kind – for example roadworks – quite unregulated.*

One final point worth noting. Under the PEA (and its predecessor the *Local Government Act 1936* (**LG Act**)) sewerage and water supply headworks in respect of the subdivision of land rezoned before 1 September 1985 were payable at the rates applicable when the land was rezoned. This benefit has now been restricted in that it will exist for the period that the PEA regime is applicable. After the commencement of the II'A regime the benefits of these previous statutory provisions will be lost (s 6.1.33).

Modified IPA regime

Application

Local governments are required to apply a modified IPA regime in respect of development applications lodged under transitional planning schemes where there are no provisions requiring contributions for specific infrastructure, no planning scheme policies about infrastructure and no benchmark development sequence (s 6.1.31(4)).

The legal tests

In respect of these development applications the following rules apply:

- A condition can be imposed requiring a monetary payment for the capital, operating and maintenance costs of or works to be carried out for community infrastructure.
- The condition must satisfy the test ins 3.5.30 of being:
  - relevant to but not an unreasonable imposition on, the development; or
  - reasonably required in respect of the development.
- The provisions relating to the imposition of conditions for out of sequence development are not applicable as no development benchmark sequence is specified in the planning scheme in this situation.

IPA regime

Application

Local governments must apply the IPA regime in all cases other than those in which it is required to apply the PEA regime or the modified IPA regime.

The legal tests

The IPA regime imposes the following rules in respect of the imposition of a condition requiring infrastructure contributions:

- A condition must be (s 3.5.30):
  - relevant to but not an unreasonable imposition on, the development or use of premises as a consequence of development; or
  - reasonably required in respect of the development.
- A condition must not require a monetary payment for the capital, operating and maintenance costs of, or works to be carried out for, community infrastructure except for (s. 3.5.32):
  - State owned or State controlled transport infrastructure; or
  - the bring forward costs of supplying limited types of State social infrastructure and development infrastructure items.
- A condition can require a monetary payment to lessen the cost impacts of supplying the following infrastructure:
  - State schools infrastructure;
  - public transport infrastructure;
  - State controlled roads infrastructure; or

- police or emerging services infrastructure; or
- a development infrastructure item.

Where the development is:

- inconsistent with the planning scheme such as an infrastructure charges plan (for example the development involves a higher density than that provided for in the infrastructure charges plan thereby requiring augmentation of services) (s 3.5.35(1)(a)(i)); or
- outside the area identified in the benchmark development sequence for the first 5 year of anticipated development (s 3.535(1)(a)(ii)).

The process of preparing a benchmark development sequence is explained below.

Cost impact methodology

The IPA regime sets up different methodologies for the calculation of the cost impacts of supplying:

- State social infrastructure; and
- development infrastructure items.

The cost impacts of supplying both types of infrastructures is to be calculated by reference to:

- the formulas specified ins 3.5.35; and
- the guidelines issued by the Department responsible for IPA.

Based on the formula ins 3.535 and the guidelines issued by the Department responsible for IPA the cost impacts of State social infrastructure is calculated in the following manner (s 3.5.35; 3.5.36):

- Firstly, identify whether there is a prima face case of extra costs in supplying any of the following State social infrastructure items:
  - State schools infrastructure;
  - public transport infrastructure;
  - State controlled roads infrastructure; or
  - police or emerging services infrastructure.
- Secondly, for each selected infrastructure item estimates are made for each year of the period upon which the development benchmark sequence is based of the capital, operating and maintenance costs that would have been incurred had development continued in accordance with the planning scheme. The estimates of cashflow are to be based on the assumption that recently observed budget policies and allocations continue for the whole of the period upon which the development benchmark sequence is based.
- Thirdly, the estimates of capital, operating and maintenance costs are revised to take account of the unanticipated development. The estimates are to be based on the assumptions that:
  - the population attracted to the unanticipated development will come from other developments anticipated by the planning scheme;
  - the quality of service of the social infrastructure is the same as for the anticipated development scenario.
- Fourthly, the net present value of the costs of supplying infrastructure to the unanticipated development is compared with that of the anticipated development. If the net present value costs of the unanticipated development are greater, a condition can be lawfully imposed to lessen the cost impact.
- Fifthly, the monetary payment to be required is calculated. The amount must:
  - not exceed the sum of the difference in the net present value costs and the administrative costs of undertaking steps 1-4 (s 3.5.35);
  - to the extent the amount relates to the capital costs of infrastructure, exceed the full capital costs (s 3.5.36(2)(a)); and
  - to the extent the amount relates to the operating and maintenance costs of infrastructure, the additional operating and maintenance costs for 15 years (s 3.5.36(2)(b)).
- Finally, a condition is drafted which must state (s 3.5.36):
  - the amount;
  - the State entity to be paid;
  - the date by which the service is to have started or the item is to have been constructed; and
  - that the amount must be paid 60 business days before the start of the service or construction, unless otherwise agreed with the entity requiring payment.

The cost impacts of development infrastructure items is calculated in a similar manner except for the following changes:

- Estimates are only made of the capital costs not the operating and maintenance costs (ie recurrent costs) of servicing the unanticipated development and the anticipated development.
- Additional estimates must also be made of:
  - the additional financing costs (including interest charges) and operating and maintenance costs that must be paid by the local government as a result of the unanticipated development; and
  - any amendments to the infrastructure charges plan necessitated by the unanticipated development.
- The condition must state:
  - the amount;
  - the date by which the service will be available to the land or the item will be constructed; and
  - that the amount is payable the day the development starts or a different date agreed by the local government.

Relationship to IDAS

As part of the IDAS process the assessment manager (ie local government) and State agencies may request the applicant to prepare an assessment of the cost impacts. Alternatively, these agencies may undertake the assessment themselves and recover the cost pursuant to the conditions of the development approval.

Repayment of monies

Monetary payments must be repaid where:

- the service is not provided or the item is not constructed within the specified period; or
- the development approval lapses or is cancelled.

Infrastructure charges

Objectives

One of the main objectives of IPA is to introduce greater certainty in infrastructure funding. Infrastructure funding under the development process has been perceived to inhibit forward planning of growth areas.[29] The introduction of infrastructure charges plans is intended to improve efficiency, clarity, accountability, and coordinated planning in the delivery of infrastructure to communities.[30]

Infrastructure charges, as discussed previously, are based on the user pays principle and may be levied on a landowner either at the time of a development approval or at some other time as determined by the local government.[31] The charges may also be levied on the owners of vacant land who will receive a benefit from the infrastructure upon development of the land.

Infrastructure charges are to be treated in the same manner as a rate and are not to be levied for social infrastructure. They are to be limited to infrastructure where consumer choice is constrained due to reasons of health or safety or where there are compelling savings in long term provision costs.[32] Consideration of all available funding mechanisms prior to adopting infrastructure charges is encouraged by IPA.[33]

Infrastructure charges encourage forward planning by moving the focus from up-front contributions for infrastructure from developers to charges for infrastructure supplied as part of a long term (ie 15 year) development sequence specified in a Planning Scheme. Until now development has been dictated by the budget of local governments, so that development has been determined by the local government on an ad hoc basis as opposed to being determined by market driven forces.[34]

Nature of infrastructure charges

An infrastructure charge is a general charge under the LGA which is levied in accordance with the Act. Infrastructure charges are therefore levied as a user charge rather than as a condition of a development approval.

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29 Hansard, *Second Reading Speech*, 20 November 1997, 4544.
30 Ibid.
31 Department of Local Government and Planning and Local Government Association of Queensland, *IPA Implementation Manual*, 31.
32 Department of Local Government & Planning, *IPA Guideline 4198 – Infrastructure Charging*, 1998, 6.
33 Ibid.
34 Hansard, *Second Reading Speech*, 20 November 1997, 4551.

Making infrastructure charges

The making of an infrastructure charge involves three steps:

- the levying or fixing of the infrastructure charge;
- the notification of the person on whom the charge is levied; and
- the amending of the infrastructure charges plan.

Fixing of infrastructure charge

A local government may fix an infrastructure charge where:

- The infrastructure charge relates to a development infrastructure item (land and capital works in or outside the local government area) which:
  - is being used for urban water cycle management, local transport infrastructure or local community purposes (s 5.1.5);
  - is not being developed by the State government under a community infrastructure designation (s 2.6.6); and
  - is not servicing works or a use authorised under the *Mineral Resources Act 1989* (s 5.1.5(3)).
- The development infrastructure item is listed in the infrastructure charges plan, and the charge (s 5.1.6):
  - is payable by applicant or owner;
  - is fixed in accordance with the infrastructure charges plan;
  - is no more than the proportional cost of the item that can be apportioned to the premises based on likely usage; and
  - takes account of money already spent on the item.
- The development infrastructure item is not in the infrastructure charges plan, and the charge (s 5.1.7):
  - is payable by an applicant;
  - is in respect of a development which is inconsistent with the planning scheme (such as the infrastructure charges plan) or is out of sequence; and
  - is based on the minimum life cycle costs to achieve the desired standard of service for a similar item in the infrastructure charges plan and any guidelines approved by the Chief Executive of the Department responsible for IPA.

Notice of charge

When an infrastructure charge is fixed the local government must give to the person who is liable a notice stating (s 5.1.8):

- the amount of the charge;
- the land to which the charge applies;
- the day by which the charge is payable;
- the development infrastructure item for which the charge has been fixed; and
- the person to whom the charge must be paid.

When an infrastructure charge is payable by an applicant, the date the payment shall be made (s 5.1.10):

- For the reconfiguration of a lot – before the approval of the plan of subdivision, or before the operational works start if the development infrastructure item is required to service the premises before the start of the works.
- For building works – before the issue of the certificate of classification, or before the building works if the development infrastructure item is required to service the premises before the start of the works.
- For material change of use – before the change.

Where an infrastructure charge is payable by an applicant the notice must be given (s 5.1.9):

- to the applicant within a specified time frame after decision; and
- the owner of the land where the applicant is not the owner.

Amending infrastructure charges plan

When an infrastructure charge is levied on an applicant pursuant to s 5.1.7 (ie the development infrastructure item is not in the infrastructure charges plan) the local government must amend its infrastructure charges plan as soon as practicable after the charge is paid (s 5.1.7).

Satisfying an infrastructure charge

A person may satisfy an infrastructure charge by:

- paying the charge by the specified date;
- doing the work for which the charge was fixed and if required securing the performance of the work (s 5.1.15(1)); or
- giving the land in fee simple if the development infrastructure item is land (s 5.1.15(1)).

If the charge is not satisfied it may be recovered as a rate under the LGA unless the applicant and the local government enter into a written agreement stating that the charge is a debt owing by the applicant to the local government (s 5.1.14).

Dedication of land for local community purposes

A local government may serve a notice requiring an applicant to give part of the land the subject of a development application to the local government in fee simple on trust for local community purposes (s 5.1.15(3) and (6)).

The value of the land and any infrastructure charge that has been imposed must not be greater than the amount of the charge had only a charge been payable (s 5.1.15(5)).

A local government must give public notice of the sale of any land acquired pursuant to a notice and consider all submissions (s 5.1.16 and 5.1.17). If this occurs the land can be sold free of the trust (s 5.1.18).

Infrastructure agreement

IPA requirements

IPA allows infrastructure agreements to be entered into as an alternative to infrastructure V funding mechanisms in the Act (s 5.2.1). The agreement must explain how the obligations imposed under the agreement will be fulfilled in the case of a change of ownership and changed in the case of a change to the planning instruments (s 5.2.3). If the local government is not a party to the infrastructure agreement the local government must be given a copy of the agreement (s 5.2.4). The development obligations under the agreement attached to the land and are binding on successors in title (s 5.2.5). An infrastructure agreement is not invalid merely because its fulfilment depends on the exercise of a discretion by a government agency about a development application.

The impact of IPA on existing infrastructure agreements

Infrastructure agreements that were in existence before the commencement of IPA are protected by the transitional provisions of IPA:

- Pursuant to s 6.1.45 of IPA those infrastructure agreements made under the PEA such as the Springfield Infrastructure Agreement and the Kawana Waters Infrastructure Agreement are deemed to have effect and are to be binding on all parties as if PEA had not been repealed.
- Pursuant to s 6.1.46 of IPA the Robina Central Planning Agreement which was made under the *Local Government (Robina Central Planning Agreement) Act 1992* is deemed to apply as if that Act had not been repealed.

The introduction of IDAS under IPA has also meant that transitional provisions have had to be introduced into IPA to deal with the master planning design process and other similar processes provided for in the development control plans made under the PEA in conjunction with the various infrastructure agreements. Section 6.1.45A of IPA provides that development control plans that contain these provisions are valid and that development must comply with the development plans that are approved pursuant to these processes.

Impact of IPA on future infrastructure agreements

A comparative analysis of the infrastructure provisions of PEA and those in IPA indicate that there are two significant differences:

- First, the circumstance in which an infrastructure agreement can be used.
- Second, the extent to which an infrastructure agreement can fetter the exercise of a discretion of a public sector entity.

Scope of infrastructure agreement

In relation to the scope of an infrastructure agreement under IPA it is important to note that infrastructure agreements under the PEA could deal with any item of infrastructure provided that land was within a development control plan. It was for this reason that many infrastructure agreements executed under the PEA were also accompanied by the gazettal of development control plans – Kawana and Springfield being cases in point. The equivalent provision in IPA (s 5.2.1) appears to be more restrictive despite the fact that the requirement for the land to be in a development control plan has been removed.

In essence, IPA recognises three categories of infrastructure agreements:

- The first category of infrastructure agreements axe those infrastructure agreements that are negotiated as part of IDAS in respect of State infrastructure contributions for out of sequence developments. This category is equivalent to the Transport Infrastructure Agreements that have been previously negotiated under the *Transport Infrastructure Act 1994*.
- The second category of infrastructure agreements are those infrastructure agreements that are negotiated as part of the application of an infrastructure charge. These infrastructure charges axe imposed independently of IDAS and are only imposed in respect of development infrastructure items identified in infrastructure charges plans. This category of infrastructure agreement has no equivalent under the PEA.
- The third category encompasses those infrastructure agreements that were previously prepared under the PEA. Pursuant to s 5.2.2 of IPA infrastructure agreements in this category can provide for:
  - The funding of a development infrastructure item in an infrastructure charges plan.
  - The supply of a development infrastructure item to a standard different to that specified in an infrastructure charges plan.
  - The supply of a development infrastructure item not identified in an infrastructure charges plan.
  - The supply of infrastructure other than a development infrastructure item specified in an infrastructure charges plan.

This third category of infrastructure agreements appears to be more limited than those made under the PEA in that the power to provide funding (ie the payment of money) is limited to development infrastructure items in an infrastructure charges plan. It is strongly arguable that the distinction between "funding" and "supply" in s 5.2.2 of IPA means that an infrastructure agreement cannot provide for the making of financial contributions other than in respect of a development infrastructure item in respect of an infrastructure charges plan. In respect of the other matters specified in s 5.2.2, infrastructure agreements can only provide for the "supply" (ie the provision) of these types of infrastructure.

In short, s 5.2.2 of IPA would appear to prevent infrastructure agreements under IPA from requiring financial contributions other than in respect of a development infrastructure item under an infrastructure charges plan. This is certainly more restrictive than was provided for under s 6.6 of the PEA.

Limits on discretion

It is also contended that IPA is much more restrictive then the PEA in terms of the impact of infrastructure agreements on the exercise of a statutory discretion.

Under s 6.8 of the PEA an infrastructure agreement was said not to be invalid because it had the effect of limiting the exercise of a discretion by a local government. On the basis of this provision, local governments could for example agree to exercise a statutory provision in respect of the making of infrastructure contribution in a particular way. For example, local governments could agree to exercise a statutory provision to the extent of not requiring an infrastructure contribution or requiring a smaller infrastructure contribution than would otherwise be required.

The equivalent provision in IPA (s 5.2.6), appears to be much narrower. It provides that an infrastructure agreement is not invalid because it depends on the exercise of the discretion in respect of a development application. This provision could be interpreted narrowly to mean by way of example that an infrastructure agreement is not invalid because its terms are to be fulfilled only after a development application has been approved. Therefore, the provision does not authorise a public sector entity to limit the exercise of its discretion as was the case with local governments under the PEA.

Accordingly, the infrastructure agreement provisions of IPA need to be revisited to remove two restrictions:

- First, infrastructure agreements should be able to provide for the making of financial contributions in respect of all items of infrastructure whether they are development infrastructure items in an infrastructure charges plan or not.
- Second, infrastructure agreements should be able to provide for limitations on the exercise of a statutory discretion by a public sector entity at least to the extent that it was permissible by local governments under the PEA.

Benchmark development sequence

Statutory requirements

Under IPA a development approval can only be subjected to a condition requiring the payment of money to lessen the cost impacts of supplying infrastructure where that development is not anticipated by the planning scheme.

A development is not anticipated by the planning scheme if it is not consistent with:

- the development benchmark sequence;
- the development upon which the infrastructure charges plan is based; or

- the development envisaged by other provisions of the planning scheme.

Benchmark development sequence is defined in Schedule 10 to mean a development sequence in a planning scheme:

- applying to the areas in the planning scheme where residential development is preferred over a 15 year period (or other period agreed to by the Minister);
- dividing the sequence into successive 5 year periods (or other period agreed to by the Minister); and
- prepared having regard to any guidelines approved by the chief executive about methods of preparation and contents of the sequence.

Preparing a development benchmark sequence

Steps

The preparation of a benchmark development sequence involves six steps:

- Step 1 – Defining sequencing districts.
- Step 2 – Forecasting population growth.
- Step 3 – Estimating land requirements.
- Step 4 – Grouping land requirements to local government cost categories.
- Step 5 – Identifying land needed for growth.
- Step 6 – Refining the draft benchmark sequence to reflect State social infrastructure costs.

Step 1 – Defining sequencing districts

The first step is to divide the local government area into districts which correspond to a housing market such as urban residential or rural residential. For example in the case of a local government undergoing both urban residential and rural residential development the sequencing districts may comprise:

- Stage 1A – Urban Residential.
- Stage 1B – Rural Residential.
- Stage 2 – Other Areas of the Local Government Area.

Where a housing market crosses a local government border, a joint benchmark development sequence should be established with the adjoining local government.

If the local government is in a low growth area only one sequencing district should be selected. For example:

- Stage 1 – Urban residential.
- Stage 2 – Other Areas of the Local Government Area.

Step 2 – Forecasting population growth

Once indicative sequencing districts are established:

- population and dwelling forecasts should be collected for the local government area;
- the forecasts should be disaggregated and proportioned into three areas:
  - the urban sequencing district;
  - the rural residential sequencing district; and
  - other rural areas (which are sequenced);
- dwelling growth should be allocated to each sequencing district using trend projections based on ABS data.

Step 3 – Estimating land requirements

Once the future dwelling growth of each sequence district has been projected, it is necessary to estimate what proportion of the dwelling requirements will be met from:

- higher density redevelopment of existing dwellings in existing residential areas – this will be negligible in rural residential areas due to on-site efficient disposal limitations;
- infill or vacant lots in existing residential areas – this will be limited in urban residential areas due to the scarcity of vacant lots but of greater potential in rural residential lots;
- outward expansion of residential areas.

The land requirements for dwellings in greenfield sites should be calculated in the case of:

- high growth areas – by using an aggregate approach involving the calculation of land requirements for all facilities (ie total dwelling units/land area for all facilities);
- low growth areas – by using a disaggregate approach involving the calculation of land requirements for dwellings and each category of facility (such as open space, roads, refill, education).

Step 4 – Grouping land required into infrastructure costs categories

Once the land requirements for future dwellings have been calculated:

- the developable land within each sequence district should be identified;
- the developable land should be categorised into parcels according to the relative costs of development infrastructure items (eg local roads, water supply, sewerage and water cycle management works) and ,local social infrastructure costs (ie supply of local community purposes) for their development over the next five years.

Step 5 – Identifying land needed for growth

The land requirements for each sequencing district identified in Step 3 should then be assigned to parcels of developable land identified in Step 5 for the 5, 10 and 15 year time periods based on:

- the costs of supplying development infrastructure items and local social infrastructure; and
- the costs of State social infrastructure where the local infrastructure costs are roughly the same.

This will represent the draft benchmark sequence.

If the local government is in a low growth area it is not necessary to prepare a 15 year, 3 stage benchmark development sequence. Instead the Minister may approve a benchmark development sequence for only a five year period.

Step 6 – Refining the draft benchmark sequence to reflect State social infrastructure costs

The draft benchmark development sequence should:

- be reviewed by State social infrastructure agencies;
- only be changed if the savings in the State social infrastructure costs are greater than the costs of the development infrastructure, local social infrastructure and other State social infrastructure occasioned by the change – ie there must be a total net cost saving to the community as a whole.

Preparation of benchmark development sequence and conditions

IPA requires benchmark development sequences and conditions of development approvals requiring the payment of the bring forward costs for out of sequence development to be prepared, having regard to the guidelines approved by the Chief Executive of the Department responsible for IPA.

The guidelines are statutory instruments under the *Statutory Instruments Act 1992* (section 7). As such, they are subordinate legislation and must be complied with.

However, IPA only requires that regard be had to these guidelines in the drafting of benchmark development sequence and the calculation of the bring forward costs to be included in conditions of development approvals.

The Courts have held that the use of the phrase "having regard to" means that the guidelines should not be interpreted as limiting the consideration of other relevant matters, but rather should be interpreted only as a guide of the matters that should be considered (see *Consolidated Abalone Divers Group Inc v Department of Fisheries*, Supreme Court New South Wales, Danford J, 15 May 1998; *Briggs v City of Mt Gambier* 49 LGR.A 177).

Infrastructure charges plan

Preparing an infrastructure charges plan

An infrastructure charges plan must be prepared if infrastructure charges are to be levied (s 5.1.6(1)).

The Act defines an infrastructure charges plan as being the part of a planning scheme that (s 5.1.4(1)):

- identifies development infrastructure items making up a network of development infrastructure items;
- states the desired standard of service for the network having regard to user benefits and environmental effects of the network; and
- evaluates alternative ways of funding the items.

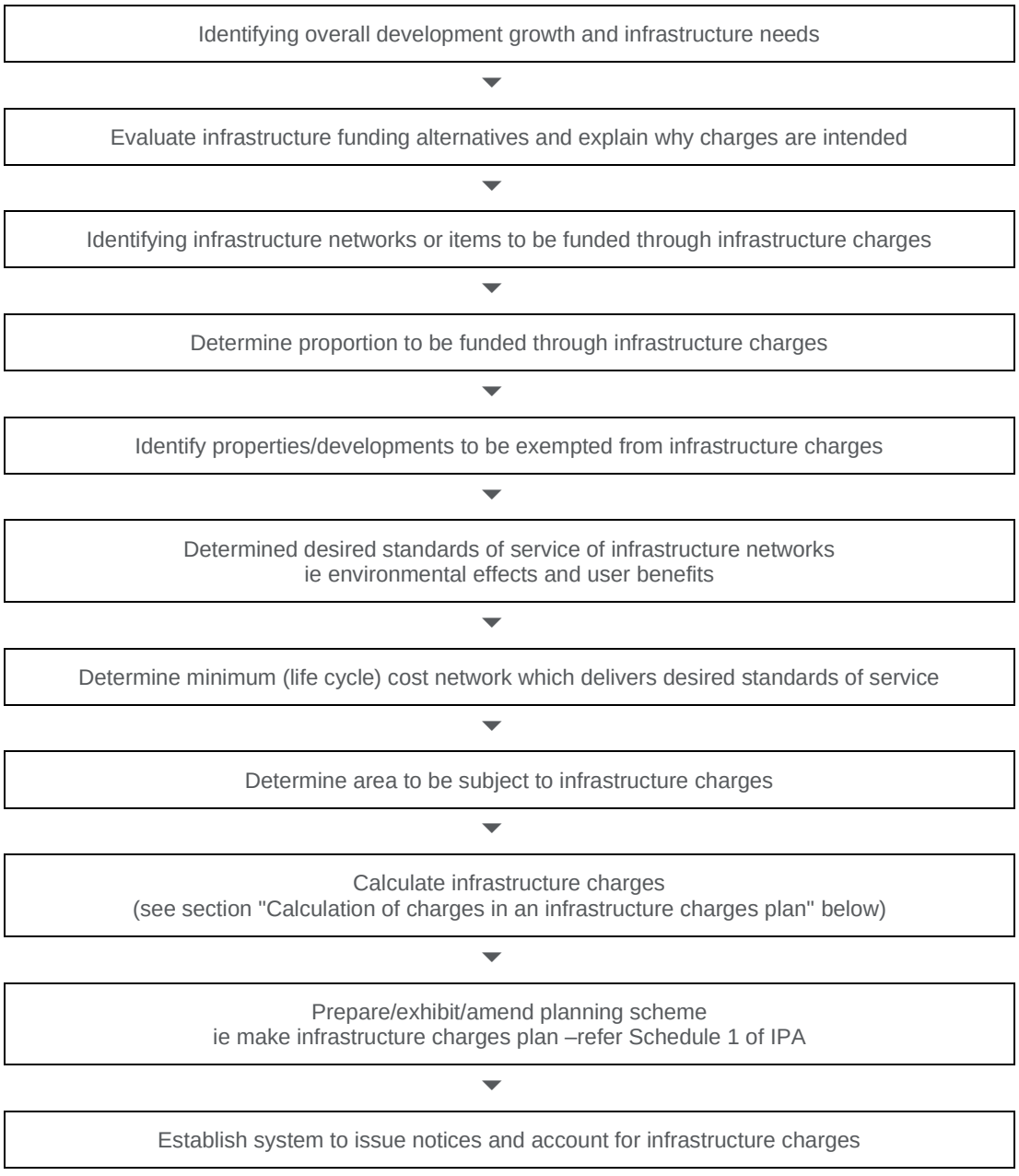
The following details must be provided about development infrastructure items included in the infrastructure charges plan (s 5.1.4(2)):

- justification of the need for the works, services and facilities shown in the infrastructure charges plan;

- an estimate of the amount to be funded by infrastructure charges as opposed to other funding sources;
- the schedule of works to be funded, including timing of provision of infrastructure and costings;
- the method by which infrastructure charges are calculated;
- clear boundaries of the area to which the infrastructure charges plan applies;
- description of each type of lot, work or use to which charges apply;
- the rate at which charges apply in each area for each type of lot, work or us; and
- if the charge is payable by a person other than an applicant for a development approval, state when the change is payable.

The Department responsible for IPA has prepared Guidelines for the preparation of Infrastructure Charges Plans. Figure 2 – Main Steps in preparing an Infrastructure Charges Plan which is extracted from the Guidelines presents a flow chart for preparing an infrastructure charges plan.

Figure 2 Main Steps in preparing an Infrastructure Charges Plan



Making and amending an infrastructure charges plan

Since an infrastructure charges plan must form part of the planning scheme, local governments must follow the requirements in IPA for making and amending a planning scheme in Schedule 1, when making and amending an infrastructure charges plan.

However, Schedule 1 provides a shortened process for minor amendments to an infrastructure charges plan (Schedule 1, section 2(1)). This could cover matters such as changes in discount rates or cost estimates for items, minor changes in timing of delivery, changes in development rates assumptions or other assumptions used in formulating charges.

Drafting of infrastructure charges plan

Structure

The Act does not provide a particular format for infrastructure charges plans. Despite this it is clear that infrastructure charge plans need to refer to or take account of:

- the scope of infrastructure financing mechanisms and their interrelationships;
- the nature of the infrastructure to be provided;
- demands generated by development;
- current government policies;
- standards of infrastructure provision;
- the local government's future intentions for the area; and
- community expectations and scope for involvement in policy development.[35]

Guidelines have been prepared by the Department responsible for IPA creating infrastructure charges plans. A suggested layout for infrastructure charges plans is set out in Appendix 2 – Contents of Infrastructure Charges Plans.

Practical implementation

Infrastructure charges plans address many of the problems previously encountered with developer contributions and other funding mechanisms such as accountability, full cost recovery, transparency, double dipping etc. New concerns have arisen, however, in relation to the creation and application of infrastructure charges plans.

The identification of likely areas of development and the infrastructure required for those areas is perceived by local governments to be a difficult political task. Furthermore, once the required infrastructure has been identified the local government must then assign a cost to the infrastructure, taking into account inflation and market value. This requires the making of further assumptions about future market operations.

In New South Wales a concept similar to infrastructure charges plans was adopted in 1992 under the *Environmental Planning and Assessment Act 1979*. Under section 94 of the *Environmental Planning and Assessment Act 1979* local governments must adopt a contributions plan for the purpose of levying contributions charges. A contributions plan is required to show how infrastructure funds are derived and allocated by local governments.[36]

Similarly to infrastructure charges plans, contributions plans must establish a relationship between the development or use being levied and the infrastructure being levied for. This is a task which local governments have. found to be particularly difficult. In order to establish whether a sufficient relationship exists for the purpose of levying infrastructure charges local governments need to undertake a comprehensive assessment of their whole area, now and in the future. This requires extensive resources and time.

To assess the relationship between infrastructure and land use or development, local governments must forecast future population growth and demographic composition, the type of infrastructure required for that population, future land use and development characteristics, the demand for commercial or industrial space, environmental constraints, the desirable level of standards and the likely influence of government policy on development and grants.[37]

Such assessment is also required for the preparation of a works schedule. The inclusion of a works schedule is a requirement which applies to both infrastructure charges plan and contribution plans. Contributions plans must show the projected costs and timing for infrastructure. The purpose of the works schedule is to identify the time

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35 Thompson, S., *Infrastructure Financing – A Framework for Policy Development*, (1994) 3(4) & 4(1) Urban Futures Journal, 22.

36 Barnes, N., Dollery, B, *Financing Urban Infrastructure in New South Wales: An Evaluation of the Section 94 Contributions Plan*, (1996) 21 Urban Futures Journal, 19.

37 Barnes, N., 20.

frame and demand threshold at which point infrastructure charges will be levied.[38] In order to determine infrastructure demands and costs local governments need to assess population projections, demographics, production rates, occupancy rates, existing infrastructure capacities etc.[39] This involves making assumptions about the characteristics of the incoming population and the infrastructure needs and expectations of this population. This requirement has been criticised in New South Wales on the basis that such predictions are rarely if ever going to be accurate.[40] Immediate needs should not determine future requirements. Where this approach is taken, future requirements will be assessed in terms of the existing population and will not take account of fluctuations in size, technology, demography etc.

Determining the proportion of costs which may reasonably be allocated to a premises pursuant will also provide a challenge. The problems faced under the PEA in determining what constitutes reasonable standards will again be confronted with infrastructure charges, as the concept of what is reasonable can only be determined from standards already adopted by local government.[41] Furthermore, a decision to raise standards in a new development area is likely to create confusion in terms of whether these standards should also be raised in existing areas of development.

In conclusion, the effort expended in determining these matters will ultimately require a substantial amount of time and funding. Although these costs may be recovered through the infrastructure charges plan, commentators have wondered if such plans should be more procedural.[42] Regardless of this perspective, however, the adoption of infrastructure charges plans in the specified manner will force local governments to participate in forward planning and to provide clear mechanisms for acquiring and distributing infrastructure funds. To adopt an infrastructure charges plan local governments will be required to engage in detailed planning of growth areas in order to meet the accountability and cost apportionment tests for the purposes of IPA.

Calculation of charges in an infrastructure charges plan

Statutory requirements

IPA does not prescribe a methodology for the calculation of charges. However, the following limitations are imposed:

- the capital cost of development infrastructure items must be calculated to minimise the life cycle cost for the desired standard of service for the network (s 5.1.4(3));
- regard must be had to the guidelines for the preparation of infrastructure charges plans issued by the Department responsible for IPA (s 5.1.4(4)).

Suggested methodology

The departmental guidelines for infrastructure charges plans set out a ten step process for calculating infrastructure charges. This process can be restructured into a six step process involving some 10 tasks.

Step 1 – Identification of existing capacity and future infrastructure requirements

Task 1 – Identify infrastructure which has spare capacity to service growth and estimate:

- the current replacement cost;
- the year the item was installed; and
- the design economic life.

Task 2 – Identify new infrastructure that is required to service growth and estimate its capital cost at current prices.

Step 2 – Calculate the net present value of the cost of existing capacity and the new infrastructure

Task 3 – Estimate the net present value of the cost of existing capacity of each infrastructure item by multiplying the replacement cost of the item by the ratio of the remaining economic life to the design/economic life.

Task 4 – Estimate the net present value of the cost of providing new infrastructure in the future by adjusting the cost of the infrastructure in future years by a discount rate to reflect additional costs and compensating revenues.

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38 Department of Planning, Section 94 Contributions Plans Manual, 1992, 4 in Barnes, N., Dollery, B, *Financing Urban Infrastructure in New South Wales: An Evaluation of the Section 94 Contributions Plan*, (1996) 21 Urban Futures Journal, 20.

39 Barnes, N., Dollery, B, *Financing Urban Infrastructure in New South Wales: An Evaluation of the Section 94 Contributions Plan*, (1996) 21 Urban Futures Journal, 20.

40 Id at 21.

41 Ibid.

42 Witherby, A., Lecturer/Sub-Dean, Geography and Planning, University of New England Armidale, pers. Comm., 10 July 1996 in Barnes, N., Dollery, B, *Financing Urban Infrastructure in New South Wales: An Evaluation of the Section 94 Contributions Plan*, (1996) 21 Urban Futures Journal, 21.

Step 3 – Calculation of existing future demand for each service catchment

Task 5– —Define the service catchment for each infrastructure item which receives a benefit form the infrastructure.

Task 6 – Calculate the existing demand in each service catchment by identifying the number of current users of the infrastructure (from Task 1) and convert to an equivalent unit such as equivalent persons.

Task 7 – Calculate the future demand in each service catchment by identifying the number of future users of the infrastructure (from Task 3) and convert into the same equivalent units as for existing users.

Step 4 – Calculate the net present value of future demand

Task 8 – Calculate the net present value of future demand by adjusting the equivalent unit (equivalent persons) in future years by a discount rate to reflect unexpected changes in future demand.

Step 5 – Calculate the infrastructure charges and apportion over existing and future users to derive an amount per equivalent user

Task 9 – Calculate the total infrastructure charges for each infrastructure item by dividing the net present value of the infrastructure item by the percentage share of the item's capacity attributable to existing and future demand and then aggregate the charges to produce a total charge.

Task 10 – Apportion the total charge over existing and future users to derive an amount per equivalent user.

Step 6 – Adjust the charges annually

Infrastructure planning and IDAS

Framework prior to IPA

Legislative framework

The story of infrastructure planning in Queensland prior to IPA starts with the insertion of section 33(6A)(e)(iv)(A) (Application for rezoning of land) into the then LG Act.

Section 33(6A)(e)(iv)(A) of the LG Act provided as follows:

> *In respect to any application made pursuant to this sub-section (i.e. a rezoning application) the Local Authority shall, amongst other things, take into consideration, whether, having regard to permissible uses of land in the proposed zone and the potential for subdivision if the rezoning is effected – water, gas, electricity, sewerage and other essential services would be available to the land and to each separate parcel thereof if the land was subsequently subdivided.*

This section was subsequently amended in 1980 by replacing the reference to "permissible uses" with the words "permitted uses with or without the consent of the Local Authority". The effect of this decision was to require local governments as a consideration of rezoning applications to consider the infrastructure needs of both as of right uses as well as consent uses in the zone to which the land is being rezoned.

The section was further amended in 1982 whereby the words "would be available" were replaced with the words "should be made available". The reason for this change was to overcome arguments raised by developers that services would be available to a development when the relevant public sector entities get around to providing them and accordingly, the development complied with this provision. Accordingly, the words "should be made available" were inserted to make it clear that local governments, when assessing a rezoning application, are to assess whether the services should be made available (see Hansard 30 March 1982: 5283; 21 September 1982: 989).

At the commencement of the PEA on 14 April 1991, section 33(6A)(e)(iv)(A) of the LG Act as amended was replaced with section 4.4(3)(e) (Assessment of proposed planning scheme amendment) of the PEA. Section 4.4(3)(e) of the PEA was essentially the same in all relevant respects with section 33 (6A)(e)(iv)(A) of the LG Act which it replaced.

Prematurity principle

It was this legislative framework upon which the Courts gradually built a body of case law based on the so called "prematurity principle".

The prematurity principle provides that the development of an area will be considered to be premature if the infrastructure that is necessary to service that development is incapable of being provided to service that development.

The application of the prematurity principle to a particular development therefore requires three issues to be addressed:

- First, what is the infrastructure that is necessary to service the development?
- Second, what is the required standard of infrastructure that is necessary to service the development?

- Third, can the necessary infrastructure of the required standard be provided by the relevant public sector entity or the applicant to service the development?

Necessary infrastructure

In determining what type of infrastructure items are required to service a development, the Courts have had regard to the proposed development, the relevant infrastructure item and the requirements of the relevant planning scheme. In general, the Courts have laid down the following guidelines:

- Private benefit infrastructure items such as road, sewerage and water supply are considered to be necessary to service urban development.
- Social infrastructure items are not generally considered to be necessary to service urban development.

As a result the availability or otherwise of social infrastructure to service a development did not triggered the application of the prematurity principle.

Standard of Infrastructure

Having identified the various types of private benefit infrastructure items that are required to service the development, it is then necessary to identify the required standard of those infrastructure items.

In determining what is the required standard of the infrastructure items, the Court also had regard to the proposed development, the infrastructure item and the requirements of the relevant planning scheme. Ultimately, this is a question of fact that is based on technical determinations. Two cases, on either side of the line, highlight this point.

On one side of the line is *Kennedy & Ors v Redland Shire Council* [1985] QPLR 28. This case concerned a subdivision of land in the Non-urban zone into 10 lots of 4,000m^2 each for rural residential purposes in circumstances where no reticulated water could be provided to the subdivision. The Court held that the development was not premature because adequate water could be provided from roof drainage and reticulated water was not generally regarded as an essential in rural residential type subdivisions.

On the other side of the line is *Garnet Lincoln & Associates & Anor v Fitzroy Shire Council* [1985] QPLR 311. This case concerned a rezoning of land from the Rural A zone to the Rural B zone for the purpose of a rural residential subdivision comprising 360 lots with a minimum area of 1 hectare. Once again, no reticulated water could be provided to the subdivision. In this case, the Court held that the development was premature because reticulated water could not be provided and it was considered undesirable that dwelling houses should be dependent on a tanker service for the provision of a domestic water supply service.

The Court's attitude to the standard of service can also be highlighted with reference to sewerage services. For example, in *Thomas & Anor v Brisbane City Council & Ors* [1982] QPLR 309, the Court held that development in the Future Urban zone was V not premature because sewerage was not available because a development condition could be imposed requiring the installation of a septic tank and an on-site effluent disposal system.

However, in *Bonton No. 1 Pty Ltd v Brisbane City Council* [1984] QPLR 297, the Court held that a rezoning from the Future Urban zone to the Residential A zone was premature in circumstances where sewerage was not available, because the provision of a septic system for serving Residential A land was not an acceptable method of disposal of sewerage, be it on a temporary or a permanent basis.

Servicing development

The third and final issue to be considered in the application of the prematurity principle to a proposed development is to determine whether the proposed development can be serviced by the necessary infrastructure to the required standard.

The Courts have considered a proposed development to be capable of being serviced by an infrastructure item and therefore not premature in at least 3 categories of circumstances:

- First, a public sector entity has already provided the infrastructure item. In this case, the prematurity argument never arises.
- Second, a public sector entity is in the course of providing the infrastructure item that will be available in the immediate future. An example of this situation is *Dennis & O'Neill Pty Ltd & Ors v Mulgrave Shire Council* [1982] QPLR 394 where the proposed development was held not to be premature because it could be serviced by a sewerage treatment plant, the upgrading of which would be completed in some 12 months.
- Third, a public sector entity can impose a lawful condition requiring an applicant to provide the infrastructure item. Examples of these situations are provided by *Peel & Anor v Brisbane City Council* [1982] QPLR 251, *Dennis & O'Neill Pty Ltd & Ors v Mulgrave Shire Council* [1982] QPLR 394, *Lewiac Pty Ltd v Gold Coast City Council* [1983] QPLR 133, *Tulle v Toowoomba City Council* [1986] QPLR 199, *Jesberg & Ors v Hervey Bay Shire Council* [1989] QPLR 190, *Grant v Pine Rivers Shire Council* [1991] QPLR 160 and *Reilly v Kilkivan Shire Council* [1994] QPLR 366.

On the other hand, the Courts have considered a proposed development has not been capable of being serviced by an infrastructure item and is therefore premature in at least three categories of circumstances:

- First, the relevant public sector entity has not planned for the provision of the infrastructure. Examples of this situation are provided by *Aspley Gardens Pty Ltd v Brisbane City Council* [1968] 15 LGRA 232, *Hollingsworth & Ors v Brisbane City Council & Anor* [1975) 31 LGRA 429, *Alexcal Pty Ltd v Brisbane City Council* [1985] QPLR 111 and *Capricorn Survey Constructions Pty Ltd & Anor v Livingstone Shire Council* [1983] QPLR 347.

  However, a public sector entity will be considered by the Court to have planned for the provision of infrastructure, notwithstanding the following circumstances:

  - the planning scheme did not provide for the development, but the Council has resolved to amend the planning scheme to provide for the development – see *Suncorp Insurance & Finance v Logan City Council & Ors* [1987] QPLR 112;
  - the public sector entity has not prepared staging or sequencing plans for development already provided for within the Council's planning scheme – see *Gregory Charles Copley v Beaudesert Shire Council & Anor* [1994] QPLR 216, *Palmwoods Residents and Ratepayers Association Inc v Maroochy Shire Council & Anor* [1997] QPLR 331;
  - the provision of infrastructure may affect a listing in the Register of the National Estate – see *Transtate Developments Pty Ltd v Brisbane City Council* [1994] QPLR 258;
  - the provision of infrastructure may affect a future planning scheme – see *Jesberg & Ors v Hervey Bay Shire Council* [1989] QPLR 190.
- The second category in which a development would be considered premature is where the Council has planned for the provision of infrastructure but the construction of the infrastructure is very much in the future. Examples of this situation are provided by *Arpedco Pty Ltd v Beaudesert Shire Council* [1977] 35 LGRA 103 and *Alan J Fox Pty Ltd v Redland Shire Council* [1976] 33 LGRA 36, where the construction of the infrastructure items was between 5 and 10 years into the future.
- Thirdly, a development will be considered premature if the public sector entity cannot impose reasonable and relevant conditions requiring the applicant to provide the infrastructure items. Examples of this situation include:
  - *QM Properties Pty Ltd v Council of the Shire of Maroochy & Ors* [1992] QPLR 186 – where the Court held that it could not order the applicant to provide higher order retailing, health facilities, garbage and post, public transport, day care facilities and recreational activities for youth.
  - *Cullinanes Pty Ltd & Ors v Maryborough City Council & Anor* [1986] QPLR 322 – where the Court had that it could not order the applicant to provide a discount department store tenant for a shopping centre.
  - *Gold Coast Carlton Pty Ltd & Anor v Beaudesert Shire Council & Anor* [1985] QPLR 343 – where the Court could not order retailers to be tenants in a development.

Finally, it is important to note that the Court has no power to overcome a premature development by ordering a public sector entity to provide infrastructure to service the development. The principle was established in *Knox v Brisbane City Council* [1975] 31 LGRA 108, applied in *North Coast Quarries Pty Ltd v Pine Rivers Shire Council* [1976] 33 LGRA 1 and upheld by the Full Court of Queensland in *Logan City Council v Harderan Pty Ltd* [1989] QPLR 11.

Policy framework prior to IPA

Having regard to this analysis, the following conclusions can be made about the legal and policy framework governing out of sequence or premature developments prior to IPA:

- First, the prematurity principle was limited to private benefit infrastructure and, as such, had no application to social infrastructure.
- Second, a development was out of sequence or premature if it could not be serviced by necessary infrastructure to the required standard provided by the relevant public sector entity or by the applicant in response to a reasonable and relevant development condition.
- Third, a public sector entity cannot be required by a Court to provide necessary infrastructure to the required standard to an out of sequence or premature development. This can only be achieved by a negotiated agreement between the public sector entity and the applicant.

It was this third point that led to the negotiation of rezoning agreements and development agreements between public sector entities and applicants. However, since the lawful scope of these agreements was limited by the general conditions power under both the LG Act and the PEA, most of the agreements negotiated in respect of out of sequence developments were unlawful. As a result, the PEA was amended to provide for the negotiation of infrastructure agreements which were not constrained by the general conditions power.

Framework after IPA

Policy position

IPA has substantially changed the legal and policy framework in respect of out of sequence developments. The IPA framework is based on the following principles:

- Firstly, local governments are expected to work with State government infrastructure agencies to identify a preferred sequence of development for up to 15 years comprising three 5 year stages (Schedule 10 of IPA and Draft Guidelines).
- Secondly, the preferred development sequence should be consistent with regional strategies and should be designed to deliver efficiencies in the provision of both social infrastructure and private benefit infrastructure (Draft Guidelines).
- Thirdly, developers can take on projects outside the preferred development sequence but are liable to compensate State and local governments for any additional delivery costs of social infrastructure (section 3.5.35(1)(b)(i)-(iv) and 3.5.35(5) of IPA) and private benefit infrastructure (section 3.5.35(1)(b)(v) and 3.5.35(6) of IPA).
- Fourthly, the additional costs of the delivery of social infrastructure and private benefit infrastructure are the difference between the net present value cost of providing the infrastructure items under the preferred development sequence and the net present value cost of providing the same level of service (including timing), under the development sequence proposed by the developer. In practice, this means the developer would pay the cost of bringing forward the infrastructure items (section 3.5.35(5) and (6) of IPA).
- Finally, once infrastructure agencies have been compensated for the bring forward costs of the infrastructure item they are then required to provide the infrastructure item in accordance with the amended development sequence or repay the moneys to the developer (section 3.5.36(6) of IPA).

It should be noted in passing, that any payments for the bring forward costs of social infrastructure are in addition to any user pays contributions for private benefit infrastructure. The bring forward payments should not be seen as developer contributions for social infrastructure. Rather, they represent compensation to governments whereby governments can be returned to a financially neutral position with respect to their social infrastructure programs. If such compensation were not forthcoming, the general taxpayer would be called upon to more heavily subsidise out of sequence development whilst existing communities would be forced to wait longer for essential services because of the limits on the aggregate infrastructure funds available to the government.

In this new policy context, what then is the value, if any, of the existing case law in respect of the prematurity principle.

Relevance of the prematurity principle

The case law in respect of the prematurity principle is still relevant, although its application has been altered somewhat by IPA. In essence, the prematurity principle now only has application to development which is outside the benchmark development sequence (ie outside the 15 year time horizon provided for in the planning scheme).

Development outside the benchmark development sequence

In respect of development which is premature, that is, outside the benchmark development sequence, the legal position under the PEA has been retained by IPA:

- First, public sector entities can impose reasonable and relevant conditions requiring applicants to provide the necessary infrastructure to the required standard of service to service the premature development (section 3.5.35(1)(a)(i) of IPA).
- Second, public sector entities cannot be required to provide infrastructure (see *Logan City Council v Harderan Pty Ltd* [1989] QPLR 11).
- Third, public sector entities can enter into infrastructure agreements in respect of the provision of infrastructure for a premature development (section 3.5.35(4) of IPA).

Developments within the benchmark development sequence

The prematurity principle however no longer has any effective application in respect of developments within the benchmark development sequence, irrespective of whether they are in accordance with that benchmark development sequence or not. It has been altered in three important respects:

- First, a development which is within the benchmark development sequence (ie within the 15 year horizon) but is not in accordance with that benchmark development sequence is not premature, as the local government has power to impose reasonable and relevant conditions requiring the applicant to compensate both State and local governments in respect of the bring forward costs of delivering social infrastructure and private benefit infrastructure (section 3.5.35(5) and (6) of IPA).

- Second, a Court can by imposing reasonable and relevant conditions, require an applicant to pay the bring forward costs of social infrastructure and private benefit infrastructure, thereby requiring State and local governments to provide that infrastructure (sections 3.5.36(3) and (6) of IPA). Accordingly, the principle in *Logan City Council v Harderan Pty Ltd* [1989] QPLR 11 no longer applies in respect of development within the benchmark development sequence, as it has been expressly overruled by IPA.
- Third, the quantum of the bring forward costs that can be imposed by way of condition is to be calculated having regard to the guidelines issued by the Chief Executive of the Department responsible for IPA.

Appendix 1 Glossary of infrastructure terms

Benchmark development sequence is defined in Schedule 10 to mean a development sequence in a planning scheme:

- applying to the areas in the planning scheme where residential development is preferred over a 15 year period (or other period agreed to the Minister);
- dividing the sequence into successive five year periods (or other period agreed to by the Minister); and
- prepared having regard to any guidelines .approved by the chief executive about methods of preparation and contents of the sequence.

Community infrastructure is defined in Schedule 10 to mean the community infrastructure in Schedule 5. Importantly community infrastructure does not include infrastructure for local community purpose.

Development infrastructure item is defined in s 5.1.1 to mean land, capital works or land and capital works for any of the following infrastructure:

- urban water cycle management infrastructure (including infrastructure for water supply, sewerage and collecting water, treating water, stream management, disposing of waters and flood mitigation);
- transport infrastructure (including roads, vehicle lay-by's, traffic control devices, dedicated public transport corridors, public parking facilities predominantly serving a local area, cycle ways, pathways and ferry terminals);
- infrastructure for local community purposes.

Infrastructure is defined in Schedule 10 to include land, facilities, services and works used for supporting economic activity and meeting environmental needs.

Infrastructure agreement is defined by s 5.2.1 to mean an agreement, as amended from time to time, mentioned in sections 3.5.35, 3.5.36, 5.1.11(2), 5.1.12, 5.1.14(2), 5.1.15(1) and (2) and 5.2.2(1).

Infrastructure charge is defined by s 5.1.5 to mean a general charge fixed by a local government under s 559(2) of the *Local Government Act 1936* for the capital cost of a development infrastructure item in accordance with Division 2 of Part 1 of Chapter 5 of the Act.

Infrastructure charges plan is defined by s 5.1.4 to mean the part of the planning scheme that:

- identifies development infrastructure items making up a network of development infrastructure items; and
- states the desired standard of service for the network having regard to the user benefits and environmental effects of network; and
- includes alternative ways of funding the items.

Infrastructure for local community purposes is defined in Schedule 10 to mean infrastructure for public recreation predominantly servicing the local area or other purpose prescribed under a regulation.

State owned or state controlled transport infrastructure is defined in s 3.5.32(3) to mean transport infrastructure under the *Transport Infrastructure Act 1994* that is owned or controlled by the State.

Transport infrastructure is defined by Schedule 3 of the *Transport Infrastructure Act 1994* to include road, rail, port and miscellaneous transport infrastructure.

Appendix 2 Contents of infrastructure charges plan

Part 1 – Preliminary

Name of plan

The infrastructure charges plan's name is identified eg This plan is to be known as the ..... Infrastructure Charges Plan.

Contents of plan

The contents of the plan is listed, eg

> This Plan is arranged as follows:
>
> Part 1 – Preliminary
>
> Part 2 – Development Infrastructure
>
> Part 3 – Infrastructure Charges
>
> Part 4 – Schedules
>
> Part 5 – Supporting Information

Terms used in the infrastructure charges plan

Explanation of terms used in the Plan, eg Act, Planning Scheme, Development Area, etc are given.

Purposes of this plan

The purposes of the plan are identified, eg to meet the requirements of the Act, allow new infrastructures to be provided to recover costs for existing infrastructure etc.

Evaluation of alternative ways of funding

Here, the proportion of the relevant infrastructure costs to be funded by infrastructure charges as opposed to other mechanisms would be summarised. Also, an explanation would be provided as to why infrastructure charges were preferred over the alternatives.

To what land does the infrastructure charges plan apply

The area of the local government's area subject to infrastructure charges plan (the **development area**) is identified by means of description and map.

Part 2 – Development Infrastructure

What development infrastructure networks or items will be funded

Development infrastructure networks, and their extent, to be funded through infrastructure charges are defined (ie urban water cycle management infrastructure, transport infrastructure and/or infrastructure for local community purposes).

Need for the development infrastructure networks or items to be funded

The need for the development infrastructure items is justified.

Desired levels of service

The desired levels of service of the infrastructure networks, in terms of user benefits and environmental effects, are identified for each of the development infrastructure networks.

What existing capacity is available to serve development

Capacity in existing infrastructure networks that can meet the demand for infrastructure is identified. Available capacity is classified as to whether it has been provided in anticipation of new development or results from other causes (ie funded from other sources).

Proportion of the capital cost funded through infrastructure charges

The proportion of capital costs to be funded through infrastructure charges is stated. Other mechanisms which will be used to fund the remainder of costs are identified.

Part 3 – Infrastructure charges

Method of calculating the charge

The formulae used to calculate charges with an explanation of each element in the formulae is given.

Who is liable to pay the charge

The lot, works or uses liable for charges are identified (ie types of applicants and/or non-applicants), and in what circumstances they are liable, are identified. A table detailing liabilities for different land uses expressed as equivalent units could be included here.

Who is exempt from charges

Exemptions from the charge, if any, are identified.

Method and timing of payment

The methods of payment are identified. (Generally charges will be paid in the form of monetary payments but in certain situations the local government may wish for payment in the form of works and/or land. if so, the local government may wish to identify this here or in a planning scheme policy referred to here).

Times when charges are to be paid by non-applicants, if any, are set out. Timing requirements for applicants should also be set out, subject to timing requirements in the Act (section 5.1.10).

This paper was presented at the Queensland University of Technology, February 2001.

Practical issues in the making and enforcement of local laws

Ian Wright | Leanne Bowman

This article discusses the issues in making and enforcing local laws. It looks to the legislative and policy issues surrounding the making of local laws and considers the practical legal issues associated with the enforcement of local laws caused by the State Penalties Enforcement Registry

February 2001

Introduction

Revolutionary change

The *Local Government Act 1993* heralded sweeping changes in the executive and legislative powers and processes of Queensland local governments. Arguably, the most significant of these changes were the grant of a wide head of power to local government to make local laws, the specification of detailed processes in relation to the making of new local laws and the review of local laws made prior to the *Local Government Act 1993* for redundant provisions.[43]

The identification and repeal of the redundant provisions of local laws made prior to the *Local Government Act 1993* occupied much of the legislative agenda of local governments in the years following the commencement of the *Local Government Act 1993*.

Continual change

However, the significant changes wrought to local governments' existing and proposed local laws was quickly surpassed by a series of significant legislative and policy changes that have impacted on the legislative and executive powers of local governments. Significant among these were:

- First, the 1997 amendments to the *Local Government Act 1993* to require the identification and review of any anti-competitive provisions of local laws and to establish a continuing process for the identification and testing of any anti-competitive provisions in future local laws.
- Second, the 1998 amendments to the *Local Government Act 1993* to restrict the making of local laws in respect of development matters regulated by the *Integrated Planning Act 1997*.
- Third, the 1999 amendments to the *Local Government Act 1993* and *Local Government Regulation 1994* to ensure that the drafting of local laws is consistent with the drafting of State legislation.
- Fourth, the restructuring of State legislation such as the *Environment Protection Act 1993*, the *Transport Operations (Road Use Management) Act 1995* and the *Vegetation Management Act 1999* whose provisions impact on existing and proposed local laws.
- Finally, the replacement as and from 27 November 2000 of the existing SETONS System with the proposed SPER system of local law enforcement.

Themes of paper

This paper has two broad themes:

- First, it will consider the legislative and policy issues to be addressed in the making of local laws.
- Second, it will consider the practical legal issues associated with the enforcement of local laws through the recently introduced State Penalties Enforcement Registry (or **SPER**) under the *State Penalties Enforcement Act 1999* which commenced operation on 27 November 2000.

Turning then to the first of these two broad themes, the making of local laws.

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[43] In this paper the term "*local law*" includes subordinate local law unless specifically indicated to the contrary.

Making of local laws

Legislative and administration powers

Under the *Local Government Act 1993* local governments have a legislative role in making local laws (and in this sense, local laws does not include subordinate local laws) and an executive role in making policy through subordinate local laws and administering and enforcing local laws (and through them subordinate local laws).

Limitations on power

However, the legislative and executives roles of local government are expressly limited by the *Local Government Act 1993*. In relation to the legislative power of local governments to make local laws the *Local Government Act 1993* prescribes five significant limitations:

- First, a local government can only make a local law for and otherwise to ensure the good rule and government of its territorial unit.[44] That is, a local government must legislate within its powers.
- Second, a local government cannot make a local law or do anything that the State could not validly do itself.[45] That is, a local government cannot out-legislate or out-administer the State.
- Third, a local government cannot make a local law inconsistent with a State law.[46] That is, a local government cannot override a State law.
- Fourth, a local government cannot make a local law that does not take account for a State interest.[47] That is, a local government cannot override a State policy matter.
- Fifth, a local government cannot make a local law other than by following the process prescribed for making the local law.

Turning then to the first of these limitations, namely, that a local government must legislate within its powers.

Local laws must be within power

The legislative power of a local government is defined in broad terms – not by reference to specific topics as is the case with the Commonwealth parliament and as was the case with the old *Local Government Act 1936*, not by reference to the territory of the local government.

Local governments are empowered to make local laws for and otherwise to ensure the good rule and government of their territorial units.[48] Whilst this legislative power is wide it is not without its limitations. At least four limitations can be identified.

Local government limitation

First, only a local government can "*make*" local laws. Therefore, a local government cannot abdicate or delegate their legislative making powers to another entity such as another local government, another public sector entity, a corporatised corporation owned by the local government, a chief executive officer, a standing committee, an advisory committee, an employee of a local government or a councillor.[49]

Territorial unit limitation

Second, a local government can only make a local law for its territorial unit which is defined to include its basic territorial unit (that is, the local government area)[50] and its additional territorial unit (being any place outside of its local government area which is put under its control).[51]

Therefore, a local government cannot purport to make a local law which regulates a matter outside of its territorial unit. However, it could in the course of regulating a matter within its territorial unit impact on a person, event or other matter outside of its territorial unit. Two examples are illustrative of this point:

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44 See section 25 (Jurisdiction of local government) of the *Local Government Act 1993*.

45 See section 30(1) (General limitations on exercise of jurisdiction) of the *Local Government Act 1993* and section 30(2) (General limitations on exercise of Jurisdiction) of the *Local Government Act 1993*.

46 See section 31 (Inconsistency within State law) of the *Local Government Act 1993*, section 854 (Local laws and subordinate local laws about development) of the *Local Government Act 1993* and section 7(4) of the *Vegetation Management Act 1997*.

47 See section 592 (Definitions) of the *Local Government Act 1993*.

48 See footnote 2

49 See section 472(3)(b) (Delegation by local government) of the *Local Government Act 1993* which confirms that a local government cannot delegate a power to the Mayor, a standing committee, the chairperson of a standing committee or the chief executive officer if an Act provides the power must be exercised by resolution. The powers conferred on local governments in Part 2 (Local Laws and Subordinate Local Laws) require the local government to make a resolution.

50 See section 22 (Exercise of jurisdiction for its local government area — the "*basic territorial unit*") of the *Local Government Act 1993* and section 3 (Definitions) of the *Local Government Act 1993* which defines "*local government area*".

51 See section 23 (Exercise of jurisdiction outside its local government area — the "*additional territorial unit*") of the *Local Government Act 1993*.

- A local government could make a local law preventing the issue of a licence for a domestic water carrier if the vehicle used in the operation of the activity is not being lawfully stored on land whether it be in or outside its territorial unit.
- A local government could also make a local law preventing the registration of a dangerous dog visiting from another local government area if that dangerous dog is not lawfully registered by the other relevant local government.

Limitation of purpose to territorial unit

Third, a local government can only make a local law for the good rule and government of its locality rather than for the good rule and government of the State or a region. That is, not only must a local law not have an extra territorial operation (beyond its territorial unit), its purpose cannot be the good rule and government of an area beyond its territorial unit.

Limitation of purpose

Finally, a local government can only make a local law which has as its purpose "*good rule and government*". Whilst in a practical sense it is hard to imagine that a local government would make a local law for any other purpose it is conceivable that a local government could make a local law which struck at a right deeply rooted in our democratic system of government or the common law.[52] The following examples provide illustrations on either side of the line:

- A local law which sought to prevent persons from meeting in a public place for the purpose of discussing political affairs of a local government would be likely to be struck down by a court.
- However, a local law which sought to prohibit all signs, including election signs being exhibited in a public place (as well as private places) is likely to be upheld by the court as it is directly related to environmental issues such as visual pollution and litter rather than the regulation of political affairs.

Turning then to the second limitation on local governments local law, law making power; the principle that local governments cannot out-legislate or out-administer the State.

Local laws cannot out-legislate or out-administer the State

Limitations on State government

A local government cannot make a local law or do anything for that matter which the State cannot validly do itself.[53]

The State's legislative power is contained in section 2 of the *Constitution Act 1867* and powers the Queen with the advice and consent of the Legislative Assembly to make laws for the peace, welfare and good government of the colony in all cases whatsoever.

Whilst the State's legislative power is very wide it is subject to at least four limitations:

Express and implied constitutional prohibitions

First, the State cannot make a law which is expressly or impliedly prohibited by the Commonwealth Constitution. An example of an express prohibition is section 90 which prohibits a State from imposing custom duties or an excise. An example of an implied prohibition is the implied freedom of communication.[54]

Inconsistency with a Commonwealth law

Second, whilst the State may govern and make a law that State law may become inoperative to the extent to which it is inconsistent with a valid Commonwealth law in accordance with section 109 of the Constitution.

Extraterritorial operation

Third, the State cannot make a law which has an extra territorial operation unless there is a connection (even if remote and general) between the subject matter of the State law and the State.[55]

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52 See *Union Steamship Company of Australia Pty Ltd v King (1988)* 166 CLR 1 and *City of Collingwood v Victoria (No. 2)* (1994) IVR 652.

53 See section 30(1) (General limitations on exercise of jurisdiction) of the *Local Government Act 1993* and section 30(2) (General limitations on exercise of Jurisdiction) of the *Local Government Act 1993*.

54 See *Aust Capital Television Pty Ltd v The Commonwealth (No. 2) (Political Advertising Ban)* (1992) 177 CLR 106, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, *Theophenous v Herald & Weekly Times* (1994) 68 ALJR 713, *Stephens v West Australian Newspapers Ltd* (1994) 68 ALJR 765, *Cunliffe v Commonwealth* (1994) 68 ALJR 791, *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, *Levy v State of Victoria* (1997) 146 ALJR 248.

55 See section 2(1) of the *Australia Act 1986* and *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1, *Port Macdonnell Professional Fishermans Association Inc. v South Australia* (1989) 168 CLR 340.

Procedural limitations

Fourth, the State cannot make a law which does not comply with a specific procedural restriction on amending legislation which is specified in the *Constitution Act 1867*.[56] For example, section 56 of the *Constitution Act 1867* provides that the constitutional recognition of local government may not be amended by amending the *Constitution Act 1867* unless the amendment has first been approved by referendum.

Extra-territorial operation and legislative procedures

These latter two restrictions on the State's legislative power have been expressly extended to local governments. Accordingly, a local government is prohibited from making a local law other than in respect of its territorial unit[57] or which has the effect of excluding or limiting the amendment of a local law.[58]

Local law inconsistency with a Commonwealth law

In relation to the second restriction on State legislative power, a local law as a sub-law of a State law will like a State law become inoperative to the extent to which it is inconsistent with a valid Commonwealth law in accordance with section 109 of the Constitution. For example, under the Commonwealth *Telecommunications Act 1997* a licensed carrier is authorised to carry out certain specified activities notwithstanding a State law (and by definition a local law) regulating those activities.[59]

Local laws expressly prohibited by the Commonwealth Constitution

In relation to the first limitation on the State's legislative power, local governments like the State cannot make a local law which is expressly or impliedly prohibited by the Commonwealth Constitution.

An example of a category of local law which offends an express prohibition in the Constitution are those local laws which impose an excise contrary to section 90 of the Constitution. An excise is a tax on goods.

Therefore, to be invalid as an excise a local law must require a payment which is a tax as opposed to other forms of payment such as a fee for service. For example, if a local law requires a payment that involves a "*profit*" to the local government then that payment can be characterised as a tax. If that payment is calculated by reference to goods such as the volume of material transport or excavated from a site or the size of an advertising device, then that payment would be held to be an excise.

Local laws impliedly prohibited by the Commonwealth Constitution

In relation to an implied constitutional prohibition a recent example has arisen in relation to election publications. In 1999 Caloundra City Council and Beaudesert Shire Council purported to make local laws which prohibited the distribution of election publications including how to vote cards on public places (not private places).[60]

Prior to the March 2000 election the Minister advised the Councils (in the writer's view quite wrongly) that the relevant provisions of the local laws were inconsistent with the implied constitutional freedom of communication.

With the greatest respect to the Minister the freedom of communication with respect to political affairs which the Constitution protects is a freedom which is commensurate with reasonable regulation of that communication in the interests of an orderly society. Thus, a local law may validly affect political communication if the local law is made for a legitimate purpose within the local government's general local law making power and is appropriate and adapted to achieve that purpose.

In these cases the relevant provisions were only directed to the management of activities on land owned, occupied or managed for the local governments. The provisions in their operation did not impede political communication orally, by actions, in newspapers or by mail, nor by television, radio or other technologies and did not affect election publications other than on public places.

In the writer's respectful view the provisions were a reasonable and appropriate regulation for the management of the respective local governments public places and in the interests of the good rule and government of those local governments.

It is perhaps for this reason that the Minister chose to amend the *Local Government Regulation 1994* by declaring the distribution of how to vote cards to be a State interest[61] and then by declaring the relevant provisions to be of no effect to the extent that they dealt with the distribution of how to vote cards.[62]

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56 See *McCawley v The King* (1920) Act 691, *AG (NSW) v Trethowan* (1931) 44 CLR 394, *Union Steamship Co. of Australia Pty Ltd v King* (1988) 166 CLR 1.
57 See section 25 (Jurisdiction of local government) of the *Local Government Act 1993*.
58 See section 30(I)(b) (General limitations on the exercise of discretion) of the *Local Government Act 1993*.
59 See the *Telecommunications Act 1997 (Cth)* and Telecommunications (Low Impact Facility) Determination 1997 (Cth).
60 See section 10 (Distribution of an election publication) of Local Law No. 2 (Council Facilities and Other Public Places) made by Caloundra City Council and section 10 (Distribution of an election publication) of Local Law No. 5 (Council Facilities) made by Beaudesert Shire Council.
61 See section 3A (Meaning of "*State interest*" Act, s.3) of the *Local Government Regulation 1994*.
62 See section 12A (Overruling particular local laws — Act, s.163) of the *Local Government Regulation 1994*.

Having accepted that local laws cannot override the Commonwealth Constitution or Commonwealth laws it is necessary to consider the third general limitation on local government law making power, namely, the principle that local governments cannot override State laws.

Local laws cannot override State laws

It is clear that if a State law and a local law are inconsistent the State law prevails over the local law to the extent of the inconsistency.[63]

There are four matters to note in relation to the inconsistency provisions contained in section 31 of the *Local Government Act 1993*.

Local law must include subordinate local power

First, the reference to local law must be interpreted to include a subordinate local law as well as a local law.

State law must include statutory instruments

Second, the reference to a State law must be interpreted to include a State law and all statutory instruments (including proclamations, notifications, standards and guidelines and other instruments of a public nature).[64]

Local law inoperative not invalid

Third, a local law which is inconsistent with a State law is not ultra vires or a nullity or void abonitio but inoperative only. Therefore, a local law which is inconsistent with a State law is merely suspended in its operation so long as the inconsistency persists. This is to be contrasted with section 854 of the *Local Government Act 1936* which prohibits a local government from passing a resolution after the commencement of the *Integrated Planning Act 1997* (on 31 March 1998) to make a local law or subordinate local law which would duplicate the Integrated Development Assessment System (**IDAS**) and which declares any such local laws and subordinate local laws that are made to be of no effect.

Inconsistency defined

Fourth, the term "*inconsistent*" is not defined in the *Local Government Act 1993*. Accordingly, it is appropriate to have regard to the common law in respect of the equivalent provision in section 109 of the Constitution. An analysis of these cases indicates that there are three tests which may be applied in determining whether or not an inconsistency exists.

- First, a local law will be inconsistent with a State law where it is not possible to comply with the local law without breaching the State law.
- Second a local law will be inconsistent with a State law if it affects the operation of the State law. That is, a local law would be inconsistent with a State law if the operation of a local law would vary, affect or alter a right or privilege conferred under a State law.
- Third, a local law will be inconsistent with a State law where the State law is intended to cover or regulate the subject matter of the regulation exclusively. This intention may be expressed or implied.
    - An example of where an express intention has been indicated to cover the field is the *Integrated Planning Act 1997* where local laws which are inconsistent with a code identified in a regulation are declared to be of no effect.[65]
    - Another example is section 584 of the *Local Government Act 1993* itself where local laws which are inconsistent with IDAS are declared to be of no effect.[66]
    - An example of where a State law indicates an express intention that it is not intended to be a code is the *Vegetation Management Act 1999* which provides that nothing in that Act prevents a local law from imposing requirements upon the clearing of vegetation in its local government area.[67]

The regulation of how to vote cards also provides a relevant example of the application of section 31 of the *Local Government Act 1943* to local laws regulating the distribution of election publications. It has been argued by some commentators that Chapter 5 of the *Local Government Act 1993* relating to local government elections is a code and any local law regulating local government elections is therefore inconsistent. The writer respectfully disagrees with this approach.

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63 See footnote 4.

64 See *Acts Interpretation Act 1954* and *Statutory Instruments Act 1992*.

65 See section 3.1.3(5) (Code and impact assessment for assessable development) of the *Integrated Planning Act 1997* and section 3 (No changes by local planning instruments or local laws) of the *Standard Building Regulation 1993*.

66 See section 854 (Local laws and subordinate local laws about development) of the *Local Government Act 1993*.

67 See section 7(3)(4) (Application of Act) of the *Vegetation Management Act 1999*. In passing it should be noted that the reference in this section to "*local government area*" is too restrictive as it does not allow local governments to impose clearing requirements in respect of vegetation in any additional territorial unit of the local government for the purposes of section 23 (Exercise of jurisdiction outside its local government area — the "*additional territorial units*") of the *Local Government Act 1993*.

A law can be described as a code if it is intended to be a consolidating and complete authority on all legislative and common law argument about a subject matter.[68] Often accepted examples are the *Standard Building Regulation 1993*, the *Integrated Planning Act 1997* and the Criminal Code (Queensland).

However, Chapter 5 cannot be considered to have codified all law relevant to local government elections. For example, Chapter 5 doesn't purport to regulate the erection of election signs, the use of public places for political meetings or the use of public places for graffiti art relating to local government elections. It is for these reasons that the writer is of the opinion that Chapter 5 was not intended to exhaustively regulate local government elections as a code or otherwise.

Turning then to the fourth limitation on a local government's law making power; the principle that a local law cannot override a State policy matter.

Local law cannot override a State policy matter

A local government can only proceed to make a local law if the Minister is satisfied that the local law deals satisfactorily with State interests.[69]

State interests is defined to include three types of interests.

Effect on economic, social or environmental interest of State or region

Firstly, a State interest is an interest that in the governing council or Minister's opinion affects an economic, social or environmental interest of the State or a region. Accordingly, a matter is not a State interest if it is only of genuinely local interest with no ramifications beyond the territorial unit of a local government.

Effective, efficient and accountable system of local government

Second, a State interest includes an interest in ensuring that there is an effective, efficient and accountable system of local government. Interestingly, whilst this was also one of the reasons stated by the Minister when purporting to overrule the local laws of Caloundra City and Beaudesert Shire Council regulating how to vote cards, the Minister did not rely on this aspect of the definition of State interest to overrule the local law.[70]

Interest declared by regulation

Finally, a State interest is an interest declared by regulation to be a State interest. Only one such interest has been declared, namely, the distribution of how to vote cards.[71]

Fundamental legislative principles

The State interest of greatest practical relevance to the making of local laws is the requirement to comply with the fundamental legislative principles identified in the *Legislative Standards Act 1992*.[72]

The fundamental legislative principles are used by the Minister to require local governments to amend local laws in the following important respects:

- Firstly, to require local law requirements affecting public places such as roads and parks to be identified and signs exhibited in these places so that the rights and obligations of the public in respect of such public places is sufficiently defined.
- Second, to remove provisions from local laws regulating public places such as roads, gates and grids which seeks to limit the civil liability of local governments.
- Third, to remove evidentiary provisions in administration local laws seeking to reverse the onus of proof and the privilege against self-incrimination.
- Fourth, requiring penalty provisions to be prescribed for individual offences within a local law rather than generally for all or some offences under a local law.
- Finally, requiring administrative decisions by local governments or their delegates under local laws to be subject to review. In this respect the *Local Government Regulation 1994* provides that the fundamental legislative principle of an appropriate review of an administrative power only requires decisions delegated to local government officers to be reviewed by the local government by resolution.[73]

Turning to the final limitation on local government's local law making power; is the principle that local laws and subordinate local laws must be made in accordance with the prescribed procedures.

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68 See *Brennan v The King* (1936) 55 CLR 253.
69 See section 856 (Step 2 — ensure proposed law satisfactorily deals with any State interest) and section 872 (Step 7 – again ensure proposed law satisfactorily deals with any State interest) of the *Local Government Act 1993*.
70 See definition of "*State interest*" in section 3 (Definitions) of the *Local Government Act 1993*.
71 See footnote 19.
72 See section 4 (Meaning of "*fundamental legislative principles*") of the *Legislative Standards Act 1992*.
73 See section 34B (Particular application of drafting standards) of the *Local Government Regulation 1994*.

Local laws must comply with the prescribed making processes

A local government cannot make a local law or a subordinate local law other than by following the process prescribed for making a local law or subordinate local law. If a local government purports to make a local law or a subordinate local law in contravention of the prescribed process, the relevant local law or subordinate local law is of no effect.[74]

The *Local Government Act 1993* prescribes specific processes for the making of local laws and subordinate local laws. Whilst these processes are undoubtedly a code, it is unlikely that the parliament intended exact compliance with each and every requirement of this code. Some requirements are of such significance that exact compliance would be required whilst others only require substantial compliance whilst others may not require to be complied with at all.[75]

It is likely that the Courts would require exact compliance with the following requirements:

- First, the local government must satisfy any condition about the content of the local law advised by the Minister.[76]
- Second, notice which is given to the public in respect of a proposed local law or subordinate local law must state the purposes and general effect of the local law.[77]
- Third, any amendments made to the local law following public notice must not change the purposes and general effect of the proposed local law or in the case of a subordinate local law must not substantially amend the subordinate local law.[78]
- Fourth, a local government cannot make a local law or subordinate local law which contains anti-competitive provisions (that is provisions which require a permit or licence in respect of a commercial activity) unless the local government has carried out a public interest test, prepared a public interest test report and resolved with reasons whether to implement the recommendations of the public interest test report.[79]
- Finally, a notice of the making of a local law or subordinate local law must be given in the Gazette or local newspaper respectively.[80]

An example of one requirement of Part 2 of the *Local Government Act 1993* that is unlikely to be considered mandatory is the requirement that the proposed local law be drafted substantially in accordance with the drafting standards prescribed by the *Local Government Regulation 1994*.[81]

Some final observations in the making of valid local laws

Finally, before turning to the enforcement of local laws it is important to reiterate that in order for a local law to be validly made it must:

- first, be within the head of power prescribed by the *Local Government Act 1993*;
- second, not extend beyond the power of the State;
- third, not override a State law;
- fourth, not override a State policy matter; and
- finally, be made in accordance with the terms of the prescribed code.

Having considered the necessary requirements for making a valid local law attention should now be turned to the enforcement of that local law and the innovations introduced by the State Penalties Enforcement Registry (otherwise known as **SPER**) from 1 December 2000.

This paper was presented at the LAAMS seminar on Critical Issues in Municipal Law, February 2001.

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74 See section 865 (Local law process) and section 876 (Subordinate local law process) of the *Local Government Act 1993*.

75 See *Tasker v Fullwood* (1978) 1 NSW LR 20, *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 72 ALJR 841 and *Victoria v Commonwealth and Connor* (1975) 134 CLR 81.

76 See section 867(7) (Step 2 – ensure proposed law satisfactorily deals with any State interest) and section 872(5) (Step 7 – again ensure proposal law satisfactorily deals with any State interest) of the *Local Government Act 1993*.

77 See section 868(5) (Step 3 – consult with public about proposed local law) and section 878(5) (Step 2 – consult with public about proposed subordinate local law) of the *Local Government Act 1993* and the case of *Kwiksnax v Logan City Council* (1993) QdR 452 in relation to the equivalent provisions of the *Local Government Act 1936*.

78 See section 871 (Step 6 – decide whether to proceed with making proposed law) and section 881(2) (Step 5 – make proposed subordinate local law) of the *Local Government Act 1993*.

79 See section 885 (Local Laws and Subordinate Local Laws not to be made unless local government complies with division) of the *Local Government Act 1993*.

80 See section 874 (Step 9 – give public notice of law) and section 882 (Step 6 – give public notice of subordinate local law) of the *Local Government Act 1993*.

81 See section 867(2) (Step 2 – ensure proposed law satisfactorily deals with any State interest of the *Local Government Act 1993* and section 34A (Prescribed drafting standards) of the *Local Government Regulation 1994*.

Critical issues in municipal law (Queensland): Drafting and enforcement of local laws – Recent legislative and policy changes and implementation

Ian Wright | Leanne Bowman

This article discusses the recent introduction of the State Penalties Enforcement Registry under the *State Penalties Enforcement Act 1999*

February 2001

Enforcement of local laws

The *State Penalties Enforcement Act 1999* provides a legislative framework for the establishment of a new "*on the spot fine*" system. This Act also creates a new penalties enforcement registry. The State Penalties Enforcement Registry, otherwise known as SPER replaced the recent SETONS regime on 27 November 2000. **SETONS** stood for Self Enforcing Ticketable Offence Notice System. The SETONS system simply allowed a local government department to issue infringement notices and when the matter remained unpaid, pursue its remedy through a particular court mechanism, which was known as the SETONS Court.

The Setons process

The SETONS Court was established by Part 4A of the *Justices Act 1886* to allow the enforcement process to be applied on an administrative basis, rather than requiring, as was previously the case, the issue of a complaint and summons in all cases where a fine, imposed by an infringement notice remained unpaid after the initial period.

The definition of "*infringement notice offence*" excludes indictable offences and offences against the person from being enforced as infringement notice offences (section 98B of the *Justices Act 1886*). For example, a council was unable to issue infringement notices under its local laws for injuries to a person as a result of an attack by say, an unrestrained dog or for obstructing or impeding an authorised council officer from issuing an infringement notice.

"*Local law*" was defined in the *Justices Regulation 1993* to mean "*any provision of a local law (other than a provision in relation to an offence against the person) contravention of which may result in a maximum penalty of not more than 50 penalty units or, if the penalty is expressed as a dollar amount, $3,750 for an offence against the provision*".

Therefore, for an offence against a local law provision to have constituted an infringement notice offence, the following criteria must have been met:

- the local law must have created an offence against a provision;
- the local law must not have dealt with an indictable offence or an offence against the person;
- the local law must have included a fixed and definite penalty for the offence; and
- the maximum penalty must not have exceeded 50 penalty units (or $3,750 if expressed in monetary terms).

If a local law specified a penalty, whether it be in penalty units or dollar amounts, the infringement notice penalty was approximately one tenth of the penalty specified in the local law. The rationale behind this was that a council should benefit administratively from not having had to prosecute an offence and the offender benefit from not having had a conviction recorded.

The fact that an infringement notice offence was served on a person did not prevent a council from commencing proceedings against the person in a court for the offence (section 98M of the *Justices Act 1886*). However, such proceedings had to be ceased if the infringement notice was paid by the person prior to or during the proceedings (section 98F of the *Justices Act 1886*).

Reason why SETONS was replaced

The reason why the SETONS regime has been replaced by the new SPER system is simply because of the escalation of unpaid fines. The explanatory notes for the State Penalties Enforcement Registry Bill states that $62.6 million in fines remain uncollected since 1 July 1995.

One of the problems with the SETONS regime was that fine option orders were available for election at any step in the enforcement process. In fact, after a person had avoided payment for a matter of months or years, Part 4A of the *Justices Act 1886* required the police and SETONS to offer community service when the person was arrested under a warrant for the non-payment.

The SPER process

Objectives

SPER will be responsible for the collection of:

- court ordered fines;
- infringement notice penalties and fees;
- compensation and restitution; and
- amounts forfeited under bail undertakings.

The SPER charter in section 9 includes the following:

- maximising the collection for victims of offences of amounts payable under the *Penalties and Sentences Act 1992* by way of compensation;
- maximising the amount of fines before enforcement action is taken;
- discouraging community work in lieu of payment of fines;
- reducing the amount of imprisonment for fine default by encouraging the use of other enforcement mechanisms; and
- educating the public about the offenders' obligations.

Form of the infringement notice

Under the *State Penalties Enforcement Act 1999*, infringement notice forms will still be required to comply with the requirements specified in section 98C of the *Justices Act 1886*. However, section 15 of the *State Penalties Enforcement Act 1999* also specifies a number of additional requirements:

- the Act specifically requires that infringement notices must be dated (if this is not already the case);
- the infringement notice penalty must be referred to as a "*fine*"; and
- reference is required to be made to section 22 of the *State Penalties Enforcement Act 1999* for the options available to an alleged offender.

Section 22 of the *State Penalties Enforcement Act 1999* provides that an alleged offender must, within 28 days after the date of the infringement notice:

- pay the fine in full to the council;
- give the council a written election to have the matter of the offence decided in a Magistrates Court; or
- if available, apply to the council to pay the fine by instalments.

Instalment payments

The option for an alleged offender to pay a fine by instalments is a feature introduced by the SPER which did not exist under the SETONS system.

If the fine is equal to or more than the "*threshold amount*" the alleged offender may apply to the council for approval to pay the fine by instalments of not less than the "*minimum instalment*".[82]

The terms "*threshold amount*" and "*minimum instalment*" are defined in the regulations. Pursuant to sections 28 and 30 of the *State Penalties Enforcement Regulation 2000*, the threshold amount is set at $150 and the minimum instalment is set at $60 per month.

Where an alleged offender applies to pay a fine by instalments, the application must be accompanied by payment for the first instalment. If the council approves the application the alleged offender must then pay all remaining instalments to the SPER.

Default in paying instalment

If, on two consecutive occasions, a person fails to pay an instalment notice under the notice, the Registrar may cancel the instalment payment without forewarning the person.[83]

Withdrawal and reissue of infringement notice

A council may withdraw an infringement notice at any time before the fine is paid or otherwise discharged under the Act. A withdrawal notice must be served on the alleged offender.[84]

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82 Section 23 of the *State Penalties Enforcement Act 1999*.
83 Section 36 of the *State Penalties Enforcement Act 1999*.
84 Section 28 of the *State Penalties Enforcement Act 1999*.

If an infringement notice offence is withdrawn and registration at SPER is cancelled, SPER or the council as the case may be, must refund the person any amount paid to either of them by the person for the offence. If the person has performed community service for the offence under a fine option order then SPER is to pay an amount as compensation, worked out according to a set formula.[85]

If, because of a cancelled infringement notice, demerit points are allocated against the alleged offender, the demerit points for the offence are also cancelled. Further, if, because of the cancelled infringement notice, a licence, permit or other authority was suspended or cancelled, the suspension or cancellation stops having effect, unless the person's licence, permit or authority would still be suspended, cancelled or no longer enforced for another reason.[86]

Time limits

The fact that an infringement notice has been served on a person for an offence does not affect the time in which legal proceedings should be instituted against that person.[87]

Enforcement – enforcement orders and fine option orders

Under the *Justices Act 1886* the SETONS Registry had power to enforce a penalty infringement notice by issuing an enforcement order or fine option order. However, this power only existed in relation to infringement notice offences involving vehicles. The *State Penalties Enforcement Act 1999* now extends this power to other infringement notice offences.

If an alleged offender fails to respond to an infringement notice within 28 days then, under the *State Penalties Enforcement Act 1999*, the administering authority, that is probably the council, may give to SPER for registration a default certificate for the relevant infringement offence. However, a default certificate must be given to the registrar within the time a person may start a prosecution for the offence. A default certificate must be accompanied by a registration fee.[88]

Section 34 creates a system of registration of unpaid amounts under various types of orders made by a court for the purpose of enforcement by SPER. They include:

- an order fining a person for an offence;
- an order under the *Penalties and Sentences Act 1992* that a person pay an amount of forfeited recognisance;
- an order that a person pay restitution under the *Penalties and Sentences Act 1992*; and
- an order under the Bail Act that a person pay an amount on the forfeiture of an undertaking.

Upon registration of court ordered penalty amounts, the amount unpaid is increased by the amount of registration fee and search fee for establishing ownership of a motor vehicle under infringement notice. SPER becomes responsible for the collection of the unpaid amount.[89]

Enforcement order

Upon registration of an unpaid fine, the registrar must issue to the offender an enforcement order to pay the stated amount to SPER within 28 days.[90]

The enforcement order essentially serves two purposes:

- a warning; and
- provides options to the offender.

Upon the issue of the enforcement order the offender will have 28 days to pay the fine or apply for an extension of time or a fine option order. A fine option order will allow the alleged offender to convert the fine into a number of hours of unpaid community service. However, section 45 provides that a means test for community service fine option orders will apply.

Imprisonment

Section 39 sets out how the period of imprisonment stated in the enforcement order is calculated.

Service

Service of an enforcement order on a person may be personally or by sending it by ordinary post.[91]

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85 Section 29 of the *State Penalties Enforcement Act 1999*.
86 Section 31 of the *State Penalties Enforcement Act 1999*.
87 Section 16 of the *State Penalties Enforcement Act 1999*.
88 Section 33 of the *State Penalties Enforcement Act 1999*.
89 Section 35 of the *State Penalties Enforcement Act 1999*.
90 Section 38 of the *State Penalties Enforcement Act 1999*.
91 Section 40 of the *State Penalties Enforcement Act 1999*.

Fine options

Section 41 provides options to the offender in which he/she may deal with the enforcement order. For example:

- pay amount stated in the order;
- seek an extension in which to pay;
- seek a conversion of money into community service; and
- proceed to a Magistrates Court.

An enforcement debtor cannot apply for a fine option order if that person has contravened a previous fine option for the same offence, or after the issue of an arrest and imprisonment warrant for the amount stated in the enforcement order.[92]

A fine option order can only be made for an unpaid fine and relevant fees and costs under the Act. Fine option orders will not be available say, to deprive victims of compensation or restitution, professional fees, witness expenses and interpreter's allowances.[93]

If the offender does not pay the fine or apply for an extension or fine option order within 28 days of the date of the enforcement order then proceedings may be commenced in the Magistrates Court.[94]

Default after enforcement order

If an offender fails to pay an amount stated in an enforcement order within 28 days, the Registrar may issue:[95]

- an enforcement warrant;
- a fine collection notice; or
- an arrest and imprisonment warrant.

An arrest and imprisonment warrant must state the period of imprisonment of the offender. It must also provide how the period will be calculated.

Effective appeal on enforcement order

If an offender appeals against the conviction or sentence, the appeal has the effect of suspending the enforcement order. If the appeal is upheld, the Registrar must refund any amount paid to SPER. If the appeal is dismissed, the Registrar may continue to enforce the enforcement order as if no appeal had been brought.[96]

Cancellation of certain enforcement orders

An enforcement debtor may apply to SPER within six months after the making of an enforcement order, for the cancellation of the order. The offender must not make more than one application. The application can be for any of three reasons:[97]

- the person did not receive the infringement notice or the enforcement order; or
- the person receives the infringement notice or enforcement order after the time allowed for taking action stated in the infringement notice or enforcement order; or
- the person was prevented by accident, illness and other similar reason from taking action in relation to the infringement notice or enforcement order.

Civil enforcement

If at the end of the 28 day period the offender has not paid the fine or made other arrangements, the Registrar of SPER will determine which enforcement action is appropriate, which means that the Registrar may issue an arrest and imprisonment warrant for the offender.[98]

Possible enforcement action includes:

- An enforcement warrant directed to all enforcement officers may be issued:[99]
  - authorising seizure and sale of real or personal property;
  - imposing a charge on property (eg land, shares etc).

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92 Section 44 of the *State Penalties Enforcement Act 1999*.
93 Section 46 of the *State Penalties Enforcement Act 1999*.
94 Section 51 of the *State Penalties Enforcement Act 1999*.
95 Section 52 of the *State Penalties Enforcement Act 1999*.
96 Section 54 of the *State Penalties Enforcement Act 1999*.
97 Section 56 of the *State Penalties Enforcement Act 1999*.
98 Sections 61 and 62 of the *State Penalties Enforcement Act 1999*.
99 Sections 63 and 65 of the *State Penalties Enforcement Act 1999*.

- An order for an oral examination may be made.[100]
- A search warrant may be obtained to search premises to determine if sufficient goods owned by the offender could be seized, for sale, to satisfy the debt.[101]
- A Fine Collection Notice may be issued for:[102]
  - garnishee of wages;
  - regular redirection from a financial institution account; or
  - redirection of a debt owed by a third person to the offender.
- The issue of a fine collection notice suspends the operation of an enforcement warrant so long as the amounts are deducted under the notice.[103]
- Section 79 deals with the power of the Registrar to issue to the employer of an offender a fine collection notice for redirection of the offender's earnings. It may be issued only if he or she is satisfied about certain listed criteria including that the enforcement debtor will have enough money available to satisfy the unpaid amount after deducting the necessary living expenses of the offender and his or her dependents and that the amount of earnings to be redirected would not impose unreasonable hardship.
- Section 83 is applicable when calculating the amount of earnings an employer pays to an employee over a period if, for example, the payment is made under contract or part time etc.
- If an employer other than a government body fails to deduct an amount required under a fine collection notice, the employer must pay a late payment penalty to SPER.[104]
- An offence is created if an employer, because of the offender, prejudices the offender's employment, promotion or earning prospects or tax, or intimidates, coerces, imposes a penalty on, or takes any disciplinary action against, the person.[105]
- A fine collection notice authorising the redirection of a debt belonging to an enforcement debtor from a third person (other than a financial institution) must be served on the third person to have effect:[106]
  - if the offence was motor vehicle related, the Registrar may issue a Notice of Intention to suspend the offender's driver's licence. Suspension can last for 3 months.[107]
  - a charge creating an interest over land owned by the offender may be registered, if the amount outstanding is $1,000 or more;[108]
  - a charge creating an interest over a motor vehicle or other property owned by the offender may be registered; if the amount is $1,000 or more.[109]

An enforcement debtor who knowingly contravenes a warrant can face a maximum penalty of 200 units or 3 years imprisonment.[110]

Order of satisfaction of other amounts

If at any stage the offender pays all or part of an unpaid amount payable other than for an infringement notice offence, subject to section 113, the amount must be applied towards satisfying the unpaid amount in the following order:[111]

- compensation;
- restitution;
- damages;
- a fixed portion of a penalty;
- court fees;
- witnesses expenses payable under the decision;

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100 Section 69 of the *State Penalties Enforcement Act 1999*.
101 Section 71 of the *State Penalties Enforcement Act 1999*.
102 Section 75 of the *State Penalties Enforcement Act 1999*.
103 Section 76 of the *State Penalties Enforcement Act 1999*.
104 Section 88 of the *State Penalties Enforcement Act 1999*.
105 Section 92 of the *State Penalties Enforcement Act 1999*.
106 Section 97 of the *State Penalties Enforcement Act 1999*.
107 Section 104 of the *State Penalties Enforcement Act 1999*.
108 Section 110 of the *State Penalties Enforcement Act 1999*.
109 Section 110 of the *State Penalties Enforcement Act 1999*.
110 Section 110 of the *State Penalties Enforcement Act 1999*.
111 Section 112 of the *State Penalties Enforcement Act 1999*.

- professional costs;
- any other fees or costs;
- any amount ordered to be paid including a fine.

If there are two or more orders, amounts paid by the offender must go towards satisfying the first relevant category abovementioned.[112]

Good behaviour order when imprisonment not appropriate

If, after an enforcement warrant or a fine collection notice has been issued and the Registrar is satisfied, after considering a report from a doctor, that for a medical or psychiatric reason the offender is not suitable for performing community service, cannot pay or continue to pay the unpaid amount, and it may be inappropriate to enforce the payment of the amount by issuing an arrest and imprisonment warrant, the Registrar may order that the offender must be of good behaviour for the period of not longer than three years on the conditions the Registrar considers appropriate.

Enforcement by imprisonment

If, after attempting to enforce an enforcement warrant, the Registrar is satisfied the unpaid amount cannot be satisfied in any other way, an arrest and imprisonment warrant may be issued. The warrant stops having effect if the amount is paid before the person is imprisoned. The period of imprisonment is cumulative on any other period of imprisonment the person must serve under any other warrant or under any order of a court.[113]

Satisfaction of fine by imprisonment

If a person serves the total period of imprisonment under an arrest and imprisonment warrant, the unpaid amount stated in the warrant is stated to be satisfied. The amount of imprisonment time shall be reduced appropriately if the person pays part of the unpaid amount.[114]

Other changes introduced by SPER

Apart from the impacts on the mechanism for issuing infringement notices, other changes which the SPER will introduce to the infringement notice system for local governments can be summarised as follows:

- The appropriate penalty unit will increase from $60 to $75.
- A new civil enforcement regime will be introduced.
- Greater support will be provided to administering authorities such as Councils through the establishment of a SPER call centre. For example, once the fine is registered at SPER for enforcement and an enforcement order issued, the offender is given 28 days to make a choice between three or four options. The call centre will provide assistance. The offender's options will be examined eg tailored instalment plans, and fine option orders to discharge the debt by doing community service. The call centre will be pro-active in making contact with offenders.

Transitional provisions

The transitional provisions in part 10 of the *State Penalties Enforcement Act 1999* provide that:

- An infringement notice issued under part 4A of the *Justices Act 1886* is taken to be an infringement notice issued under the *State Penalties Enforcement Act 1999* and the penalty stated in the infringement notice is taken to be a fine under the notice.
- A council may continue to use an infringement notice that complies with part 4A of the *Justices Act 1886* for the period ending six months after the commencement of the *State Penalties Enforcement Act 1999*.
- If a council continues to use SETONS infringement notices for this six month period, a council must at the same time issue a notice to the alleged offender which states that the infringement notice will be enforced as if it were issued under the *State Penalties Enforcement Act 1999* and that the rights and obligations of the alleged offender are governed by section 22 of the *State Penalties Enforcement Act 1999*.

This paper was presented at the LAAMS seminar on Critical Issues in Municipal Law, February 2001.

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112 Section 113 of the *State Penalties Enforcement Act 1999*.
113 Section 119 of the *State Penalties Enforcement Act 1999*.
114 Section 120 of the *State Penalties Enforcement Act 1999*.

STAGE 1

Infringement Notice issues or Court imposes fine

S22

- The person can elect within 28 days to pay the fine.
- Pay instalments.
- Proceed to Magistrates Court.

STAGE 2

Fine is registered at SPER and Enforcement Order issues

Part 4

- If within 28 days, the offender has defaulted or "*done nothing*", the infringement notice offence progresses to registration for enforcement purposes.
- If no fine option order and the person defaults, Court Registrar may issue an arrest warrant or register the amount at SPER for enforcement purposes, and registration attracts a fee.
- An Enforcement Order acts as a reminder notice. The offender is encouraged to call the call centre. The call centre will be proactive.

STAGE 3

Civil Enforcement

Part 5

- If at the end of the 28 day period the offender has not paid the fine or made other arrangements, the Registrar of SPER will determine which enforcement action is appropriate. These include:
- Issue a Fine Collection Notice for:
  - garnishee of wages;
  - regular redirection from a financial institution account; or
  - redirection of a debt owed by a third person to the offender.
- Cause a search warrant to be obtained to search premises to determine if sufficient goods owned by the offender could be seized, for sale, to satisfy the debt.
- Issue an Enforcement Warrant directed to all enforcement officers:
  - authorising seizure and sale of real or personal property;
  - imposing a charge on property (eg. land, shares etc).
- Issue an order for an oral examination.
- Register a charge creating an interest over land owned by the offender, if the amount outstanding is $1,000 or more.
- Register a charge creating an interest over a motor vehicle or other property owned by the offender, if the amount is $1,000 or more.
- If the offence was motor vehicle related, the Registrar may issue a Notice of Intention to suspend the offender's driver's licence. Suspension can last for 3 months.
- Division 2 of the *State Penalties Enforcement Act 1999* provides that the Registrar may issue Enforcement Warrants for an unpaid amount. That is, it includes a warrant to seize and sell the property.
- An enforcement debtor who knowingly contravenes a warrant can face a maximum penalty of 200 units or 3 years imprisonment.

STAGE 4

Arrest and Imprisonment

Part 6

- If enforcement action has failed, the Registrar may issue an Arrest and Imprisonment Warrant for the offender.
- Payment in full or imprisonment are the only alternatives at this stage.

Review of recent developments in planning law at both State and Commonwealth level

Ian Wright

This article discusses the recent developments in planning law at both State and Commonwealth level. It particularly focuses on planning of coastal development, amendments to the *Water Act 2000*, changes to IPA, land access to telecommunication facilities and the proposed reform to Commonwealth biodiversity and heritage legislation and State town planning appeals system

March 2001

Planning and management of coastal development

The Queensland government has adopted State Planning Policy 1/00 which addresses the need for early identification and management of Acid Sulphate Soils (**ASS**) so as to minimise actual and potential adverse impacts to the natural and built environment from development activities conducted along the Queensland coastline. The policy commenced on 20 November 2000 and will cease to have effect on 18 November 2001.

The policy applies to coastal areas below five metres Australian Height Datum (**AHD**) and provides a non-exhaustive list of included local government areas. The policy must be considered when making or amending planning schemes as well as during the assessment of development applications under the *Integrated Planning Act 1997* (**IPA**). The policy provides a minimum standard for the identification and management of ASS in Queensland.

Acid Sulphate Soils and their potentially harmful effects

ASS occur naturally within the soils in low lying coastal areas, which include some 6,500km of the Queensland coastline. The presence of sulphate, iron and organic matter, along with the anaerobic conditions of low-lying coastal areas such as mangroves and swamps, combine to create iron sulphides. The introduction of oxygen to the iron sulphides by exposure to air, produces sulfuric acid, dissolved aluminium, iron and manganese. Soils which contain high levels of iron sulphides and have been exposed to oxygen to create the damaging by-products are termed "*actual acid sulphate soils*" (**AASS**). Soils which contain high levels of iron sulphides but have not been exposed to the oxidation process are termed "*potential acid sulphate soils*" (**PASS**).

The release of sulphuric acid, dissolved aluminium, iron and manganese into surface and tidal waters invariably causes adverse impacts on the surrounding natural environment including degraded water quality, fish death and disease, declines in plant production and changes in stream ecology. Acidified waters also adversely impact on the surrounding built environment via the corrosion of concrete and steel infrastructure and the compromising of building foundations.

The trigger for the creation of ASS is the introduction of oxygen to an iron sulphide environment. This "*introduction*" can occur through soil disturbance in the development process by way of excavation, dewatering (including drainage) or filling. If ASS soils already exist, then disturbance via the development process would result in the release of harmful substances into the surrounding built and natural environments. The aim of the policy is to provide mechanisms to identify, plan and manage AASS and PASS disturbances to minimise adverse impacts.

The Policy

The policy was prepared in accordance with Chapter 2 Part 4 of the IPA which allows the Minister to make a State planning policy "*about matters of State interest*". "*State interest*" means "*an interest that, in the Minister's opinion, affects an economic or environmental interest of the State or a region*". By virtue of the actual and potential adverse effects from ASS to both the natural environment and the built environment (resulting in flow on economic impacts), the planning and management strategies laid down by the policy would clearly constitute matters of State interest. The policy is temporary, ceasing effect within a year of commencement. The Queensland government chose a temporary policy for the reduced consultation process and because of its intention to adopt State and regional coastal management plans which could more effectively address ASS at the regional level.

Making or amending planning schemes

The policy refers to the requirement in IPA for new or amended planning schemes to advance the purpose of IPA which is to seek to achieve ecological sustainability (which includes applying the precautionary principle). The policy clearly adopts this principle and requires development that involves the disturbance of potential or actual

ASS to be planned and managed so as to avoid potential adverse effects on the natural and built environments through careful evaluation of the land use and land management options available.

The policy places two clear obligations on local governments when making or amending a planning scheme. The first is a requirement that the allocation of land uses in ASS areas follow a specific hierarchy where possible to avoid excavation, dewatering or filling, plan and manage any disturbance to avoid acid generation and treat existing acidity, and manage surface and groundwater flows from areas where ASS are likely to occur to avoid the leaching of acid and metal contaminants into the environment.

The second obligation is on local governments planning for future development in low-lying coastal areas to identify the location, depth and severity of ASS. The Department of Natural Resources has prepared ASS locality maps for some areas which would assist local governments, in addition to analyses of soil descriptions, geology, vegetation and other factors. The ASS investigations by local governments will provide a guide only and development applicants will need to identify and provide ASS management strategies on a site-by-site basis in accordance with the policy.

From the local government's investigations, options regarding the scale and nature of future development in each area can be defined. The presence of ASS will not necessarily preclude development that may disturb the soils, provided sufficient planning and management strategies are undertaken to avoid potential adverse effects on the natural and built environments.

Development applications

There is no direct legal requirement for ASS information to be provided with a development application made under IPA. However, IPA places varying obligations on assessment managers to have regard to State planning policies. An assessment manager, when making an assessment under a transitional planning scheme, is obliged to have regard to "*all State planning policies*". When making an assessment of an impact assessable development application made under an IPA planning scheme, (noting that s3.3 of the ASS policy restricts the policy's application to impact assessment only) consideration must be given to the relevant provisions in the planning scheme which incorporate a State planning policy as well as consideration in its own right of any other current relevant State planning policy.

When deciding an application under a transitional planning scheme, the assessment manager must give appropriate weight to all relevant State planning policies and may legitimately refuse the application for non-compliance with a State planning policy. When deciding an application under an IPA planning scheme, an assessment manager's decision must not conflict with the desired environmental outcomes of the planning scheme. This means that if a development application conflicts with either the desired environmental outcomes of the scheme or those elements of the scheme that reflect a State planning policy, it may be legitimately refused by the assessment manager.

These obligations on assessment managers to consider State planning policies in certain circumstances make it prudent for a development application to include an assessment of the ASS impacts and specify management techniques in accordance with the annexes to the policy. This is consistent with paragraphs 3.4 and 3.5 of the policy which recommend that the assessment manager request information regarding the presence of ASS on the site and any proposed management techniques. The information provided should be prepared by a suitably qualified professional experienced in ASS assessment and it should be sufficient to allow the assessment manager to determine whether there would be any adverse effects on the natural and built environments and human health caused by the release of acid and metal contaminants into the environment. The policy contemplates the imposition of reasonable and relevant conditions on the development approval by the assessment manager to ensure the impacts of ASS are appropriately managed. It is essential for any requirements of such conditions to be approved prior to any disturbance occurring on site.

For the policy to apply, the development must meet the following criteria:

- where it is subject to impact assessment or the impact assessment process, and
- where it involves one or more of the following aspects of development:
  - making a material change of use of premises, or the carrying out of works that will result in car parking, storage or other areas below ground level;
  - making a material change of use where excavation or filling are an integral aspect of the use, such as a golf course, marina and canal estate;
  - making a material change of use for extractive industry;
  - reconfiguration of a lot involving the opening of a road;
  - operational works comprising excavation or filling, and
- where the development occurs below five metres AHD (or a more specific area as determined in the planning scheme) and involves:
  - excavation of more than 100m^3 of material;

- dewatering (including permanent or temporary drainage or pumping of groundwater resulting in the aeration of previously saturated soils or sediments); or
- filling (resulting in groundwater extrusion through compaction of saturated soils or sediments and/or lateral displacement of previously saturated soils or sediments above the watertable).

Supporting information

Three annexes to the policy contain technical procedures for the investigation, identification, treatment and management of ASS. It is in these annexes that existing Queensland and New South Wales guidelines have been incorporated and expanded upon.

Conclusion

While the ASS State planning policy 1/00 is only a temporary measure, it places clear obligations on all parties involved in the town planning process. Once it has been established that the policy applies to a particular development application, identification, investigation, treatment and management guidelines in the policy need to be complied with. This is the first statutory instrument in Queensland specifically addressing the ASS issue and it will be interesting to monitor the level of compliance achieved during its short life, in view of the sometimes prohibitive costs involved in treating ASS. It will be necessary for the Queensland government to provide an effective permanent mechanism to address ASS. However, the implementation of the policy represents the first important step.

Water Act 2000

The *Water Act 2000* (**WA**) contains a number of consequential amendments to IPA. Whilst these amendments have not yet taken effect, they are expected to have commenced by the end of March 2001.

Development

The WA amends the IPA definition of "*operational work*" to include:

> *Operations of any kind and all things constructed or installed for taking, or interfering with, water under the Water Act 2000*.

No guidance is provided as to the meaning of "*operations*". However, the Department of Natural Resources has advised that this amendment is only intended to capture the construction of works for taking or interfering with water and not the actual supply of water after such works have been completed.

Assessable development

The following development will become assessable development under Schedule 8 of the WA upon commencement of the remainder of Schedule 2 of the WA.

- Carrying out operational work, that is, operations of any kind and all things constructed or installed for taking, or interfering with, water under the WA if the operations are, under the WA, for:
  - taking, or interfering with, water from a watercourse, lake or spring (subject to exceptions contained in section 20 of the Act), or
  - taking, or interfering with, artesian water, or taking, or interfering with:
    - overland flow water mentioned in a water resource plan, or
    - subartesian water mentioned in a water resource plan or prescribed under a regulation.
- Carrying out operational work that is the construction and maintenance of a referable dam under the WA. A referable dam will generally be a dam:
  - more than eight metres in height with a storage capacity of more than 500 megalitres; or
  - more than eight metres in height with a storage capacity of more than 250 megalitres and a catchment area more than three times its maximum service area at full supply level,

  which will expose two or more persons to risk if the dam were to fail.

Information submitted with Development Applications

Where a development application is required for works associated with the taking or interfering with water under the WA, the development application will need to be accompanied by:

- evidence of an entitlement under the WA, such as a water allocation, interim water allocation or water licence, for the taking of or interference with the water, or
- the written consent of the Chief Executive of the Department of Natural Resources to the application being made without evidence of the entitlement.

Similarly, where a development application is made for the extraction of gravel, rock, sand or soil from a watercourse or lake, for a purpose other than for the removal of the material as waste material, the application will need to be supported by:

- evidence of an allocation of the material under the WA; and
- where the land is leased, the written consent of the lessor to arrangements concerning the route of use across the lessee's land for removal of the quarry material.

However, for the above purposes, an entitlement to take or interfere with water or allocation of quarry material may be provided at the same time as the development permit if DNR is the assessment manager for the development application. Alternatively, where DNR is a referral agency for the development application, the entitlement or allocation may be provided at the same time as DNR provides their response as a referral agency. Where a development application is for the construction and maintenance of a referable dam the development application will need to be accompanied by evidence that:

- DNR has accepted a failure impact assessment of the dam, and
- if the person is required to be a water entitlement holder to operate the dam – the owner or operator of the dam is the holder of a water allocation, interim water allocation or water licence for the dam.

Assessment of development applications

It is expected that the *Integrated Planning Regulation 1998* will be amended to prescribe DNR to be a referral agency for development applications for operational works for the taking or interfering with water under the WA. Similarly, development applications for operational works across more than one local government area for the taking or interfering with water are expected to be referred to DNR as assessment manager. Where DNR is the assessment manager or referral agency for a development application, the application must be assessed against the purposes of the WA to the extent that the purposes relate to:

- the taking or interfering with water; or
- other resources; or
- referable dams.

Regulations may be made under the WA approving a code against which development applications under IPA may be assessed by DNR as an assessment manager or referral agency.

Other IPA changes

Another amendment of interest is that the Minister may now delegate his/her powers and functions under IPA to the Minister for State Development or another appropriately qualified public service officer.

Land access for telecommunication facilities

There is much telecommunications network construction activity being undertaken in Australian cities at the moment. A glance skyward to the roof of any building or structure of reasonable height in cities, and increasingly in the suburbs, gives you an idea of the extent of the activity. Requests from carriers to install roof top antennae and dishes, and cabling and MDF rooms within buildings are now commonplace. While carriers have a statutory right to install such facilities on land and buildings, commercial negotiation of rights of access now seems to be the way.

A brief history

Carriers' rights of access today are considerably less than the virtual immunity from all. State planning and environmental laws enjoyed by Telstra in its original form as the Postmaster General's Department and then the Australian Telecommunications Corporation (**Telecom Australia**), which merged with the other government-owned carrier, OTC Limited, in 1991 to become the Australian and Overseas Telecommunications Corporation (which changed its name in 1993 to Telstra).

Changes in 1991 addressed what the Commonwealth government saw as inconsistencies between the State planning and environment laws and the *Telecommunications Act 1991* (Cth), which oversaw the introduction of Optus as Australia's second carrier, and had as one of its objectives the rapid expansion and development of the national telecommunications infrastructure and network. The 1991 Act gave Optus the benefit of an immunity from all State planning and environmental laws similar to that enjoyed by Telstra, to enable the new carrier to compete on equal footing with the former monopoly. The 1991 Act did, however, impose some restriction on the manner and conditions under which Telstra and Optus could establish infrastructure by the Telecommunications National Code which created a system of environmental regulation requiring carriers to adhere to a comprehensive notification and consultation procedure before it could commence construction of any significant facilities.

Those rights were further eroded following the 1997 reforms made by a package of legislation, including the *Telecommunications Act 1997* (Cth), which sought to introduce greater competition in the telecommunications market from 1 July 1997. The reforms ushered in the Telecommunications Code of Practice 1997 (to replace the Telecommunications National Code) which contains conditions regulating carriers' activities in exercising the powers and immunities given to them under the Act.

So what are the rights and obligations of telecommunications carriers in seeking access to land and buildings to install telecommunications facilities?

The current legislative framework

- The Act creates a regulatory framework for the telecommunications industry, and its main objective is to promote the long term interests of end-users of telecommunications services, and an efficient and competitive Australian telecommunications industry.
- Schedule 3 to the Act sets out the powers and immunities of carriers, and the manner in which they must exercise them.
- The Telecommunications Code of Practice 1997 contains conditions regulating carriers' activities relating to the inspection of land, connection of subscribers, low-impact facilities, temporary defence facilities and the maintenance of facilities.
- The Telecommunications Low-impact Facilities Determination 1997 (as amended by Amendment No 1 of 1999) identifies low-impact facilities by reference to the type of facility, and the type of area in which they are installed.

Authorised activities

The Act gives authority to carriers to undertake certain activities without the approval of the relevant State or Territory or local government body or the owner of the land. The Act and Schedule 3 authorise carriers to:

- access land (public or private) for the purpose of assessing the land's suitability for the carrier's purposes (which may include surveying, taking samples, digging pits, lopping trees, and sinking bores);
- install certain telecommunications facilities (infrastructure such as cables, apparatus, antennae and associated equipment), including facilities classified as "*low-impact*", and facilities installed before 1 July 2000 solely for connecting a building to a network that existed on 30 June 1997; and
- maintain a facility which has already been installed:

In exercising its powers to undertake these activities, a carrier must comply with the conditions specified in Schedule 3 which include:

- minimising detriment and inconvenience, acting in accordance with good engineering practice, and complying with industry standards;
- protecting the safety of people, property and the environment;
- complying with the provisions of the Code;
- complying with conditions specified in a facility installation permit (where the facility is not a low-impact facility); and
- giving notice to and responding to any objections of the owner of the land.

Carriers must also make reasonable efforts to enter into and comply with agreements with public utilities about the way the carrier will undertake the authorised activity if it is likely to affect the utility's operations.

Low impact facilities

Low-impact facilities are those facilities specified in the determination. Overhead cabling and new mobile telecommunications towers are not and cannot be low-impact facilities in any type of area. Low-impact facilities now include:

- colour matched subscriber dishes and panel antennae of certain dimensions;
- small microcell installations;
- in-building coverage installations (concealed in a building), and in-building subscriber connection equipment (such as cabling into an MDF room, installing racks in an MDF room, and cabling up the risers to connect with a customer's equipment);
- extensions to a tower if the extension does not exceed 5 metres and there have been no other extensions to the tower;
- pits, manholes, underground conduits and cables, and underground equipment shelters;
- pillars, roadside cabinets, pedestals and equipment shelters; and
- payphones and temporary facilities.

A facility will be low-impact only if it is installed in particular areas. The determination identifies low-impact facilities by reference to the type of facility, and the type of area in which it is installed. Areas specified in the determination have an order of importance, based on zoning under State and Territory laws. The order of priority is areas of environmental significance, residential areas, commercial areas, industrial areas, and rural areas.

Telecommunications Code of Practice 1997

The Code sets out conditions (including notification and dealing with the objections of land owners) that carriers must comply with when engaging in the permitted inspection, installation and maintenance activities under Schedule 3. A carrier must notify a land or building owner in writing at least 10 business days before it intends to commence work on a facility installation. The land owner may object in writing to the carrier's proposed activity at least 5 business days before the carrier's intended start date, but the grounds of any objection must only relate to the following:

- using the objector's land to engage in the activity;
- the location of the facility on the land;
- the dates of the proposed commencement, undertaking and completion of the activity;
- the likely effect of the activity on the land; and
- the carrier's proposals to minimise detriment and inconvenience, and to do as little damage as practicable, to the land.

Carriers must then make reasonable efforts to consult with the land owner within 5 business days after receiving the objection, and resolve the objection by agreement within 20 business days after receiving the objection. If an objection is not then resolved, the carrier must consider whether to change the proposed activity. However, a carrier is not required to change the proposed activity in a way that:

- is not economically feasible or technically practicable; or
- is likely to have a greater adverse effect on the environment than the originally proposed activity; or
- is inconsistent with a recognised industry standard practice relevant to the activity.

Within 25 business days after receiving the objection, the carrier must notify the objector in writing whether it proposes to change the activity (and if so, how), and if no change is proposed, why not.

If the land owner is not satisfied with the carrier's response, it may ask the carrier to refer the objection to the Telecommunications Industry Ombudsman (**TIO**) within 5 business days after receiving the carrier's response to the objection (which it may do). There is no time frame within which the TIO is required to deal with the objection. The TIO may direct the carrier about the way it should engage in the activity, and the carrier must comply with any direction given.

Similar provisions for notification of, and objections to, land entry activities (for inspection purposes, which as noted above may include surveying, sinking bores, taking samples, digging pits and examining soil) apply.

Money matters

It is worth noting that a carrier's obligations under the Act and the Code do not include any obligation to pay rent to a building owner, and an owner's rights to object to a proposed installation cannot be based on a carrier's refusal to pay rent. A carrier's notice to a land owner must include a statement explaining that compensation will be payable to the land owner under clause 42 of Schedule 3 if the land owner suffers financial loss or damage as a result of the carrier's activities. "*Financial loss or damage*" is generally regarded as being a reasonable amount of compensation as agreed by the carrier and land owner, or as determined by a court.

The issue of compensation is now a topic of some debate, particularly given that what it covers has not yet been judicially tested. The TIO has no jurisdiction to determine the compensation payable by a carrier in the event of a dispute with a land owner as to the amount. The narrow view is that the compensation referred to in clause 42 of Schedule 3 means compensation for physical damage, such as payment of the costs of repairing a hole put in the wall by a carrier. The "*middle of the road*" view is that it means financial loss actually incurred by a land owner. For example, carrier X would pay $15,000 to install subscriber cabling in a building, but cannot because carrier Y will use up all of the rack space in the building's MDF room. The compensation (from carrier Y) would be $15,000. The broad view is that compensation is compensation for loss of opportunity or prospective loss. For example, rack or riser space in a building is assessed as having a market value of $20,000 per annum, so the compensation payable would be $20,000 per annum.

The correct meaning of compensation is uncertain, but the narrow view is probably the correct view at present. The "*middle*" view is a possibility, and the broad view is unlikely to be adopted.

Conclusion

It is reasonable to assume that the Federal government will always be prepared to step in to protect its policy that competition in the telecommunications industry be encouraged, and the access rights of carriers which facilitate that.

As new technologies and network deployment methods emerge, we will no doubt be faced with new issues which are not adequately dealt with by the current access regime. Of increasing concern to the community are the health and safety issues surrounding mobile network facilities which are otherwise "*low impact*" for the purposes of the Act, and the fact that the current access regime does not adequately address these issues.

Proposed changes to Commonwealth biodiversity and heritage legislation

The *Environment and Heritage Amendment Bill (No. 2) 2000* (**Biodiversity Bill**) was introduced into Federal Parliament on 7 December 2000. The Biodiversity Bill proposes amendments to the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) in relation to heritage matters. The Biodiversity Bill forms part of a legislative package which includes the *Australian Heritage Council Bill 2000* and the *Australian Heritage Council (Consequential and Transition Provisions) Bill 2000*. The legislative package:

- will repeal the *Australian Heritage Commission Act 1975*;
- will provide that the Register of the National Estate will no longer have statutory force. (Although the information on the register will be used as a source of information in considering the effect of proposed actions under the EPBC Act);
- will replace the Australian Heritage Commission with the Australian Heritage Council, which will have various functions under the EPBC Act, and
- will establish two new registers:
  - the National Heritage List, and
  - the Commonwealth Heritage List.

Current status of legislative package

The legislative package has been referred to the Senate Committee on Environment, Communications, Information Technology and the Arts References for inquiry and report by 28 March 2001. The package must then, proceed through both houses of Parliament before becoming law. The changes to the EPBC Act and the repeal of the Australian Heritage Commission Act will commence when the legislative package receives assent.

Appeals system reform

Reform of the town planning appeals system is an evergreen topic. Recent expressions of concern in some quarters suggest that the advent of a new minister may be an appropriate time for the Institute to revive debate in Queensland. In 1989, Labour promised to introduce a tribunal system, but Tom Burns was effectively snowed by the legal lobby.

As reported in the September issue of New Planner, RAPI's NSW Division has made a comprehensive submission to the (NSW) Attorney-General in response to his government's current review of the plan-making and development assessment provisions of the Environmental Planning and Assessment Act and the role of the Land and Valuation Court in relation to them.

In NSW, appeals against council planning decisions fall within seven classes of jurisdiction exercised by the Land and Valuation Court and its six full-time judges **and nine "*commissioners*" (formerly called "*assessors*"). Professionally qualified planning commissioners sitting alone may hear and determine merit issues.** The rules of evidence do not apply in merit appeals, and the proceedings are required to be conducted with as little formality as possible, subject to the rules of natural justice and procedural fairness.

Thus the NSW system is much less formal and legalistic in character than the Queensland system. NSW RAPI's criticisms are therefore very interesting. They are even more applicable in Queensland where complaints about excessive formality, cost and inaccessibility have been levelled against the Planning and Environment Court and its predecessor the Local Government Court for the past thirty years.

The NSW Division's submission refers, inter alia, to "*growing concern among the planning profession about the perceived increase in the extent of legal intervention relating to matters usually assessed on their merits ... tactically prolonging appeal proceedings, with consequential increases in time and costs borne by the parties*". Again: "*It is clearly apparent to the planning profession that lawyers have overly influenced many proceedings by a 'win at all costs' approach ... and by prolonging matters to win by attrition, thereby causing the other party to withdraw because of costs (or frustration)*".

The submission goes on to argue for the hearing of merit issues by commissioners "***on an inquisitorial basis with minimal intervention by legal representatives of the parties***". It also advocates more acceptance by the court of written submissions in merit proceedings with the consent of the parties.

This paper was published as a Planning Law Update in the Queensland Planner 41:1, March 2001.

No 'duty' of Councils to enforce planning laws

Ian Wright

This article discusses the decision of the New South Wales Court of Appeal in the matter of *Ryde City Council v Echt* (2000] NSWCA 108 heard before Cowdroy AJ

April 2001

In brief

The NSW Court of Appeal has held that local councils are not under a legal duty to use their statutory powers to enforce planning laws.

Facts

Mr and Mrs Shallita and Mr and Mrs Echt are neighbours. The Shallitas carried out work on their property under a building approval, but did not comply with conditions requiring them to provide screening from the Echts property.

The Echts sought to have the Ryde City Council take action against the Shallitas to enforce the terms of the building approval. However, the Council decided not to take legal action. The Echts then brought their own proceedings in the Land and Environment Court under the open standing provisions of the *Local Government Act 1993* (**LG Act**) to make the Shallitas comply with the approval. The Council was named as a respondent to the proceedings.

Before the case came on for hearing, the Echts and Shallitas settled most of their differences and agreed on what orders the Court should make. However, they did not agree about who should pay costs. The Echts sought an order that the Council pay their costs of the proceedings.

In a judgment delivered on 21 August 1998, Cowdroy AJ found that the Council had a responsibility to enforce the provisions of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) (although this case actually concerned the LG Act), had failed to do so, and ordered the Council to pay the costs of both the Echts and the Shallitas. The Council appealed to the NSW Court of Appeal.

Judgement

The Court of Appeal upheld the appeal and overturned the orders of Cowdroy AJ. Spiegelman CJ (with whom Powell and Reydon JA concurred) noted that while councils have a "responsibility" to administer acts such as the LG Act and EP&A Act, the term "responsibility" is to be understood in an allusive and general sense. In particular, the "responsibility" should not be seen in terms of obligations upon councils that can be enforced by third parties against the councils.

His Honour referred with approval to the decision of Pearlman J in *Payne v Mosman Municipal Council* [2000] NSWLEC 25, in which her Honour stated that Cowdroy AJ's decision should not be accepted as authority for the proposition that the discretion of the Council, in deciding whether or not to bring proceedings in relation to a breach of planning legislation, was fettered in some way.

Having found that a council has a general discretion to decide whether or not to bring proceedings in relation to a breach, his Honour went on to examine whether there was any legal error committed by the Council in the exercise of its discretion in this case and held that there was not.

Comments

The Court of Appeal's judgment takes a common sense approach to the question of a council's discretion to enforce the LG Act and the EP&A Act. Council budgets are, by nature, limited and the bringing of enforcement proceedings can be a costly task. It makes sense to find that councils have a general discretion to decide how to spend their resources, and whether a particular breach of a planning law should be the subject of enforcement proceedings.

What this case does not mean, however, is that those breaching planning laws have free rein to do so unchecked. There are two matters worth bearing in mind:

- Although councils are not legally required to take legal action to enforce every breach of a planning law, they certainly have the right to do so. Where a significant breach of a planning law which impinges upon the environment, including the amenity of other residents, is drawn to its attention, a responsible council should take the complaint seriously and make an informed decision as to whether to bring enforcement action based on the circumstances of the case.

- Even if a council decides not to take any action, open standing provisions in Acts such as the LG Act and EP&A Act mean that third parties can still bring enforcement proceedings and seek orders requiring the law to be complied with.

Colin Biggers & Paisley

North Queensland Conservation Council Inc seeking judicial review of a permit to develop a harbour and associated works within a marine park

Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *North Queensland Conservation Council Inc v The Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172 heard before Chesterman J

April 2001

In brief

The North Queensland Conservation Council Inc (**NQCC**) has commenced proceedings in the Supreme Court of Queensland against the Executive Director of the Queensland Parks and Wildlife Service (**QPWS**). The NQCC is seeking judicial review of the decision of the QPWS to issue a permit allowing the State of Queensland to develop a harbour and associated works within a marine park at Nelly Bay, on Magnetic Island.

NQCC has campaigned for many years to prevent the development and have the area returned to its natural state. The QPWS applied to the Court for an order dismissing the NQCC's application. The main ground that was the NQCC was not a "person aggrieved" by the decision within the meaning of the *Judicial Review Act 1991* (Qld). The application by QPWS was dismissed by the Supreme Court. QPWS has not appealed the decision.

The findings

Both parties argued on the basis of the conventional law in relation to the issues of standing.

Chesterman J noted that the Federal Court's decisions in *Australian Conservation Foundation Inc v Minister for Resources* (1989) 19 ALD 70 and *North Coast Environment Council Inc v Minister for Resources* (1955) 127 ALR 617 suggested that in certain cases environmental groups have sufficient standing to question executive decisions impacting on the environment. However, while the judge considered that the NQCC satisfied the need for a "special interest" in this case, he chose to base his judgement on a broadened rule or standing, based on whether the application for review is an abuse of process, stating:

> *The plaintiff should have standing if it can be seen that his connection with the subject matter of the suit is such that it is not an abuse of process. If the plaintiff is not motivated by malice, is not a busy body or crank and the action will not put another citizen to great cost or inconvenience his standing should be sufficient.*

The Court considered that such an approach takes into account the plaintiffs interests in bringing the suit and also takes account of the effect of the proceedings on the defendant.

A new test for standing

The Court reviewed the major cases relating to standing and concluded that the "special interest" test provided little assistance in determining standing where the applicant had no proprietary or financial interest. The only rationale for restricting standing was to be found in the judgment of Gibbs CJ in *Onus v Alcoa* (1981) 149 CLR 27 where the Chief Justice referred to the possibility of abuse of open standing provisions by 'busy bodies' and persons with a mere intellectual concern, which could put another citizen to great cost and inconvenience.

The High Court's decision in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefits Fund Pty Ltd* (1998) 72 ALJR 1270 can be seen as paving the way for a new test. At paragraph 39 of that case, the majority said:

> *... it may well be appropriate to dispose of any question of standing ... by asking whether the proceedings should be dismissed because the rights or interest of the plaintiff was insufficient to support a justiciable controversy, or should be stayed as otherwise oppressive, vexatious or an abuse of process.*

The Queensland Supreme Court made a number of points to support a broadened test for standing, listed following:

- There has been some relaxation in the strictness with which the standing test has been applied in recent years which reflects a greater readiness by the Courts to permit challenges to the decisions or executive government.

- It was important to provide an avenue for the public to ensure that government decisions have been made in accordance with the law. Particular reference was made to the judgment of Gaudron J. in *Corporation of the City of Enfield v Development Assessment Commission* (2000) 74 LJR 490 at paragraph 56, where Her Honour said:

  > *... the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the law which govern their exercise. The rule of law requires no less.*

- The Court expressly recognised society's interest not only in efficient government but equally in lawful government. It followed from this express recognition of a public interest in ensuring lawful government decision making that an application for review of an administrative decision will not be an abuse of process unless it is officious or the product of some collateral motive. Chesterman J. was of the view that the law may be moving towards a statement that the public interest in ensuring the lawful exercise of executive power is itself a "special interest".

- His Honour also considered that the public expects that development will occur with due regard to the environment, which requires a balance of competing factors. To allow the balancing process there must be a contestant who can challenge arguably unlawful developments.

Application of the new test to this case

The Court posed the question of whether NQCC's concern with the litigation was such that its application was not an abuse of process. This involved an inquiry into the nature of the legal proceedings, the nature and extent of NQCC's interest in those proceedings and their outcome, and whether any person would be put to expense or inconvenience as a result of the proceedings.

The Court considered it important that the proceedings asked for the judicial review of an administrative decision on the grounds that the decision maker had no right to grant the permit in question and, accordingly, the purpose of the proceeding was to test the lawfulness of that decision.

The Court considered that the essence of abuse of process is that there is no real controversy to be resolved and that proceedings were begun primarily to vex an opponent. His Honour did not consider that to be the case here, saying that NQCC's purpose was genuinely to test the legal propriety of the permit as part of its commitment to the protection of the natural environment.

The Court also thought it important that no one else was likely to be granted standing if the NQCC was not allowed standing. On the last factor, His Honour acknowledged that the development would be delayed, but he considered that the delay would not be great.

Implications

The Courts' decision is a significant step towards open standing for the review of the government decisions. However, several notes of caution should be expressed. The new test is yet to be approved by a Court of Appeal (the QPWS has not appealed the decision in this case). Secondly, whether a given situation constitutes a lack of abuse of process will vary from case to case. A closer analysis may need to be made by Courts where the application is not a peak environmental organisation and does not have a proprietary or financial interest.

Thirdly, it should not be forgotten that the new test has two arms. Beside the absence of an abuse process, the Court must also consider the cost and inconvenience to the other party. Where a significant practical delay will occur or where private legal rights or proprietary interests are directly affected, the Courts may not be so inclined to allow a decision to be tested.

Finally, the nature of the challenge will be important. In this case, the challenge is to the power of the decision-maker to make the decision itself. If a challenge were to rest on a lesser basis, for example, on the failure to take a relevant consideration into account, it is possible that a Court would not consider this to be as strong a factor in exercising its discretion.

Notwithstanding these notes of caution, this decision appears to confirm that the demise of the "special interest" requirement for standing is almost complete.

The legal and technical principles in drafting decision notices

Ian Wright

This article discusses the importance of having effective written communication when drafting decision notices and outlines relevant decision making provisions and legal principles under IPA

April 2001

Introduction

Purpose of paper

Effective written communication is essential to the work of persons involved in the Integrated Development Assessment System (**IDAS**) process, whether it be the drafting of application documents, negotiating with applicants or communicating with assessment managers.

The purpose of this presentation is to give some practical directions on how to achieve more effective written communications. It sets out rules and principles that should be followed in relation to the structure, context, language and presentation of all documents produced as part of IDAS, in particular refusal decision notices and conditions of development approvals.

Achieving effective written communication

Effective written communication can be achieved through the use of four techniques:

- *structure of a document* – a document should have a logical, coherent structure;
- *content of a document* – the content and context of a document should be clear, concise and consistent;
- *language of a document* – a document should adopt plain language;
- *presentation of a document* – a document should be presented or laid out to provide effective communication.

Each of these four techniques needs to be applied when drafting refusal decision notices and conditions of development approvals. Before these elements of drafting can be considered however, the legislative and common law decision making powers of assessment managers under the *Integrated Planning Act 1997* (**IPA**) need to be canvassed and understood.

IPA decision making provisions

IPA head of power

Under IPA an assessment manager may (s 3.5.11(1)):

- approve all or part of the development application;
- approve the development application subject to conditions; or
- refuse the development application.

Refusal power under IPA

Under IPA an assessment manager must refuse a development application in four circumstances:

- First, where the assessment manager is required to refuse a development application by the concurrence agency (s 3.5.12).
- Second, in the case of code assessable development where:
  - the development does not comply with the applicable code; and
  - compliance cannot be achieved by imposing conditions.
- The conflict either:
  - cannot be justified having regard to the purpose of the code; or
  - involves the *Building Act 1975* (including the *Standard Building Regulation 1993*); or

- involves a code in the planning scheme and the achievement of the desired environmental outcomes would be compromised (s 3.5.13).

- Third, in the case of impact assessable development where:
  - there is conflict with the planning scheme that cannot be justified by planning grounds; or
  - the achievement of the desired environmental outcomes will be compromised (s 3.5.14).
- Finally in the case of an impact assessable development outside of a planning scheme area, the achievement of the desired environmental outcomes for the planning scheme area would be materially affected.

Conditions power under IPA

In relation to the power to impose conditions on a development approval, an assessment manager must not include a condition which:

- is not relevant to the development;
- is relevant to but is an unreasonable imposition on the development; or
- is not reasonably required in respect of the development (s 3.5.30(1)).

Having considered the relevant provisions of IPA that govern the making of decisions, it is necessary to consider the legal principles that underpin the drafting of decision notices.

Legal principles relevant to decision notices

Drafting conditions of approval

In relation to the conditions of development approval, IPA does not define terms such as "*relevant*" or "*unreasonable*". Accordingly the common law tests of lawfulness continue to apply under IPA as they did under the *Local Government (Planning and Environment) Act 1990*.

In summary, in order to be lawful at common law, conditions must:

- be for a planning purpose (see *Newbury District Council v Secretary of State for the Environment* [1981] AC 578);
- fairly and reasonably relate to the application (see *Newbury District Council v Secretary of State for the Environment* [1981] AC 578);
- not be so unreasonable that no reasonable planning authority could have imposed them (known as *Wednesbury* reasonableness) (see *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; *Provincial Picturebuses Ltd v Wednesbury Corporation* [1948] 1KB 223);
- be certain (see *Shilling v Cairns City Council* [1988] QPLR 243);
- not require constant supervision by the assessment manager (see *Mery McKeown Carpets Pty Ltd v Brisbane City Council* [1977] QPLR 20).

Therefore, to determine whether a condition is relevant and reasonable, it is necessary to consider the changes that are likely to emerge from the development, and whether the conditions are related to those changes. It is also necessary to consider the relevant planning scheme provisions and sections of IPA which relate to the development.

Drafting refusal decision notices

In relation to the drafting of a refusal decision notice a persuasive and effective refusal is one that is based on:

- relevant planning grounds; or
- technical legal grounds such as the adequacy of public notification or the validity of the development application.

When recommending a refusal of a development application based solely on inadequacies in the public notification, it should be borne in mind that the court has the power to approve a development application regardless of a failure in the public notification where the failure to give proper public notification has not been prejudicial to the right of submission by the public.

At most, refusal based on inadequate public notification or a development application not being duly made may force the applicant to re-advertise or to re-lodge the development application. However it may not finally determine the application. Of greater weight are decision notices where the grounds of refusal are founded on relevant planning grounds.

Relevant planning grounds

The Courts have recognised a number of relevant planning grounds that would support a refusal of a development application:

- *Impact on amenity* – The single most important planning ground that would support a refusal is the impact of a development on the amenity of an area. This involves a two part test:
  - first the existing and future amenity of an area must be established by reference to factors such as:
    - the perceptions of residents of the area; and
    - the development that is envisaged for the area by the planning scheme; and the context of the area, for example whether it is a busy road or a cul-de-sac.
  - second the effect of the development on the established amenity must be judged by an objective standard of an ordinary person not affected by any special sensitivity (see *Everson v Beaudesert Shire Council* [1992] QPLR 129).
- *Absence of need* – An additional planning ground that would support a refusal is the absence of need. This will occur if existing or planned facilities are jeopardised by a proposed development and that detriment would not be made good by the proposed development (see *Kentucky Fried Chicken v Gantidis* [1979] 140 CLR 675).
- *Deleterious effect on the environment* – A further planning ground that would support a refusal is where the proposed development would cause a deleterious effect to the environment which is defined comprehensively in IPA to include everything that is living and dead (see *Hilcorp Pty Ltd v Logan City Council* [1993] QPLR 199).
- *Unlawful development* – A further ground of refusal is where the development application involves what would be an illegal activity such as where a brothel has been disguised as another use (see *Dennis v Parramatta City Council* [1981] 43 LGRA 71).
- *Non-Derogation or Coty principle* – A further factor supporting refusal and one which will become increasingly relevant with the introduction of IPA planning schemes is the non-derogation principle. In essence, this principle states that an assessment manager should where a planning scheme or an amendment to a planning scheme is in the process of approval avoid as far as possible giving a judgment or establishing any principle that would render more difficult the ultimate decision as to the form the planning scheme should take. That is a development application should not be approved if the development approval would cut across the intent of the new planning scheme (see *Coty (England) Pty Ltd v Sydney City Council* [1957] 2 LGRA 117; *Colonial Sugar Refining Co Ltd v Sydney City Council* [1959] 4 LGRA 1).

There are cases, however, where the non-derogation principle may have no application:

- If the planning scheme is impossible to implement (see *Samuel Wood v Sydney City Council* 6 LGRA 288).
- Where the proposed development application would render the land sterile.
- Where the assessment manager has previously permitted substantial encroachments onto the policy that is set out in the proposed scheme.
- Where the proposed planning scheme has not progressed very far towards approval (ie public notice has not been given of the planning scheme).

Factors that are not relevant planning grounds

The Courts have also identified a number of factors that are not relevant planning grounds to support a refusal of a development application:

- The requirement to obtain subsequent development approvals from other public agencies is not relevant (see *Walker v Noosa Shire Council* [1983] 2 QPLR 86).
- The fact that an existing development is unlawful is not relevant as it is the assessment manager's role to assess a development application rather than determine the validity of an existing development. That is an assessment manager must look forwards not backwards (see *Jenner v Maroochy Shire Council* [1993] QPLR 285).
- Social and moral issues are not relevant unless they have an amenity impact such as is the case with unlawful or offensive behaviour (see *Kelly v Toowoomba City Council* [1995] QPLR 3).
- It is not relevant that a development approval would mean that the assessment manager is unable to resist pressure for similar developments in the same area (see *Gore v Brisbane City Council* [1996] QPELR 276).
- A reduction in property values is not relevant (see *West Coast Developments Pty Ltd v Caboolture Shire Council* [1990] QPLR 404).
- The cost of affordable housing is not relevant (see *Cobar Investments Pty Ltd v Douglas Shire Council* [1989] QPLR 152).
- The cost burden of contributions to administrative and sinking funds in a group housing development is not relevant (see *Cobar Investments Pty Ltd v Douglas Shire Council* [1989] QPLR 152).

- The financial circumstances of an applicant or the effect of reasonable and relevant conditions on the profitability of a development is not relevant (see *Ponton v Brisbane City Council* [1970] 25 LGRA 73).
- The fact that land is listed on the Register of the National Estates is not relevant as it does not of itself prejudice any lawful use that may be made of the land that has been listed (see *Leisuremark (Aust) Pty Ltd v Noosa Shire Council* [1988] QPLR 132).
- The political implications of having to sanction an unpopular use is not relevant (cf. *First Steps Childrens Centre v Gold Coast City Council* [1992] QPLR 4 where the political implications of having to undertake enforcement action against a popular community use was not a ground for approving a development application).
- The existence of petitions and standard form letters is not relevant (see *Aldred v Beaudesert Shire Council* [1978] 37 LGERA 404; *Allen v Atherton Shire Council* [1977] 4 QL 266; *Wilson v Logan City Council* [1990] QPLR 197).
- Overly emotive objections by submitters are not relevant (see *Mackay Port Authority v Mackay City Council* [1992] QPLR 125). Neither are objections by submitters who have not inspected the development application (See *Good Mix Concrete Pty Ltd v Brisbane City Council* [1985] QPLR 38).
- The sheer volume of objections is also not a conclusive ground of refusal (see *Indooroopilly Golf Club v Brisbane City Council* [1981] 7 QL 287; *Baglow v Livingstone Shire Council* [1983] QPLR 352).
- Grounds of refusal directed to notions of philosophy rather than the terms of the local government's planning scheme are also not relevant (see *Anderson v Mareeba Shire Council* [1998] QPELR 355).

Refusal contrary to officer's advice

Before turning to the drafting of IDAS documents it is important to make one very practical point. A refusal which is not supported by the assessment manager's technical officers or consultants is unlikely to be upheld by a court unless it can be demonstrated that the advice of the technical officers or consultants is manifestly wrong. An assessment manager and not its officers or consultants has the responsibility to make a decision. However if an assessment manager rejects the unanimous advice of its technical officers or consultants without giving good planning reasons it is in breach of its public duty (see *Nagy v Cairns City Council* [1981] QLPR 148; *Ingram v Maroochy Shire Council* [1983] QPLR 139; *Duncanson & Brittain (Quarries) Pty Ltd v Brisbane City Council* [1986] QPLR 330; *Robinson v Brisbane City Council* [1987] QPLR 71). In such cases the assessment manager should give reasons for its decision to act contrary to the advice of its technical officers or consultants in fairness to both the applicant and its own officers and consultants (see *Duncanson & Brittain (Quarries) Pty Ltd v Brisbane City Council* [1986] QPLR 330).

Structure of a document

Plan before you draft

Before an assessment manager commences to draft an IDAS document the whole design of the document should be conceived and planned.

When planning the structure of a document regard should be had to:

- the reader of the document (ie the audience); and
- the purpose of the document.

The structure of a document can be tested by asking whether it is easy to find things in the content and move from one thing to another.

Who is the reader of the document?

One of the fundamental guidelines of good drafting is to consider the reader of the document. It is not enough for a document to be technically correct. The document must also be able to be understood by all its likely readers, including the applicant, owners (existing and future) and most importantly the courts.

Whilst the applicant is the most important and immediate audience, a document should be drafted for the least sophisticated audience, that is, an ordinary person in the community.

What is the purpose of the document?

Similarly to considering the reader, thinking about the purpose of a document will also help a draftsperson to determine the content, layout and tone. Readers do not want irrelevant information. It hides the most important information. Once the purpose of the document is identified, this should be made clear to the reader, either in the title of the document, the introduction of the document, or by some other form, as part of the document.

Useful guidelines

When planning the structure of a document the following guidelines should be adopted:

- put the most important information first and the less important information later;

- the most important information is determined by the audience and the purpose of the document;
- place the broadly applicable before the narrowly applicable;
- place the general before the specific;
- place rules before exceptions;
- place principles before procedural detail;
- group similar items or related material together and arrange ideas for different subject matter in a parallel order; and
- follow the chronological order of events.

Sentence structure

The following guidelines should also be followed in relation to the structure of sentences:

- a sentence should deal with only one idea;
- an approval condition should not contain more than one sentence;
- an ideal average sentence length is between 20 and 25 words;
- an approval condition which is noticeably long should be broken up into separate approval conditions; and
- a paragraph which continues for more than 5 lines of unbroken text should be broken up into separate sentences or breaks in the text such as sub-paragraphs should be introduced.

Content of a document

Parts of a legal obligation

There are potentially four parts to a legal obligation, namely:

- *The legal subject*: The legal person on whom the legal obligation is imposed;
- *The legal action*: The action which expresses the legal obligation;
- *The legal case*: The circumstances where the legal obligation applies;
- *The legal condition*: The action which causes the legal obligation to apply.

A document must include the first and second parts. The third and fourth parts are not always present.

For example:

Legal subject:	an applicant
Legal action:	shall pay all fees, rates, interest and other charges levied on the land
Legal case:	where an application has been made to the local government
Legal condition:	the fees, rates, interest and other charges levied on the land have not been paid

Often all four parts are found in one sentence. This can make the sentence long and complex, particularly where there are many legal conditions.

Traditionally legal conditions are placed first in a sentence. This is the ***if...then*** structure. This is fine if there is only one condition. However if there are many conditions then this creates a problem for the reader. They must keep all these conditions in mind before they reach the core of the provision, what the provision is really about. This can be avoided by placing the legal conditions after the legal action.

For example:

Instead of:	If fees, rates, interest and other charges levied on the land remain unpaid and the applicant makes an application for the release of a plan of subdivision the applicant shall pay the fees, rates, interest and other charges levied on the land
Write:	The applicant shall pay the fees, rates, interest and other charges levied on the land if: • the applicant makes an application for the release of a plan of subdivision; and • the fees, rates, interest and other charges remain unpaid.

Legal subject

The subject of a legal obligation must be a legal person. This is to ensure that the identity of the person who is to take the legal action is never in doubt.

A Draft Condition states as follows:

> "*All fees, rates, interest and other charges levied on the land shall be paid in accordance with the rate at the time of payment prior to release of the plan of subdivision*".

No legal subject is specified in the Draft Condition. It is unclear which person is to take the legal action (that is pay the money):

- the applicant;
- the developer;
- the owner.

Development approvals attach to the land and are binding on the owner of the land. Furthermore, applicant is defined in the *Integrated Planning Act 1997* to include owner. Accordingly, the legal subject should, as a general rule, be the applicant for the development approval.

The Draft Condition could be redrafted as follows:

> "*All fees, rates, interest and other charges levied on the land shall be paid by the applicant in accordance with the rate at the time of payment prior to release of the plan of subdivision*".

Legal action

The legal obligation must specify what the legal subject is enabled or commanded to do. A legal obligation must contain a predicate.

A legal obligation should contain a predicate which satisfies as many of the following guidelines as possible:

- it contains a verb – that is the action to be taken;
- the verb is finite – that is the action is limited in time;
- the verb is expressed in the active voice as opposed to the passive voice so as not to obscure the legal subject who is identified to take the legal action.

For example:

> **Passive voice:** "*The money shall be paid by the applicant*"
>
> **Active voice:** *"The applicant shall pay the money"*

- it should, as often as possible, contain an object. For example, money is the object used in the active/passive voice examples used above;
- it must distinguish whether the legal action is mandatory or discretionary.

For example:

> If mandatory the word "***shall***" should be used.
>
> If discretionary the words "***may at the applicant's discretion***" should be used.

The Draft Condition could therefore be redrafted as follows:

> "*The applicant shall prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment all, fees, rates, interest and other charges levied on the land*".

The elements of the Draft Condition as redrafted are as follows:

- legal subject – "*The applicant*";
- legal action – "shall prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment all fees, rates, interest and other charges levied on the land";
- a mandatory legal action – "*shall*".

The legal action in the Draft Condition as redrafted comprises:

- a verb – "*pay*";
- a finite verb – "prior to the release of the plan of subdivision";
- an active verb – "*the applicant shall*";
- an object – "fees, rates, interest and other charges levied on the land".

The legal case

A legal obligation should specify the circumstances in respect of which or the occasion on which the legal obligation is to take effect. This is generally known as the legal case.

The legal case is generally introduced by the word "*where*" for those circumstances which may be repeated and the word "*when*" for those circumstances which will happen only once.

The Draft Condition does not specify the land. In this example the Draft Condition only takes effect where an application has been made to the local government for the release of the plan of subdivision. However this has not been stated although it is implied.

As the Draft Condition is currently drafted a person could one day after receiving the development approval pay the fees, rates, interest and other charges that were outstanding on that day and they would have satisfied the Draft Condition even if other fees, rates, interest and other charges became payable after the date of the payment.

The Draft Condition could therefore be redrafted as follows to include the legal case:

> "*The applicant shall prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment all, fees, rates, interest and other charges levied on the land when an application has been made to the local government for the release of the plan of subdivision*".

The legal condition

A legal obligation must specify, if appropriate, what is to be done for the legal obligation to become operative.

This is generally known as the legal condition. A legal condition is normally introduced by the word "*if*". Where there is both a case and a condition limiting the application of the legal action the words "*where/when*" or "*if*" may be used interchangeably.

The Draft Condition does not specify the legal condition that must be satisfied before it operates. In this example the Draft Condition will operate where at the date of an application to the local government for the release of a plan of subdivision there are outstanding fees, rates, interest and other charges levied on the land.

As the Draft Condition is currently drafted the local government could call on a person to pay the fees, rates, interest and other charges levied on the land notwithstanding that they have already been paid or have been levied but not yet delivered to the person.

The Draft Condition could therefore be redrafted as follows to include the legal condition:

> *"The applicant shall prior to the release of the plan of subdivision pay in accordance with the. rate at the time of payment all, fees, rates, interest and other charges levied on the land where:*
>
> - *an application has been made to the local government for the release of the plan of subdivision; and*
> - *the fees, rates, interest and other charges levied on the land have not been paid."*

Order of parts

There is no set rule as to how the parts should be ordered. However it is recommended that a legal obligation should wherever possible be structured as follows:

- legal subject;
- legal action;
- legal case;
- legal condition.

Language of a document

Plain language

Plain language is commonly considered to be the best technique of effective written communication in legal documents. It is the technique used for the drafting of Acts of the Queensland Parliament.

Plain language involves the deliberate use of simplicity to achieve clear, effective communication.

A document should be as simple as possible. The ordinary person in the community should be regarded as the ultimate user of a document. A document that is easy to understand is less likely to result in dispute.

The plain language technique does not involve the simplification of a document to the point it becomes legally uncertain. In particular, care needs to be taken that legal uncertainty is not created when dispensing with terms having established meanings for users of a document.

In drafting a document, the objective should be to produce a document that is both:

- easily read and understood; and
- legally effective to achieve the desired policy objectives.

In fact, a document may involve a balancing of the outcomes of simplicity and legal uncertainty.

Use the present tense

Sometimes assessment managers use the future tense when they draft a document. Unnecessarily using the future tense makes the language complicated and difficult to understand.

For example:

Instead of:	"*Council*" shall mean Bananaland Shire Council.
Write:	"Council" means Bananaland Shire Council.

Use the active not passive voice.

The next two sentences show the difference between the active and the passive voice.

For example:

Active voice:	The applicant shall pay the money to the Council.
Passive voice:	The money shall be paid to the Council.

The structure is simple.

- *Active voice*: Subject (the actor), active verb, object (the thing being acted upon).
- *Passive voice*: Object, complex verb, subject.

Writing in the active voice is livelier, more personal and it is generally easier to understand. The passive voice usually takes more words and is less direct.

There is another disadvantage of the passive voice. Often the passive voice is used in a reduced form and does not identify the actor.

For example:

Passive voice:	Written notice must be given to the owner.
Active voice:	The local government must give the owner written notice.

Avoid false, double and layered negatives

Where an idea can be expressed either positively or negatively, it is preferable to express it positively. Negative statements force the reader to work out what they can do. Generally positive statements are easier to understand. Avoid multiple negatives.

For example:

Instead of:	Not only the applicant, but also the owner must sign the infrastructure agreement.
Write:	The applicant and the owner must both sign the deed.
Instead of:	You must not omit the certificate.
Write:	You must include the certificate.
Instead of:	It is not easy to read something that is not written in a positive way.
Write:	It is easy to read something written in a positive way.

The constructions ***may only... if*** or ***may only... when*** are easier to understand than a negative and "*unless*".

For example:

Instead of:	The, applicant cannot assign its obligations under the infrastructure agreement to another person unless the Council has consented to the assignment.
Write:	The applicant may only assign its obligations under the infrastructure agreement to another person if they have the Council's consent.

Use everyday words

Use words that the reader will understand. The following guidelines should be followed:

- *Technical words* – Words that are genuine terms of art or technical terms must be used appropriately. These words have precise meanings and there is often no convenient substitute. They are words that have an irreducible core of legal meaning. Technical words should be used when the word:
  - is the only correct term, for example, plan of subdivision;
  - is a useful shorthand for a complex idea, for example, perjury;
  - is one that the reader will come across later and you want to explain.

- If a technical word must be used:
  - highlight the term by using inverted commas;
  - explain the term when it is first used in as simple language as possible.
- *Acronyms* – avoid acronyms, unless the acronym is in everyday use.
- *Out-dated words* – use everyday words rather than out-dated words. For example, use "*the*" rather than "*aforementioned*".

For example:

> *"(1) If a person applies for a licence and intends to use the licence for a purpose to which section 10 applies, the person must keep a copy of the licence at any premises where the person is using the licence for the purpose*."

- *Jargon* – avoid industry jargon and don't create new jargon.
- *Non-English words* – avoid using Latin or French words unless they have become part of the English language.

Gender neutral language

Documents should be drafted in gender neutral language. Words that are, or could be taken to be gender specific should not be used unless the document is intended only to refer to a specific gender.

However, writing gender neutral English can be difficult. One way to do this is to always use **he** or **she**, **his** or **her**. Never use **s/he** or **he/she**. However this can be very clumsy. There are some other ways.

Repeat the noun

For example:

> "*If the applicant wants to develop the site, the applicant must....*"

Drop the pronoun

For example:

Instead of:	Upon obtaining her consent.
Write:	Upon obtaining the consent of….

Use titles or descriptions of occupations which apply equally to men and women

For example:

Not Gender Neutral	Gender Neutral
alderman	councillor
spokesman	spokesperson
policeman	police officer
workman	worker
foreman	supervisor
fireman	firefighter
barman	bartender
chairman	chairperson/chair

Use strong verbs

For example:

Instead of:	If the applicant makes his payments by…
Write:	If the applicant pays by…

Use the plural

- It is now common to use "*they*" with a singular noun. This usage is recognised by the Oxford English Dictionary that quotes its usage dating from the 14th century. Fowler's "*Modern English Usage*" acknowledges its use, but comments that "*grammarians*" do not like it.

For example:

> An applicant may renew the licence if they give the Council notice.

Alternatively, it may sometimes be appropriate to draft the document in the plural.

Presentation of a document

Format and printing style

Format is about how each particular type of provision or part of a provision is presented on the page, for example, where a heading is located, how a document paragraph and subparagraph is set out.

Printing style is about how each character of a provision is printed, for example, what size, what style.

Together format and printing style control how text is presented on a page.

Furthermore the format and printing style of all documents such as development approvals made by a single assessment manager should be the same.

Presentation

The format and printing style of a document should be used to promote effective written communication.

The format and printing style of all documents such as development approvals should, as far as practicable, be the same as the format and printing style of Acts of the Queensland Parliament.

Conclusions

In summary then there are both legal and technical principles that need to be applied in the drafting of IDAS documents. The legal principles are relatively well known and applied. However, the technical drafting principles of structure, content, language and presentation are less well known and not well applied. There is an increasing need for the education of planners and other professionals involved in the IDAS process to be altered to take account of these drafting principles. In short, planners and other professionals need to be competent draftspersons as much of their professional output involves the written word.

This paper was presented at the Queensland Environmental Law Association seminar, April 2001.

The introduction of the Brisbane City Plan 2000: How it impacts local plans in the development assessment process

Ian Wright

This article discusses the introduction of the *Brisbane City Plan 2000* with particular focus on local plans. The article compares the structure of the City Plan and local plans, considers the role of local plans in the development assessment process, outlines how local plans are to be interpreted and considers how various development processes have been transitioned to local plans under the City Plan

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Local plans under the City Plan 2000 – some legal issues

Introduction

The *Brisbane City Plan 2000* (**City Plan**) commenced on 30 October 2000. It is the fourth planning scheme prepared by the Brisbane City Council. The previous town plans (as they were then called) that were adopted in 1965, 1978 and 1987 were considered both evolutionary and revolutionary in their time. The City Plan is no different.

The City Plan was prepared in the context of the *Integrated Planning Act 1997* which introduced a new statutory planning regime for which there were no precedents in terms of the preparation of planning schemes.

The draftspersons of the City Plan are to be commended for the manner in which they have implemented the task of preparing a planning scheme in respect of a planning scheme area:

- that is managed by the largest local government in the country;
- that houses the capital city of one of the fastest growing states in the country; and
- that is part of the fastest growing region in the country.

It is not a simple task to draft a piece of legislation (and that is what the City Plan is) that is over 1,000 pages long whilst at the same time ensuring that it is internally consistent, produces good planning outcomes, addresses the positions of sectoral interests and complies with new planning legislation that is untested. All this in a politically charged environment.

The purpose of this paper is to consider only one component of the City Plan, namely, local plans. I will focus on four themes:

- First, I will compare the structure of the City Plan in general and the local plans in particular with that of the Brisbane Town Plan to demonstrate that the structure of the City Plan is similar to that of the Brisbane Town Plan except for changes in content and format necessitated by the provisions of the *Integrated Planning Act 1997*.
- Second, I will consider the role of local plans under the City Plan in the development assessment process.
- Third, I will outline the principles that should be adopted in interpreting local plans.
- Fourth, I will consider the manner in which the development expectations and development entitlements under local area outline plans and development control plans under the Brisbane Town Plan have been transitioned to local plans under the City Plan.

Structure of City Plan

In structural terms, the City Plan is similar to the Brisbane Town Plan although it has been drafted to accord with the provisions of the *Integrated Planning Act 1997*. The respective components of the Brisbane Town Plan required by the previous planning legislation, the *Local Government (Planning and Environment) Act 1990* (**PEA**), have been reviewed and rebadged in the City Plan.

Strategic planning provisions

The strategic planning provisions and structure maps of the Brisbane Town Plan have been replaced with a strategic plan and maps under the City Plan.[115] The focus statements, direction statements and elements of the Brisbane Town Plan have been replaced by desired environmental outcomes, strategies and elements under the City Plan. In general terms, the structure of the strategic plan provisions under both the Brisbane Town Plan and the City Plan is similar.

Zoning provisions

The zoning provisions and maps of the Brisbane Town Plan have been replaced with area provisions and scheme maps.[116] The intent of zones and tables of development of the Brisbane Town Plan have been replaced by an area intent, area wide desired environmental outcomes and assessment tables. Once again the structure of the zoning provisions under the Brisbane Town Plan and the City Plan is similar.

Development standard provisions

The development standard provisions under the Brisbane Town Plan have been replaced by area applicable code provisions.[117] Unlike the development standard provisions in the Brisbane Town Plan which could prohibit development (through the adoption of mandatory as opposed to discretionary development standards) the area applicable code provisions cannot prohibit development.[118] They can only regulate development.

As such the area applicable code provisions adopt a performance-based approach whereby development is required to comply with the acceptable solutions or the performance criteria and purpose of the code.

In short, the structure and legal effect of the area applicable code provisions under the City Plan are different from the development standards under the Brisbane Town Plan. These changes have been necessitated as a result of the provisions of the *Integrated Planning Act 1997* which prevents the City Plan from prohibiting development.

Planning scheme policies

The planning scheme policies under the Brisbane Town Plan which specified relaxable development standards have been embodied in the area applicable codes provisions.[119] The reason for this is that under the *Integrated Planning Act 1997* planning scheme policies cannot regulate or prohibit development.[120] Accordingly, the planning scheme policies under the City Plan are limited to contributions for sewerage, water supply and traffic infrastructure which are specifically provided for under the *Integrated Planning Act 1997*.[121]

Local plans

Finally, the local area outline plans contained in the strategic plan and the various development control plans under the Brisbane Town Plan have been replaced by local plans under the City Plan.

Under the Brisbane Town Plan, local area outline plans functioned as strategic planning documents whereas development control plans replaced the tables of development in the zoning provisions with supplementary tables of development. The transitioning of these local area outline plans and development control plans into local plans under the City Plan means that local plans fall into two categories: those that simply complement the strategic plan by expressing future planning directions for districts, and those that go further by specifying assessment tables and applicable codes that override the assessment tables and applicable codes in the area provisions.

In general terms the structure of the local plan provisions under the Brisbane Town Plan and City Plan is similar.

Summary

In summary then the structure of the City Plan is similar to that of the Brisbane Town Plan with any significant changes in content and format being necessitated to accommodate the legislative requirements of the *Integrated Planning Act 1997*.

Turning then to the second of my themes, the role of local plans in the development assessment process.

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115 cf section 2.4 of the *Local Government (Planning and Environment) Act 1990*.
116 cf sections 2.2 and 2.3 of the *Local Government (Planning and Environment) Act 1990*.
117 cf section 2.2 of the *Local Government (Planning and Environment) Act 1990*.
118 See section 2.1.23(2) of the *Integrated Planning Act 1997*.
119 cf section 1A.4 of the *Local Government (Planning and Environment) Act 1990*.
120 See section 2.1.23(4) of the *Integrated Planning Act 1997*.
121 See section 6.1.31 of the *Integrated Planning Act 1997*.

Role of local plans

As I have indicated earlier, local plans fall into those that complement the strategic plan by specifying a future direction for a particular district and those that go further by specifying assessment tables and applicable codes that override the area assessment tables and applicable codes in the area provisions of the City Plan. Therefore, in order to determine the development assessment process for a particular development, the local plan section of the City Plan should be reviewed to determine if there is a relevant local plan that specifies assessment tables and applicable codes for the relevant land.

Local plans with assessment tables and applicable codes

If this is the case the assessment tables and applicable codes should be used to determine the development assessment process. Regard should then be had to the area provisions to identify the area within which the site is located and then to the strategic planning provisions to identify the element which is applicable to the site. This will also determine the area-wide desired environmental outcomes in the area provisions and the city-wide desired environmental outcomes in the strategic planning provisions that are applicable to the development.

In determining whether the achievement of these desired environmental outcomes is compromised by the proposed development regard should then be had to any relevant development principles and development intents in the local plans which specify locally focused desired land use and built form outcomes for the relevant district.

Local plans with no assessment tables and applicable codes

However, if the local plan does not contain assessment tables and applicable codes a different approval should be adopted. Regard should be had to the area provisions to identify the area within which the site is located. This will determine the assessment tables and applicable codes that should be used to determine the development assessment process as well as the area-wide desired environmental outcomes. Regard should then be had to the strategic plan to identify the element and the associated city-wide desired environmental outcomes that are applicable to the site.

The proposed development should then be assessed against the identified area-wide desired environmental outcomes and the city-wide desired environmental outcomes to determine if the proposed development will compromise the achievement of the desired environmental outcomes. In making this assessment regard should be had to any relevant development principles and precinct intents in the local plans which specify locally focused desired land uses and built form outcomes for the relevant district.

Development assessment process

Therefore in summary, local plans perform two important functions in the development assessment process.

First, they may determine the level of assessment through specifying assessment tables and applicable codes that will override the assessment tables and applicable codes in the area provisions. Second, they contain development principles and precinct intents that will specify locally focused desired land uses and built form outcomes for the relevant district that will clarify whether the achievement of the area-wide desired environmental outcomes in the area provisions and the city-wide desired environmental outcomes in the strategic plan are not compromised by the proposed development and as such must be refused.

Turning then to my third theme, that is, the principles that should be adopted in the interpretation of local plans under the City Plan.

Interpretation of local plans

Approach interpretation

The interpretation of local plans in particular and the City Plan in general will be influenced by a number of important considerations that have been recognised by the Courts.

First, planning schemes are drafted largely by non-lawyers and are administered largely by non-lawyers.[122] Accordingly, it is acknowledged by the Courts that planning documents are not drawn with the precision of Acts of Parliament.[123]

Secondly, planning schemes are intended to be put into the hands of the ordinary citizen to be acted upon by those citizens at least in the first instance without technical assistance.[124] Accordingly, where planning schemes use terms of common parlance they should be given their ordinary meaning rather than a technical meaning.

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122 *Pacific Seven Pty Ltd v The City of Sandringham* [1982] VR 157 at 162.
123 *Degree v Brisbane City Council* [1998] QPLR 287.
124 *Leichhardt Municipal Council v Daniel Callaghan Pty Ltd* [1981] 46 LGRA 29 at 31.

Thirdly, planning schemes are intended to be practical in their application and it is intended that they should work.[125] Accordingly, Courts will adopt a common sense approach which seems to make the most sense out of planning scheme provisions which otherwise may be contradictory or obscure.[126]

Whilst these matters are important considerations which underpin the approach of the Courts to the interpretation of planning schemes, the actual process of interpreting a local plan will have more to do with the type of local plan that is being interpreted.

As I have stated earlier, local plans fall into two categories. Firstly, those that complement the strategic plan by specifying locally focused desired land use and built form outcomes through development principles and precincts intents. Secondly, those that complement the area provisions by specifying supplementary assessment tables and applicable codes that override the assessment tables and applicable codes in the area provisions.

Interpretation of local plans that affect lawful use rights

Dealing with the second category of local plans first. The local plans that contain supplementary assessment tables and applicable codes clearly confer lawful use rights. As such, these provisions will be interpreted with some rigidity to reflect the fact that the development entitlements of land owners are being conferred, removed or altered by the local plans.[127]

Interpretation of local plans that do not affect lawful use rights

However, those local plans that only specify development precincts and precinct intents that support and clarify the area-wide desired environmental outcomes in the area provisions and the city-wide desired environmental outcomes in the strategic plan will not be interpreted with the same rigidity as those local plans that affect lawful use rights.[128]

Local plans of this type set out broad desired outcomes or expectations for the relevant district. As such, these local plans are concerned primarily with intentions for the future, not lawful use rights.[129]

This has a number of consequences for the way in which local plans of this type should be interpreted.

First, local plans of this type are not inflexible and as such should be considered to provide guidelines for determining whether a development application should be approved.[130]

Second, local plans of this type should not be read too narrowly. They should be read broadly, rather than pedantically or too literally.[131]

Thirdly, not every principle or outcome in these types of local plans has to be met before a development may be approved. The failure to comply with a principle or outcome in these types of local plans should not be considered fatal to the development. However, it should be highly relevant in deciding the merits of the development application.[132]

Fourthly, the principles and outcomes in these types of local plans should not be interpreted as absolute requirements even if they are stated with a degree of particularity.[133]

Finally, the weight which should be given to the principles and outcomes in these local plans should be determined by having regard to the reason behind the relevant provision. That is, the evil that the provision seeks to avoid.[134] As a result, the development principles and precinct interests in local plans will only be determinative of a development application in very rare circumstances.[135] That is, where the evil is great.

Turning then to the last of my themes, namely, the manner in which development expectations under the local area outline plans and the development entitlements under development control plans in the Brisbane Town Plan have been transitioned to local plans under the City Plan.

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125 *Shire of Perth v O'Keefe* [1964] 110 CLR 529.

126 *Brown v Idofill Pty Ltd* [1987] 64 LGRA 218 at 227; *Tainui Pty Ltd v Brown* [1988] 65 LGRA 22 at 27; *Phil Fletcher Planning & Investment Services Pty Ltd v Brisbane City Council* [1991] QPLR 16; *ZW Pty Ltd v Peter Hughes & Partners Pty Ltd* [1992] I QDR 352; *Yu Feng Pty Ltd v Maroochy Shire Council* [1996] 92 LGERA 41.

127 *Kriecbergs Developments Pty Ltd v Logan City Council*, LGA No. 227 of 1990; *Douglas Shire Council v Fabcot Pty Ltd* [1999] 103 LGERA 195 at 204.

128 *Kriecbergs Developments Pty Ltd v Logan City Council*, LGA No. 227 of 1990.

129 *Lewiac Pty Ltd v Gold Coast City Council* [1994] 83 LGERA 224 at 230; *Fitzgibbon's Hotels Pty Ltd v Logan City Council* [1997] QPELR 208; *Douglas Shire Council v Fabcot Pty Ltd* [1999] 103 LGERA 195; *Harburg Investments Pty Ltd v Brisbane City Council* [2000] QPEC 32; *Body Corporate "Greatwood" CTS 19855 v Maroochy Shire Council* [2001] QPEC 3.

130 *Evans v Caboolture Shire Council* [1995] QPLR 28; *Craig v Brisbane City Council* [1998] QPLR 281; *MEPC Australia Limited v Westfield Limited* [1998] 100 LGERA 204; *Degree v Brisbane City Council* [1998] QPLR 287; *Harburg Investments Pty Ltd v Brisbane City Council* [2000] QPEC 32; *Queensland Investment Corporation Pty Ltd v Toowoomba City Council* [2000] QPEC 36.

131 *Yu Feng Pty Ltd v Maroochy Shire Council* [1996] 92 LGERA 41; *Ecovale v Gold Coast City Council* [1997] QPLR 344; *Body Corporate "Greatwood" CTS 19855 v Maroochy Shire Council* [2001] QPEC 3.

132 *Lewiac Pty Ltd v Gold Coast City Council* [1994] 83 LGERA 224; *Comiskey v Pine Rivers Shire Council* [1996] QPLR 158; *Fitzgibbon's Hotels Pty Ltd v Logan City Council* [1997] QPELR 208.

133 *Lewiac Pty Ltd v Gold Coast City Council* [1994] 83 LGERA 224; *Coral Sea Developments Pty Ltd v Cairns City Council* [2000] QPEC 13; *Fortier Pty Ltd v Noosa Shire Council* [2000] QPEC 64.

134 *Evans v Caboolture Shire Council* [1995] QPLR 28.

135 *Fortier Pty Ltd v Noosa Shire Council* [2000] QPEC 64.

Transitional provisions

As I have stated earlier, the local area outline plans contained in the strategic plan and the development control plans under the superseded Brisbane Town Plan were transitioned to local plans under the City Plan. This is one of the reasons why the local plans fall into two categories: those that are strategic in nature similar to the former local area outline plans and those that confer lawful use rights similar to the former development control plans.

In general terms the council has been successful in transitioning the development entitlements under former development control plans and the development expectations under the former local area outline plans into local plans under the City Plan.

However, where the City Plan has adversely affected development entitlements that were conferred by former development control plans or development expectations that were conferred by former local area outline plans, a development application can be lodged under the *Integrated Planning Act 1997* prior to 30 October 2002 to enable the development to be assessed under the now superseded Brisbane Town Plan.

If the development entitlements or development expectations that were afforded by the superseded Brisbane Town Plan are affected by council's determination of that development application then a claim for compensation can be made for the resulting loss of yield.[136]

However, whilst compensation may be claimable for any loss of development entitlements or development expectations occasioned by the City Plan, no compensation is payable in respect of changes occasioned to development entitlements or development expectations by State legislation.

Of particular concern is the *Vegetation Management Act 1999* which commenced operation on 15 September 2000, some 45 days before the commencement of the City Plan on 30 October 2000. The *Vegetation Management Act 1999* amended the *Integrated Planning Act 1997* by making the clearing of native vegetation on freehold land operational works for the purposes of the *Integrated Planning Act 1997* and declaring those operational works to be assessable development thereby requiring a development permit in order to remove vegetation on freehold land.[137]

The City Plan does not regulate the clearing of vegetation, rather leaving this matter to Chapter 22 (Vegetation Protection), of council's local laws. This local law requires a permit to clear any vegetation the subject of a vegetation protection order. This permit is granted outside of the integrated development assessment system under the *Integrated Planning Act 1997*.[138]

The *Vegetation Management Act 1999* does provide transitional provisions which exempt from the operation of the Act land which is included in development control plans and zones under transitional planning schemes such as the particular development zone previously existing under the Brisbane Town Plan.[139]

Unfortunately, these provisions do not extend to local plans under IPA planning schemes such as the City Plan. Therefore, whilst land included in a development control plan under the superseded Brisbane Town Plan may have been protected from the operation of the *Vegetation Management Act 1999*, land included in a local plan under the current City Plan is not.

This is undoubtedly a legislative oversight on the part of the State government which will significantly affect the development entitlements and development expectations of some landowners affected by local plans under the City Plan.

Furthermore, the loss of these development expectations and development entitlements is not compensatable. Accordingly, it is incumbent upon the State government to address this anomaly in the near future.

Conclusions

In conclusion, I would like to return to my initial observation that the City Plan and the local plans that have been prepared thereunder are both evolutionary and revolutionary. They are evolutionary in that they continue the current direction of planning established under the superseded Brisbane Town Plan. They are however revolutionary in terms of the changes in content, formatting and structure that has been necessitated by the *Integrated Planning Act 1997*.

In my opinion it is highly questionable whether the changes in content, formatting and structure necessitated by the *Integrated Planning Act 1997* will result in planning outcomes that are markedly different to those that would have been achieved under the superseded Brisbane Town Plan.

What I can say is that the *Integrated Planning Act 1997*, and the planning schemes made thereunder such as the City Plan, will contribute significantly to the technical development of the Queensland planning and property development professions and it is likely that the continued technical development of both these professions will lead to better planning outcomes for Brisbane City and hopefully for Queensland as a whole.

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136 See section 5.4.2 of the *Integrated Planning Act 1997*.
137 See section 1.3.5 and Item 34 of Schedule 8 of the *Integrated Planning Act 1997*.
138 See section 854 of the *Local Government Act 1993*.
139 See section 74 of the *Vegetation Management Act 1999*.

Local plans under the Brisbane City Plan 2000 – Some legal issues

Ian Wright

This article discusses the changes to local plans under the *Brisbane City Plan 2000*. It focuses on the Structure of the City Plan, the role of local plans, the interpretation of local plans and the transitional provisions regarding local plans

August 2001

Introduction

The *Brisbane City Plan 2000* (**City Plan**) commenced on 30 October 2000 and is the fourth planning scheme prepared by the Brisbane City Council. The previous town plans (as they were then called) adopted in 1965, 1978 and 1987 were considered both evolutionary and revolutionary in their time. The City Plan is no different.

The City Plan was prepared in the context of the *Integrated Planning Act 1997* (**IPA**) which introduced a new statutory planning regime for which there were no precedents in terms of the preparation of planning schemes.

Structure of City Plan

Structurally the City Plan is similar to the Brisbane Town Plan although it has been drafted to accord with the provisions of the IPA. The respective components of the Brisbane Town Plan required by the previous planning legislation the *Local Government (Planning and Environment) Act 1990* (**P&E Act**) have been reviewed and rebadged in the City Plan.

Strategic planning provisions

The strategic planning provisions and structure maps of the Brisbane Town Plan have been replaced with a strategic plan and maps under the City Plan.[140] Focus statements, direction statements and elements have been replaced by desired environmental outcomes, strategies and elements under the City Plan and in general terms, the structure of the strategic plan provisions under the Brisbane Town Plan and the City Plan have remained similar.

Zoning provisions

The zoning provisions and maps have been replaced with area provisions and scheme maps.[141] The intent of zones and tables of development of the Brisbane Town Plan have been replaced by an area intent, area wide desired environmental outcomes and assessment tables. Once again the structure of the zoning provisions under the Brisbane Town Plan and the City Plan is similar.

Development standard provisions

The development standard provisions under the Brisbane Town Plan have been replaced by area applicable code provisions.[142] Unlike the development standard provisions in the Brisbane Town Plan which could prohibit development (through the adoption of mandatory as opposed to discretionary development standards) the area applicable code provisions cannot prohibit development.[143] Development can only be regulated.

The area applicable code provisions adopt a performance based approach whereby development is required to comply with the acceptable solutions or the performance criteria and purpose of the code.

The structure and legal effect of the area applicable code provisions under the City Plan are different to the development standards under the Brisbane Town Plan. These changes have been necessitated as a result of the provisions of the IPA which prevent the City Plan from prohibiting development.

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140 *Local Government (Planning and Environment) Act 1990*, s 2.4.
141 Ibid ss 2.2 and 2.3.
142 Ibid s 2.2.
143 *Integrated Planning Act 1997*, s 2.1.23(2).

Planning scheme policies

As development cannot be prohibited the planning scheme policies under the Brisbane Town Plan which specified relaxable development standards have been embodied in the area applicable codes provisions.[144] The planning scheme policies under the City Plan are limited to contributions for sewerage, water supply and traffic infrastructure which are specifically provided for under the IPA.[145]

Local plans

The local area outline plans contained in the Strategic Plan and the various development control plans under the Brisbane Town Plan have been replaced by local plans under the City Plan.

Under the Brisbane Town Plan, local area outline plans functioned as strategic planning documents whereas development control plans replaced the tables of development in the zoning provisions with supplementary tables of development.

The transitioning of these local area outline plans and development control plans into local plans under the City Plan means that local plans fall into two categories: those that simply complement the strategic plan by expressing future planning directions for districts and those that go further by specifying assessment tables and applicable codes that override the assessment tables and applicable codes in the area provisions.

In general terms the structure of the local plan provisions under the Brisbane Town Plan and City Plan is similar.

Summary

The structure of the City Plan is similar to that of the Brisbane Town Plan with any significant changes in content and format being necessitated to accommodate the legislative requirements of the IPA.

Role of local plans

Local plans fall into those that complement the strategic plan by specifying a future direction for a particular district and those that go further by specifying assessment tables and applicable codes that override the area assessment tables and applicable codes in the area provisions of the City Plan.

In order to determine the development assessment process for a particular development, the local plan section of the City Plan should be reviewed to determine if there is a relevant local plan that specifies assessment tables and applicable codes for the relevant land.

Local plans with assessment tables and applicable codes

If this is the case the assessment tables and applicable codes should be used to determine the development assessment process. Regard should then be had to the area provisions to identify the area within which the site is located and then to the strategic planning provisions to identify the element which is applicable to the site. This will also determine the area wide desired environmental outcomes in the area provisions and the city wide desired environmental outcomes in the strategic planning provisions that are applicable to the development.

In determining whether the achievement of these desired environmental outcomes is compromised by the proposed development, regard should then be had to any relevant development principles and development intents in the local plans which specify locally focused desired land use and built form outcomes for the relevant district.

Local plans with no assessment tables and applicable codes

If the local plan does not contain assessment tables and applicable codes a different approval should be adopted. Regard should be had to the area provisions to identify the area within which the site is located. This will determine:

- the assessment tables and applicable codes that should be used to determine the development assessment process; and
- the area-wide desired environmental outcomes.

Regard should then be had to the strategic plan to identify the element and the associated city wide desired environmental outcomes that are applicable to the site.

The proposed development should then be assessed against the:

- identified area-wide desired environmental outcomes; and
- city-wide desired environmental outcomes,

to determine if the proposed development will compromise the achievement of the desired environmental outcomes.

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144 *Local Government (Planning and Environment) Act 1990*, s 1A.4.
145 *Integrated Planning Act 1997*, s 6.1.31.

In making this assessment regard should be had to:

- any relevant development principles;
- precinct intents in the local plans which specify locally focused desired land uses; and
- built form outcomes for the relevant district.

Development assessment process

Local plans perform two important functions in the development assessment process as they:

- may determine the level of assessment through specifying assessment tables and applicable codes that will override the assessment tables and applicable codes in the area provisions; and
- contain development principles and precinct intents that will specify locally focused desired land uses and built form outcomes for the relevant district that will clarify whether the achievement of the area wide desired environmental outcomes in the area provisions and the city wide desired environmental outcomes in the strategic plan are not compromised by the proposed development and as such must be refused.

Interpretation of local plans

Approach interpretation

The interpretation of local plans will be influenced by a number of important considerations that have been recognised by the Courts.

Planning schemes are drafted largely by non-lawyers and are administered largely by non-lawyers.[146] Accordingly, it is acknowledged by the Courts that planning documents are not drawn with the precision of Acts of Parliament.[147]

Planning schemes are intended to be put into the hands of the ordinary citizen to be acted upon by those citizens at least in the first instance without technical assistance.[148] Where planning schemes use terms of common parlance they should be given their ordinary meaning rather than a technical meaning.

Planning schemes are intended to be practical in their application and it is intended that they should work.[149] Courts will adopt a common sense approach which seems to make the most sense out of planning scheme provisions which otherwise may be contradictory or obscure.[150]

Whilst these matters are important considerations which underpin the approach of the Courts to the interpretation of planning schemes, the actual process of interpreting a local plan will have more to do with the type of local plan that is being interpreted.

Interpretation of local plans that affect lawful use rights

The local plans that contain supplementary assessment tables and applicable codes clearly confer lawful use rights. These provisions will be interpreted with some rigidity to reflect the fact that the development entitlements of land owners are being conferred, removed or altered by the local plans.[151]

Interpretation of local plans that do not affect lawful use rights

Local plans that only specify development precincts and precinct intents that support and clarify the area wide desired environmental outcomes in the area provisions and the city wide desired environmental outcomes in the strategic plan will not be interpreted with the same rigidity as those local plans that affect lawful use rights.[152]

Local plans of this type set out broad desired outcomes or expectations for the relevant district. These local plans are concerned primarily with intentions for the future, not lawful use rights.[153]

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146 *Pacific Seven Pty Ltd v The City of Sandringham* [1982] VR 157 at 162.
147 *Degree v Brisbane City Council* [1998] QPLR 287.
148 *Leichhardt Municipal Council v Daniel Callaghan Pty Ltd* [1981] 46 LGRA 29 at 31; *Shire of Perth v O'Keefe* [1964] 110 CLR 529.
149 *Shire of Perth v O'Keefe* [1964] 110 CLR 529.
150 *Brown v Idofill Pty Ltd* [1987] 64 LGRA 218 at 227; *Tainui Pty Ltd v Brown* [1988] 65 LGRA 22 at 27; *Phil Fletcher Planning & Investment Services Pty Ltd v Brisbane City Council* [1991] QPLR 16; *ZW Pty Ltd v Peter Hughes & Partners Pty Ltd* [1992] I QDR 352; *Yu Feng Pty Ltd v Maroochy Shire Council* [1996] 92 LGERA 41.
151 *Kriecbergs Developments Pty Ltd v Logan City Council*, LGA No. 227 of 1990; *Douglas Shire Council v Fabcot Pty Ltd* [1999] 103 LGERA 195 at 204.
152 *Kriecbergs Developments Pty Ltd v Logan City Council*, LGA No. 227 of 1990.
153 *Lewiac Pty Ltd v Gold Coast City Council* [1994] 83 LGERA 224 at 230; *Fitzgibbon's Hotels Pty Ltd v Logan City Council* [1997] QPELR 208; *Douglas Shire Council v Fabcot Pty Ltd* [1999] 103 LGERA 195; *Harburg Investments Pty Ltd v Brisbane City Council* [2000] QPEC 32; *Body Corporate "Greatwood" CTS 19855 v Maroochy Shire Council* [2001] QPEC 3.

This has a number of consequences for the way in which local plans of this type should be interpreted. These local plans:

- are not inflexible and should be considered to provide guidelines for determining whether a development application should be approved;[154]
- should not be read too narrowly. They should be read broadly, rather than pedantically or too literally;[155]
- do not require that every principle or outcome has to be met before a development may be approved. The failure to comply with a principle or outcome should not be considered fatal to the development but it should be highly relevant in deciding the merits of the development application;[156]
- state principles and outcomes which should not be interpreted as absolute requirements even if they are stated with a degree of particularity;[157]
- should reflect the appropriate weight given to principles and outcomes with regard to the reason behind the relevant provision being the evil that the provision seeks to avoid.[158] The development principles and precinct interests in local plans will only be determinative of a development application in very rare circumstances.[159] That is, where the evil is great.

Transitional provisions

The local area outline plans contained in the strategic plan and the development control plans under the superseded Brisbane Town Plan were transitioned to local plans under the City Plan.

This is one of the reasons why the local plans fall into two categories: those that are strategic in nature similar to the former local area outline plans and those that confer lawful use rights similar to the former development control plans.

The council has been successful in transitioning the development entitlements under former development control plans and the development expectations under the former local area outline plans into local plans under the City Plan.

Where the City Plan has adversely affected development entitlements that were conferred by former development control plans, or development expectations that were conferred by former local area outline plans, a development application can be lodged under the IPA prior to 30 October 2002 to enable the development to be assessed under the now superseded Brisbane Town Plan.

If the development entitlements or development expectations that were afforded by the superseded Brisbane Town Plan are affected by council's determination of that development application then a claim for compensation can be made for the resulting loss of yield.[160]

Whilst compensation may be claimable for any loss of development entitlements or development expectations occasioned by the City Plan, no compensation is payable in respect of changes occasioned to development entitlements or development expectations by State legislation.

Of particular concern is the *Vegetation Management Act 1999* which commenced operation on 15 September 2000, some 45 days before the commencement of the City Plan on 30 October 2000.

The *Vegetation Management Act 1999* amended the IPA by making the clearing of native vegetation on freehold land operational works for the purposes of the IPA and declaring those operational works to be assessable development thereby requiring a development permit in order to remove vegetation on freehold land.[161]

The City Plan does not regulate the clearing of vegetation, rather leaving this matter to Chapter 22 (Vegetation Protection), of council's local laws. This local law requires a permit to clear any vegetation the subject of a vegetation protection order. This permit is granted outside of the integrated development assessment system under the IPA.[162]

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154 *Evans v Caboolture Shire Council* [1995] QPLR 28; *Craig v Brisbane City Council* [1998] QPLR 281; *MEPC Australia Limited v Westfield Limited* [1998] 100 LGERA 204; *Degee v Brisbane City Council* [1998] QPLR 287; *Harburg Investments Pty Ltd v Brisbane City Council* [2000] QPEC 32; *Queensland Investment Corporation Pty Ltd v Toowoomba City Council* [2000] QPEC 36.

155 *Yu Feng Pty Ltd v Maroochy Shire Council* [1996] 92 LGERA 41; *Ecovale v Gold Coast City Council* [1997] QPLR 344; *Body Corporate "Greatwood" CTS 19855 v Maroochy Shire Council* [2001] QPEC 3.

156 *Lewiac Pty Ltd v Gold Coast City Council* [1994] 83 LGERA 224; *Comiskey v Pine Rivers Shire Council* [1996] QPLR 158; *Fitzgibbon's Hotels Pty Ltd v Logan City Council* [1997] QPELR 208.

157 *Lewiac Pty Ltd v Gold Coast City Council* [1994] 83 LGERA 224; *Coral Sea Developments Pty Ltd v Cairns City Council* [2000] QPEC 13; *Fortier Pty Ltd v Noosa Shire Council* [2000] QPEC 64.

158 *Evans v Caboolture Shire Council* [1995] QPLR 28.

159 *Fortier Pty Ltd v Noosa Shire Council* [2000] QPEC 64.

160 *Integrated Planning Act 1997*, s 5.4.2.

161 *Integrated Planning Act 1997*, s 1.3.5 and Item 34 of Schedule 8.

162 See s 854 of the *Local Government Act 1993*.

The *Vegetation Management Act 1999* does provide transitional provisions which exempt from the operation of the Act land which is included in development control plans and zones under transitional planning schemes such as the particular development zone previously existing under the Brisbane Town Plan. [163]

Unfortunately, these provisions do not extend to local plans under IPA planning schemes such as the City Plan. Therefore, whilst land included in a development control plan under the superseded Brisbane Town Plan may have been protected from the operation of the *Vegetation Management Act 1999*, land included in a local plan under the current City Plan is not.

This is undoubtedly a legislative oversight on the part of the State government which will significantly affect the development entitlements and development expectations of some landowners affected by local plans under the City Plan. The loss of these development expectations and development entitlements is not compensable. Accordingly, it is incumbent upon the State government to address this anomaly in the near future.

Conclusions

The City Plan and the local plans that have been prepared thereunder are both evolutionary and revolutionary.

They are evolutionary in that they continue the current direction of planning established under the superseded Brisbane Town Plan. They are however revolutionary in terms of the changes in content, formatting and structure that has been necessitated by the IPA.

It is highly questionable whether the changes in content, formatting and structure necessitated by the IPA will result in planning outcomes that are markedly different to those that would have been achieved under the superseded Brisbane Town Plan.

However, the IPA and the planning schemes made thereunder such as the City Plan, will contribute significantly to the technical development of the Queensland planning and property development professions and it is likely that the continued technical development of both these professions will lead to better planning outcomes for Brisbane City and hopefully for Queensland as a whole.

This paper was published in the Local Government Law Journal: Policy and Practice, Volume 7:1, August 2001.

[163] See s 74 of the *Vegetation Management Act 1999*.

Recent developments to planning law focussing on asbestos law, corporate environmental reporting, cultural heritage and the law of negligence

Ian Wright

This article discusses the recent developments to planning law with particular focus on changes concerning asbestos law, corporate environmental reporting, the guidelines concerning cultural heritage significance and further expansion to the law of negligence

September 2001

Asbestos law change

Recent amendments to the *Workplace Health and Safety Regulation 1997* (Qld) will impact on all those who sell, lease, dismantle or demolish an old building.

The new Regulation applies to owners of buildings built before 1990 that are used as a workplace. Building owners are required to obtain a report identifying any asbestos materials installed in the building or in an essential plant such as the air conditioning system, boilers, cooling towers, lifts, escalators, or piping. Reports must be prepared only by appropriately qualified persons such as builders, building surveyors, occupational hygienists, architects or asbestos specialists.

If the buildings were approved or built:

- before 1980, the report must be obtained within two years of 1 November 2000;
- after 1980 but before 1990, the report must be obtained within two years of 1 November 2002.

If during the compliance period (ie during the 2 years commencing on either 1 November 2000 or 1 November 2002) the building is to be offered for sale or lease, or to be dismantled or demolished, the timeframe for obtaining an asbestos report is brought forward. You must obtain an asbestos materials report before one of those events.

The "*owner*" of the building is defined as not only the person holding the title to the land, but also any person who has effective management or control of the building and any essential plant in it. This includes any person who is the managing agent of a building. If an asbestos report is not obtained, a penalty of up to $3,000 applies.

If the report shows that the building contains asbestos, you must (in brief):

- keep an asbestos materials register;
- display a notice in the building that an asbestos materials register exists, including details of where the register can be accessed;
- make the register available to any occupier or person performing work on the building;
- give a copy of the register to any person engaged to dismantle the building or any contractors;
- on the sale of the building, give the register to the buyer;
- put in place policies and procedures to prevent or minimise the exposure of occupants of the building to asbestos material;
- if the asbestos materials are friable, poorly bonded or unstable, you must ensure the materials are enclosed, sealed or removed. The new laws then set out detailed provisions regarding the removal of asbestos.

The new Regulation is relevant for purchasers and lenders during pre-purchase and pre-loan due diligence, as well as building owners and managers.

Corporate environmental reporting – at home and abroad

Australian public companies (listed or otherwise) that are subject to "*significant or particular*" environmental legislation are required to report on their environmental compliance pursuant to Section 299(1)(f) of the Corporations Law as part of their annual reporting requirements. Private companies must also comply with Section 299(1)(f) if they meet at least two of the following three criteria:

- gross revenue in excess of $10 million;
- gross assets of more than $5 million;
- or having more than 50 employees.

The requirement was being reviewed by the Federal government but current indications are that it is unlikely that any changes will be made to section 299(1)(f) by the current government.

The domestic environmental reporting requirement pursuant to Section 299(1)(f) is that the director's report for a financial year includes "*details of the company's performance in relation to the environmental legislation that applies to them*". The Corporations Law provides no further particulars as to what this may entail, but the Australian Industry Group (**AIG**) has prepared an information sheet entitled "*Mandatory Environmental Reporting*" (available online at www.aigroup.asn.au) to assist companies in complying with their obligations. Some of the topics recommended by the AIG for inclusion in the company's report include: the potential for the company's activities to cause significant environmental harm; environmental risk management initiatives taken by the company; and details of any "*significant*" breaches of environmental legislation, fines or penalties. Overall, however, the AIG suggests that broad details of the company's environmental performance are sufficient, and the content of the report should be guided by what directors believe is "*worthy of disclosure*" to shareholders.

By contrast, the environmental reporting requirements to be imposed on Australian companies operating overseas pursuant to the *Corporate Code of Conduct Bill 2000* are more extensive. While the Bill would only apply to Australian companies employing more than 100 persons in a foreign country the reporting requirements extend to:

- a statement of the environmental impact, prepared by an independent auditor, of the activities of the corporation in each country (other than Australia) in which the corporation undertakes activities; and
- a statement of foreseeable risk factors that might arise as a result of the activities of the corporation in each country in which it operates (other than Australia); and
- a statement of any contraventions of standards or laws relating to the environmental, employment, health and safety and human rights by the corporation in each country in which it operates (other than Australia); and
- a statement of the social, ethical and environmental policies of the corporation; and
- any other matter relevant to the environmental employment, health and safety and human rights standards observed by the corporation.

The report (called a Code of Conduct Compliance Report) would be required to be lodged with the Australian Securities and Investment Commission before 31 August each year.

In addition to reporting requirements the Bill would impose environmental performance standards on Australian companies to which the Act would apply. These include requiring the company to:

- take all reasonable measures to prevent any material adverse effect on the environment in and around that place from that activity;
- every 12 months, collect and evaluate information regarding the environmental impacts of its activities;
- establish objectives for the measurement of its environmental performance;
- monitor and assess compliance with these objectives;
- provide timely information to its employees and to members of the public in any place in which it undertakes activities on the actual and potential environmental impacts of the activities of the corporation;
- have appropriate policies on matters of environment safety including the handling of hazardous materials and the prevention and control of environmental accidents;
- undertake environmental impact assessment of all new developments and provide the public with an opportunity to comment on the assessment; and
- have regard to the precautionary principle in carrying out the above actions.

The Bill provides that a company to which it would apply is not required to take any action in its overseas operations that it would not be required to take in respect of its operations in Australia.

The above environmental performance and reporting requirements, however, do not necessarily apply to the domestic operations of Australian companies. For example, not all Australian companies are required to report to the extent that the Bill would require environmental reporting. The obligation in Section 299(1)(f) of the Corporations Law is limited to companies that are licensed or otherwise subject to conditions for the purposes of environmental legislation or regulation (at Federal or State or Territory level).

While Australian companies may be required to report periodically in compliance with environmental licence requirements, this obligation is not universal throughout the Australian jurisdictions. No annual reporting requirement comparable to that set out in the Bill exists in Australian companies' domestic operations.

The environmental performance and reporting requirements are set out in part 2 of the Bill. Civil penalties may be imposed on the company and its executive officers for failure to comply with part 2. Further, any person who suffers loss or who is likely to suffer loss or damage as a result of a contravention of part 2 can seek compensation and/or an injunction from the Federal Court of Australia. Court action can be undertaken on behalf of such persons by a body corporate or association of persons whose principal objects include protection of the public interest.

Managing places of cultural heritage significance

The Environmental Protection Agency (**EPA**) has developed guidelines to assist local governments in the management of places of cultural heritage significance.

The *Integrated Planning Act 1997* (**IPA**) sets out the procedure to be followed by local governments when making or amending planning schemes. The core matters which are required to be taken into account in making or amending planning schemes include land use and development, infrastructure and valuable features. The definition of "*valuable features*" includes: "*areas or places of cultural heritage significance (such as areas or places of Indigenous cultural significance, or aesthetic, architectural, historical, scientific, social or technological significance, to the present generation or past or future generations)*".

The EPA recently published guidelines to assist local governments identify and manage areas of cultural heritage significance, and therefore meet their obligations under the IPA. The EPA recognises that cultural heritage places should be managed through planning schemes if local governments are to achieve best practice heritage management. The EPA guidelines suggest that an IPA planning scheme should contain an inventory of places of local heritage significance and of known indigenous heritage significance. The scheme should also include a spatial definition of areas that have the potential to be of indigenous heritage value. The guidelines encourage the development and management of these areas in a manner that allows the local communities to continue to gain economic benefit from these areas without compromising the preservation of their cultural values.

The EPA guidelines provide local governments with options to match their available resources and information. The EPA Cultural Branch can provide advice to local governments to ensure that their level of management is appropriate to the value of the affected place.

The guidelines suggest a three stage process to undertake a survey of local historical and cultural heritage. The three stages include: the preparation of a historical context report; the identification of places of potential cultural heritage significance; and the assessment of cultural heritage significance.

Law of negligence expands

On 19 August 1992, a wooden bridge maintained and repaired by Singleton Shire Council collapsed under the weight of a truck being driven over it. The driver of the truck was badly injured and the truck was severely damaged. The driver and the truck owner sued Singleton Shire Council. The allegation of negligence against the council was that they failed to detect white ants/dry rot in the girders of the bridge which was found to be the cause of the collapse.

The council attempted to defend the proceedings in the District Court by relying on the well established legal principle of non-feasance immunity. Shortly stated, the non-feasance immunity meant that highway authorities (ie those who care for, control and maintain public roads or bridges, etc) were only liable for positive negligent acts on their part which caused danger to road users. Where there was some inherent danger on a public road or bridge, a highway authority could not be found liable merely because it failed to act to remove that danger.

This longstanding immunity has been severely criticised by both academic writers and judges over many years. It was argued that the non-feasance immunity was illogical and produced verdicts that were arbitrary and artificial. Nonetheless, the non-feasance immunity remained the law in Australia.

The plaintiffs were successful in the District Court and awarded damages of approximately $400,000. The trial judge circumvented the non-feasance immunity by making the following findings:

- the council had made visual inspections on several occasions which led to the replacement of rotting planks but the council did not inspect the girders;
- the council owed the plaintiffs a duty to properly repair the bridge; and
- by replacing the rotting planks but not inspecting the girders, the council created a trap for users of the highway which constituted a positive negligent act which was not protected by the non-feasance immunity.

The council appealed to the NSW Court of Appeal. The Court of Appeal reversed a number of factual findings made by the trial judge and held that the cause of the accident was the council's failure to replace the rotting girders. That failure to act was protected by the non-feasance immunity and therefore the council was not liable to the plaintiffs. The plaintiffs appealed to the High Court.

On 31 May 2001, by a majority of four to three, the High Court upheld the plaintiffs' appeal. Those judges who were in the majority made the following points:

- the non-feasance immunity created uncertainty in relation to the liability of highway authorities and ran contrary to the development of the general law of negligence in Australia; and

- abandoning non-feasance immunity brings Australia in line with other jurisdictions and leads to predictability in the application of the laws of negligence. The central principle of the High Court's reasoning is as follows:

> *Where the state of a roadway, whether from design, construction, work or non-repair poses a risk to a class of persons, then to discharge its duty of care, an authority with power to remedy the risk is obliged to take reasonable steps by the exercise of its powers within a reasonable time to address the risk. If the risk is unknown to the authority or latent and only discovered by inspection, then to discharge its duty of care an authority, having power to inspect, is obliged to take reasonable steps to ascertain the existence of latent dangers which might reasonably be suspected to exist*.

The implications of the decision are as follows:

- Highway authorities can no longer raise as a defence to a claim in negligence the fact that their failure to act is protected by non-feasance immunity.
- The High Court decision has imposed a positive obligation on highway authorities to take steps to inspect highways to ascertain the existence of latent dangers.
- Where a danger could not reasonably be expected to exist, or could not be found except by taking unreasonable measures, generally there will be no breach of duty by the highway authority.
- Previously, if a highway authority engaged a contractor to carry out work on a roadway and the contractor created a risk or danger that caused an accident, the highway authority could not be liable as a result of a simple failure to correct the danger. That protection no longer exists.
- The High Court was at pains to point out that a highway authority is not required to keep roads in a state of perfect repair.
- To the extent that a danger of risk exists on a highway, highway authorities may discharge their duty of care by providing adequate signage warning of the particular risks.

Freeze on gaming machines in hotels

The Deputy Premier and Treasurer Terry Mackenroth announced on 8 May 2001 that:

- the number of gaming machines in hotels had been capped from 8 May 2001;
- no more applications for new gaming machines in hotels would be accepted from midday on 8 May 2001; and
- a process would be implemented to reallocate gaming machine numbers within the cap when hotels close or reduce the number of their machines through normal commercial considerations.

Amendment of the Prostitution Act

The Prostitution Bill was introduced as a private members bill in Parliament on 16 May 2001 by the Leader of the Opposition. The purpose of the Bill is to amend section 64 of the *Prostitution Act 1999* to allow local governments to require that development applications for brothels be refused in towns of any size if the Minister agrees. Currently, local governments can only require that development applications for brothels be refused in towns with a population of less than 25,000 persons. As the Bill is a private members bill it will need the support of the government to be passed.

Health effects – electromagnetic fields

The widespread and ever increasing use of mobile phones has led to the proliferation of mobile phone base stations. This has been accompanied by an increase in the level of community concern about possible adverse health effects from Electromagnetic Fields (**EMF**).

The recent *Telstra Corporation Ltd v Pine Rivers Shire Council & Ors* [2001] QPEC 14 case addresses the application of the precautionary principle as expressed in the *Integrated Planning Act 1997* which applies in the case of threats of serious or irreversible environmental. damage. In that case, the court was satisfied that no such threat existed. In any event, the court had regard to the wide safety margins incorporated in the relevant standards and concluded that the precautionary approach had been satisfied even though the circumstances requiring its application had not been established. It appears that whilst a court may consider residents' fears with respect to the risks associated with EMF, at this stage, those fears are likely to be held unreasonable whilst not being irrational. Little weight therefore will be had to their concerns in relation to "*intangible*" amenity issues. As the need for mobile phone usage increases, so will the need for mobile phone base stations. It is unlikely that community concern will be abated easily or quickly. Therefore, local governments are urged to address this potential political nightmare proactively, firstly, by amending (if need be) their planning schemes and policies, and secondly, by ensuring that the public is able to access relevant information in relation to this issue.

Commonwealth environmental biodiversity legislation

Since its commencement in July 2000, the Commonwealth Minister for the Environment has been asked to consider a wide range of development proposals. Only a small proportion have required assessment as "*controlled actions*".

The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) has been in force since 16 July 2000. Under the EPBC Act actions, which include a project, development, undertaking, activity, or series of activities, that are likely to have a significant impact on matters of National Environmental Significance (**NES**) are subject to a rigorous assessment and approval process. Matters of national environmental significance are:

- world heritage properties;
- Ramsar wetlands of international importance;
- nationally threatened animal and plant species and ecological communities;
- internationally protected migratory species;
- Commonwealth marine areas; and
- nuclear actions.

Environment Australia reports that to 8 February 2001, 143 potential "*actions*" had been referred to the Minister. These proposed "*actions*" range from a residential subdivision, construction of a college campus, wind farms, appraisal wells, precious metal mines and airports through to construction work on a bridge and highway.

As expected, the EPBC Act touches a wide variety of developments. Judging by the number of referrals made, developers in both the public and private sector appear to be adopting a cautious approach referring to the Minister proposals where there is any doubt about whether development is a "*controlled action*". The majority of referrals made so far appear to relate to impacts on threatened species.

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Infrastructure charges plans – Proposed changes to IPA and perceptions

Emma Ryan | Ian Wright

This article discusses the proposed changes to IPA and how it will impact infrastructure charges plans

October 2001

Introduction

Revolutionary change

The *Integrated Planning Act 1997* (**IPA**) introduced a new integrated environmental management and infrastructure planning and delivery system to Queensland.[164]

IPA requires local governments to supply infrastructure in a coordinated, efficient and orderly way.[165]

Accordingly, IPA establishes specific mechanisms to address infrastructure coordination. These specific mechanisms include:

- infrastructure charges to fund the supply of development infrastructure items; and
- Infrastructure Charges Plans (**ICPs**) as a means of levying infrastructure charges in an accountable and efficient manner.

Themes

This paper focuses on four themes:

- First, some general comments will be made in relation to the previous system of developer contributions under the *Local Government (Planning and Environment) Act 1990*.
- Second, some of the key criticisms that have been raised in response to the existing infrastructure charging framework under IPA will be considered.
- Third, the proposed changes to IPA and their impact upon the existing infrastructure charging framework under IPA will be considered.
- Finally, some concluding observations will be made about the proposed changes to the infrastructure charging framework under IPA.

Previous system – some comments

The *Local Government (Planning and Environment) Act 1990* provided a regime of developer contributions to fund infrastructure by way of imposing conditions on a development approval subject to a statutory test that the conditions be reasonable and relevant and common law tests of certainty and finality.

The previous system was clearly inadequate and often led to infrastructure funding issues being resolved through ad hoc negotiation or expensive litigation.[166] This led to concerns in respect of the perceived lack of accountability and consistency in infrastructure funding arrangements and adverse impacts on pricing and the efficiency of development infrastructure.

One of the main problems associated with the previous system of infrastructure funding was the inequitable distribution of costs between users of infrastructure (ie double dipping). Residents were often charged twice for infrastructure when they purchased land upon which charges had been levied and were then asked to contribute monies through general rates.[167]

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164 Department of Local Government and Planning, IPA Guideline 4/98 - Infrastructure Charging, 1998, 2.
165 See Section 1.2.3(1)(b) of IPA.
166 Department of Local Government and Planning, *Review of Infrastructure Provisions under the Integrated Planning Act 1997*, August 2001, 1.
167 Barnes, N., Dollery, B., *Financing Urban Infrastructure in New South Wales: An Evaluation of the Section 94 Contributions Plan*, (1996) 21 Urban Futures Journal 23.

Another problem arising from excessive reliance upon developer contributions for funding infrastructure was the increased cost of housing and the creation of windfalls for existing landowners[168] who gained a tangible benefit from new facilities provided to service new residents.[169]

The problems experienced by local governments in respect of the previous system of infrastructure funding generally involved issues of certainty as development conditions requiring infrastructure contributions were often susceptible to legal challenge as there was little guidance as to what infrastructure items could attract contributions.[170]

When these problems were considered in the light of the high rates of development in Queensland, the increasing costs of infrastructure and the higher levels of community expectation there was considered to be a clear policy need to explore alternative means of funding infrastructure. This was the agenda that underpinned the introduction of the infrastructure charging system under IPA.

Existing framework – some criticisms

Infrastructure charges under IPA

The infrastructure charging system under IPA is based on ICPs.

ICPs are intended to be the foundation for a charging mechanism for three networks of development infrastructure items:

- urban water cycle management infrastructure;
- transport infrastructure; and
- local community purposes infrastructure.

IPA provides that an infrastructure charge cannot be levied without an ICP. ICPs are required to form part of the planning scheme and are intended to provide the necessary accountability and transparency to support the levying of infrastructure charges.[171]

The infrastructure charging provisions in IPA are based on a user pays philosophy[172] that requires a nexus between the benefiting demand units (ie lots of land) and the supplied infrastructure.[173]

Costing is then apportioned according to estimated shares of infrastructure usage.

The user pays philosophy of IPA's infrastructure charging system means that the burden of financing new infrastructure is shifted from the community at large to the owners of developable land, developers or buyers of new homes.[174]

The following general comments can be made about the infrastructure charging system under IPA:

- First, ICPs form part of a planning scheme.[175]
- Second, ICPs involve the imposition of infrastructure charges for the capital costs of shared development infrastructure items including:
  - land purchase;
  - infrastructure works and development; and
  - planning and design.
- Third, ICPs provide for infrastructure charges to be levied to coincide with a development approval but not as a condition of a development approval.[176]
- Fourth, ICPs require that infrastructure be provided to achieve an explicitly identified '*desired standard of service*'[177] (or standard of performance) based on defined user benefits and environmental outcomes.[178]

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168 Kirwan, R., *Financing Urban Infrastructure: Equity and Efficiency Considerations*, (1990) 8(4) Urban Policy and Research, 1.
169 Dollery B., Witherby, A., Marshall, N., *Section 94 Developer Contributions and Marginal Cost Pricing*, (2000) 18(3) Urban Policy and Research 314.
170 Hansard, Second Reading Speech, 20 November 1997, 4544.
171 Department of Local Government and Planning, IPA Guideline 4/98 - Infrastructure Charging, 1998, 5.
172 Department of Communication and Information, Local Government, Planning and Sport, Position Paper - *Infrastructure Charges Plans: Issues and Principles* April 2000, 2.
173 Id at 6.
174 Dollery, B., Witherby, A., Marshall, N., *Section 94 Developer Contributions and Marginal Cost Pricing*, (2000) 18(3) Urban Policy and Research 322.
175 Section 5.1.4(1) of the *Integrated Planning Act 1997*.
176 Department of Local Government and Planning, IPA Guideline 4/98 - Infrastructure Charging, 1998, 8.
177 Section 5.1.2 of the *Integrated Planning Act 1997*.
178 Section 5.1.4(1)(b) of the *Integrated Planning Act 1997*.

- Fifth, ICPs are limited by a consideration of alternative funding mechanisms in accordance with the requirement that infrastructure charges should be restricted to facilities where consumer choice is constrained for reasons of health and safety or where there are compelling savings in long term provision costs.[179]
- Finally ICPs rely on the concept of a benchmark development sequence to determine the timing or staging of residential development and indicate preferred areas for development in three five year stages.[180]

Problems with the existing system

A recent review of the infrastructure charging provisions under IPA has described them as "*onerous and overly complex*".[181] However, it has been recognised that there is a need to trade off a complex but sophisticated system of infrastructure charging against a transparent easy to use system given that a more complex system of charges is necessary to respond to the characteristics of local communities and their specific infrastructure needs.[182]

One of the many criticisms of the current ICP framework under IPA centres on the way in which IPA fails to integrate infrastructure with planning and development.[183] The provisions relating to infrastructure are dispersed throughout IPA making it difficult to obtain a clear comprehension of the conceptual regime through which infrastructure is to be provided.

Another problem with the current system is the somewhat ambiguous relationship between "*capital costs*" (initial capital investment) and the maintenance regime. For example, there is an argument that the maintenance required to ensure the sufficient establishment of landscaping should be considered as part of the capital costs of landscape implementation.[184] Another example can be seen in the evolving road maintenance and construction technologies which can mean that very significant maintenance works (short of reconstruction) can produce similar increases in design life to that of complete asset replacement.[185]

Another problem arises from the user pays charging philosophy underlying ICPs. The user pays philosophy requires that charges must not be more than the proportion of the cost of the item that reasonably can be apportioned to the premises for which the charge is fixed, taking into account the likely share of the usage of the item for the premises.[186] Unfortunately in the real world the catchment or benefit region for particular infrastructure rarely has a sharply defined edge.[187] This is especially the case with local community purpose infrastructure (parks etc) where usage is determined by distance.

The reliance of ICPs on a local government's benchmark development sequence has also had its problems. The concept of a benchmark development sequence requires the identification of likely areas of development and the infrastructure required for those areas over a 15 year period. This has been perceived by local governments to be a difficult political and practical task given the level of detail required.[188]

Another criticism of ICPs is that they are inflexible by nature. Infrastructure charges can only be levied after preparing an ICP. Therefore it is necessary for all details of the cost and timing of works being charged to be provided in advance. In the case of minor works (such as footpaths and reticulation pipes) it is often not feasible to do this because details of costs and timing are usually not available until shortly before the works are required.[189]

Infrastructure charges in respect of roads has also been criticised on the basis that IPA currently only allows charging for local government owned roads thereby excluding local roads under State government control. This may lead to inequity as development near some local roads may be liable for infrastructure charges whilst development on other local roads that are State controlled roads will be exempted from infrastructure charges.[190] Windfall gains may therefore accrue to those developments fortunate enough to be located on local roads under the control of the State government that are exempt from infrastructure charges.[191]

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179 Department of Communication and Information, Local Government, Planning and Sport, Position Paper - *Infrastructure Charges Plans: Issues and Principles* April 2000, 6.
180 Department of Communication and Information, Local Government, Planning and Sport, Position Paper - *Infrastructure Charges Plans: Issues and Principles* April 2000, 4.
181 Department of Local Government and Planning, *Review of Infrastructure Provisions under the Integrated Planning Act 1997*, August 2001, 2.
182 Dollery, B., Witherby, A., Marshall, N., *Section 94 Developer Contributions and Marginal Cost Pricing*, (2000) 18(3) Urban Policy and Research 314.
183 Department of Local Government and Planning, *Review of Infrastructure Provisions under the Integrated Planning Act 1997*, August 2001, 2.
184 Dollery, B., Witherby, A., Marshall, N., *Section 94 Developer Contributions and Marginal Cost Pricing*, (2000) 18(3) Urban Policy and Research 314.
185 Id at 319.
186 Section 5.1.6(2) of the *Integrated Planning Act 1997*.
187 Dollery, B., Witherby, A., Marshall, N., *Section 94 Developer Contributions and Marginal Cost Pricing*, (2000) 18(3) Urban Policy and Research 315.
188 Department of Local Government and Planning, *Review of Infrastructure Provisions under the Integrated Planning Act 1997*, August 2001, 3.
189 Department of Local Government and Planning, *Review of Infrastructure Provisions under the Integrated Planning Act 1997*, August 2001, 4.
190 Ibid.
191 Ibid.

Despite these criticisms, it is important to recognise that ICPs are an important tool that encourage forward planning by shifting the focus from up-front contributions to infrastructure by developers to charges for infrastructure supplied as part of a long term development sequence specified in a planning scheme.

ICPs address many of the problems previously encountered with developer contributions such as accountability, transparency, certainty and double dipping. New concerns however have arisen in relation to the creation and practical application of ICPs.

Proposed changes

The conceptual nature of the existing ICP framework has meant that local governments have encountered practical difficulties in the preparation and application of ICPs in their local government areas. Consequently, various changes have been proposed to assist in the efficient implementation of ICPs and to address the shortcomings of the existing provisions.[192]

Priority service areas

It is proposed that the concept of the benchmark development sequence be removed and replaced by the concept of a priority service area. The priority service area will serve as the central infrastructure component in an IPA planning scheme and will identify logical extensions of urban areas where infrastructure capacity exists, is planned, or can be cost effectively provided.

It is envisaged that the priority service area will be included in the IPA planning scheme as a map and would relate to urban land for the normal range of uses (residential, retail/commercial and industrial uses).[193]

It is also envisaged that the priority service area will be reviewed every four years. A priority service area must identify at least two matters:

- First, the existing developed urban land already serviced with infrastructure must be identified.
- Second, the additional urban land required to accommodate between 10 and 15 years of growth in each of the different use categories must be identified. This additional urban land must satisfy one of three tests:
  - first, it must be a logical extension of the urban fabric; or
  - second, it must be proposed to be serviced; or
  - third, the land must be the most effective to service with infrastructure.

Plans for infrastructure

A priority service area is required to be supported by a plan for infrastructure which identifies the infrastructure required to service expected development at the desired standard of service and which is based on the IPA planning scheme's assumptions about the scale, density and location of future development.[194]

A plan for infrastructure is required to satisfy three objectives:

- First, it must provide a benchmark for the timing, form and scale of future development to enable the assessment of any infrastructure bring forward costs or other cost impact mitigation measures.
- Second, it must result in infrastructure that achieves the desired standard of service in the most efficient manner taking into account the full (ie capital, operating and maintenance) cost of the infrastructure.
- Third, it must provide direct inputs into the preparation of an infrastructure charges plan for the relevant infrastructure network.

A plan for infrastructure will only need to deal with trunk level infrastructure consistent with those items which can be charged for under an infrastructure charges plan.

Relationship to IDAS

A priority service area is intended primarily to be an infrastructure planning mechanism and a means for improving integration between infrastructure and land use planning. Development proposals, whether located within or outside a priority service area, will still be assessed in the normal manner against the relevant requirements of the IPA planning scheme and according to the decision making rules specified in IPA.

Local governments will still have the option of conditioning a development proposal to achieve compliance with codes or other requirements of the IPA planning scheme, refusing proposals which compromise the achievement of a planning scheme's desired environmental outcomes, or refusing proposals which are otherwise inconsistent with the intent of the planning scheme, unless there are planning grounds which warrant approval of the proposal

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192 Department of Local Government and Planning, *Review of Infrastructure Provisions under the Integrated Planning Act 1997*, August 2001, 4-14.

193 Department of Local Government and Planning, *Review of Infrastructure Provisions under the Integrated Planning Act 1997*, August 2001, 5.

194 Id at 6.

despite that conflict. Being inconsistent with a priority service area (or a plan for infrastructure), would not, of itself, constitute grounds for refusal.

A priority service area will also provide the trigger for cost impact assessments for certain developments. Within a priority service area, a cost impact assessment can only be triggered if the scale, density or timing of the proposed development is inconsistent with a plan for infrastructure. For impacts related to the form and scale of development, cost impact mitigation may include the capital costs for the additional required infrastructure. If there is no plan for infrastructure, a cost impact assessment cannot be triggered for land within the priority service area.

Outside a priority service area, cost impact assessment is possible whether or not the plan for infrastructure exists. In these cases, the full range of cost impact mitigation measures, including capital cost, opportunity cost, capital and operating costs for any temporary works and maintenance costs will be available.

Infrastructure charges for large and growth local governments

Infrastructure charges are principally tools for local governments experiencing significant growth and infrastructure demands. They provide an opportunity to impose charges with certainty based on the local government's plans for capital expansion for upgrading of its infrastructure networks. However, it is recognised that infrastructure charges may not be required for areas not experiencing these pressures. Accordingly, alternative options have been proposed.

For large growth local governments, infrastructure charges will be retained as the primary "up front" infrastructure funding mechanism. If these local governments wish to obtain up front funding for infrastructure in their priority service areas, they must prepare infrastructure charges plans for these areas.

It is recognised that the level of detailed infrastructure information currently required to prepare an infrastructure charges plan imposes significant time, cost and resource demands on local governments. Consequently it is proposed to provide the option for minor infrastructure and infrastructure works solely benefiting a property to be funded through conditions.

Thresholds for higher order infrastructure for which charges must be levied under an infrastructure charges plan are still to be determined. Public recreation and community land will not be subject to a minimum threshold as all land of this nature is appropriately planned and funded well in advance of provision.

Infrastructure charges for small and low/no growth local governments

For small or low/no growth local governments it is proposed that infrastructure charges plans be optional and the current approach of dealing with proposals on a case by case basis through the imposition of conditions be continued. These local governments will have the ability to recover the costs of infrastructure provision through cost impact conditions.

If it is intended to condition for infrastructure on a regular basis, a development infrastructure policy will be required. A development infrastructure policy is intended to be a planning scheme policy which is prepared in accordance with the process specified in Schedule 3 of IPA. Development infrastructure policies will be equivalent to existing "*headworks contribution policies*", but based on infrastructure charges plan principles and methodology tailored to the circumstances of small or low/no growth local governments and applicable to the full range of trunk development infrastructure items.

If it is not intended to impose conditions on a regular basis they can be dealt with on a case by case basis without the need for a development infrastructure policy.

Low growth areas within ICP local governments

It is also acknowledged that some large and/or growth local governments may have townships or other localities within their areas experiencing low or limited growth, but which are serviced with infrastructure. These local governments will have the option of seeking the Minister's approval to levy charges in these areas through a development infrastructure policy rather than an infrastructure charges plan.

It is envisaged that such approvals would only be granted in exceptional circumstances, such as where there are joint infrastructure funding/provision arrangements with an adjoining local government which has a development infrastructure policy, or where a development infrastructure policy is the most appropriate mechanism to preserve existing infrastructure funding agreements with landowners.

Public recreational land

The reforms also make provision for the embellishment of public recreational land:

- First, public recreation infrastructure will be defined to include "*land, capital works or land and capital works*".
- Second, capital works for public recreation infrastructure will be defined to include items such as basic landscaping, playground equipment and shade structures, games and sports facilities, playing fields and courts, picnic facilities, circulation and access facilities.

Infrastructure charging for roads

In relation to infrastructure charges for roads, it is proposed that charges will be imposed according to their function rather than their ownership. Roads fulfilling a defined "*local*" function can be included within the infrastructure charging framework regardless of ownership. Other State government roads serving non-local functions would continue to be taxpayer funded.

Alternative methods of funding infrastructure

The current requirement in IPA that an infrastructure charges plan evaluate alternative methods of funding infrastructure items is also intended to be removed and replaced with a requirement that alternative methods merely be considered.[195]

Lifecycle costs

Another proposed change is the requirement to calculate the lifecycle costs of infrastructure as part of an infrastructure charges plan. Due to the detailed issues involved in the calculation of the lifecycle costs of infrastructure, it is proposed to remove references to lifecycle costs and include minimum lifecycle cost requirements in statutory guidelines.

Capital costs

It is also proposed to amend the definition of capital cost in Schedule 10 of IPA to include the cost of preparing infrastructure charges plans so that such costs are recoverable through infrastructure charges.

Conditioning powers

Clarification is also to be provided in relation to conditioning powers. Basic infrastructure works which solely benefit a property or are required to connect a property to a development infrastructure network can be imposed as conditions (subject to the normal reasonable and relevant tests). Examples of this type of infrastructure include water and road connections, internal reticulation, external works along a site frontage and intersection upgradings.

Shared financing arrangements

The final reform that I wish to focus on relates to shared financing arrangements. It is proposed to give statutory recognition to agreements between local governments and developers whereby a developer agrees to provide an item of infrastructure (which serves a catchment larger than the development site) on the basis that the developer is reimbursed as further development occurs. Such agreements are to be known as Infrastructure Funding Partnerships and are to have the status of an infrastructure agreement under IPA.

Conclusions

Finally I would like to make some concluding comments regarding the proposed reforms to the current infrastructure charging arrangements under IPA.

First, the proposed reforms will provide significant flexibility in terms of the legal instruments such as development infrastructure policies and development approval conditions that are available to local governments particularly those with low growth rates to impose infrastructure charges. The one size fits all approach of the current infrastructure charging provisions under IPA is unrealistic and will be corrected by the proposed reforms.

Second, in relation to larger local governments, the breaking of the nexus between ICPs and the local government's benchmark development sequence will remove one of the significant hurdles to the completion of ICPs before the March 2003 deadline. The priority service area concept and plan for infrastructure concept are far more flexible than the benchmark development sequence and require far less up front planning and analysis.

Third, whilst infrastructure charges plans are proposed to be simplified through the adoption of guidelines in respect of minimum lifecycle costs the process of preparing infrastructure charges plans remains very conceptual and complex.

The black box analysis involved in the preparation of infrastructure charges plans will do little to improve public understanding or industry acceptance of the resulting charges. There is a real need for model instruments to be prepared that are relatively transparent in relation to the methodology that has been adopted. They do not have to be understood by a lawyer but at least a competent professional must be able to interrogate the document and advise an owner as to the reasonableness or otherwise of the infrastructure charges.

This is the task for local government professionals and their advisers. To date there has been much debate and criticism of the infrastructure charging system under IPA. With the impending reforms some of the current criticisms will be addressed. As a result the local government professionals will have to respond with solutions. That time is very fast approaching. Indeed the March 2003 deadline is within sight. May the force be with them.

This paper was presented at the Institute of Public Works Engineering Australia conference, Beaudesert, 7-12 October 2001.

[195] See section 5.4.1(1) of IPA

Proposed reform of IPA's infrastructure charging system

Ian Wright | Emma Ryan

This article discusses the proposed reform on IPA's infrastructure charging system with particular focus on the previous system concerning developer contributions, key criticisms of the existing framework under IPA and discussion of the proposed changes and how they will impact the existing framework

November 2001

Introduction

The *Integrated Planning Act 1997* (**IPA**) introduced a new integrated environmental management and infrastructure planning and delivery system to Queensland.[196]

IPA requires local governments to supply infrastructure in a coordinated, efficient and orderly way.[197]

Accordingly, IPA establishes specific mechanisms to address infrastructure coordination. These specific mechanisms include:

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- Infrastructure Charges Plans (**ICPs**) as a means of levying infrastructure charges in an accountable and efficient manner.

Themes

This paper focuses on four themes:

- First, some general comments will be made in relation to the previous system of developer contributions under the *Local Government (Planning and Environment) Act 1990*.
- Second, some of the key criticisms that have been raised in response to the existing infrastructure charging framework under IPA will be considered.
- Third, the proposed changes to IPA and their impact upon the existing infrastructure charging framework under IPA will be considered.
- Finally, some concluding observations will be made about the proposed changes to the infrastructure charging framework under IPA.

Previous system – some comments

The *Local Government (Planning and Environment) Act 1990* provided a regime of developer contributions to fund infrastructure by way of imposing conditions on a development approval subject to a statutory test that the conditions be reasonable and relevant and common law tests of certainty and finality.

The previous system was clearly inadequate and often led to infrastructure funding issues being resolved through ad hoc negotiation or expensive litigation.[198] This led to concerns in respect of the perceived lack of accountability and consistency in infrastructure funding arrangements and adverse impacts on pricing and the efficiency of development infrastructure.

One of the main problems associated with the previous system of infrastructure funding was the inequitable distribution of costs between the users of infrastructure (ie double dipping). Residents were often charged twice for infrastructure:

- first, when they purchased land upon which charges had been levied; and
- secondly, when they were required to contribute monies through general rates.[199]

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196 An edited version of this paper was presented to the Institute of Public Work Engineers Australia (Qld Branch) Conference on 8 October 2001. Department of Local Government and Planning, IPA Guideline 4/98 – Infrastructure Charging, 1998, 2.

197 See section 1.2.3(1)(b) of IPA.

198 Department of Local Government and Planning, *Review of Infrastructure Provisions under the Integrated Planning Act 1997*, August 2001, 1.

199 Barnes, N., Dollery, B., *Financing Urban Infrastructure in New South Wales: An Evaluation of the Section 94 Contributions Plan*, (1996) 21 Urban Futures Journal 23.

Another problem arising from excessive reliance upon developer contributions for funding infrastructure was the increased cost of housing and the creation of windfalls for existing landowners[200] who gained a tangible benefit from new facilities that are provided to service new residents.[201]

The problems experienced by local governments in respect of the previous system of infrastructure funding generally involved issues of certainty as development conditions requiring infrastructure contributions were often susceptible to legal challenge as there was little guidance as to what infrastructure items could attract contributions.[202]

When these problems were considered in the light of the high rates of development in Queensland, the increasing costs of infrastructure and the higher levels of community expectation there was considered to be a clear policy need to explore alternative means of funding infrastructure. This was the agenda that underpinned the introduction of the infrastructure charging system under IPA.

Existing framework – some criticisms

Infrastructure charges under IPA

The infrastructure charging system under IPA is based on ICPs.

ICPs are intended to be the foundation for a charging mechanism for three networks of development infrastructure items:

- urban water cycle management infrastructure;
- local transport infrastructure; and
- local community purposes infrastructure.

IPA provides that an infrastructure charge cannot be levied without an ICP. ICPs are required to form part of the planning scheme and are intended to provide the necessary accountability and transparency to support the levying of infrastructure charges.[203]

The infrastructure charging provisions in IPA are based on a user pays philosophy[204] whereby a nexus is made between the benefiting demand units (ie lots of land) and the cost of the supplied infrastructure.[205] The cost of the infrastructure is then apportioned according to the deemed units estimate share of the usage of that infrastructure.

The user pays philosophy of IPA's infrastructure charging system means that the burden of financing new infrastructure is shifted from the community at large to the owners of developable land, developers or buyers of new homes.[206]

The following general comments can be made about the infrastructure charging system under IPA:

- First, ICPs form part of a planning scheme.[207]
- Second, ICPs involve the imposition of infrastructure charges in respect of the capital costs of shared development infrastructure items including:
  - land purchase;
  - infrastructure works and development; and
  - planning and design.
- Third, ICPs provide for infrastructure charges to be levied to coincide with a development approval but not as a condition of a development approval.[208]
- Fourth, ICPs require that infrastructure be provided to achieve an explicitly identified "*desired standard of service*"[209] (or standard of performance) based on defined user benefits and environmental outcomes.[210]

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200 Kirwan, R., *Financing Urban Infrastructure: Equity and Efficiency Considerations*, (1990) 8(4) Urban Policy and Research, 1.
201 Dollery, B., Witherby, A., Marshall, N., *Section 94 Developer Contributions and Marginal Cost Pricing*, (2000) 18(3) Urban olicy and Research 314.
202 Hansard, Second Reading Speech, 20 November 1997, 4544.
203 Department of Local Government and Planning, IPA Guideline 4/98 - Infrastructure Charging, 1998, 5.
204 Department of Communication and Information, Local Government, Planning and Sport, Position Paper – *Infrastructure Charges Plans: Issues and Principles* April 2000, 2.
205 Id at 6.
206 Dollery, B., Witherby, A., Marshall, N., *Section 94 Developer Contributions and Marginal Cost Pricing*, (2000) 18(3) Urban Policy and Research 322.
207 Section 5.1.4(1) of the *Integrated Planning Act 1997*.
208 Department of Local Government and Planning, IPA Guideline 4/98 - Infrastructure Charging, 1998, 8.
209 Section 5.1.2 of the *Integrated Planning Act 1997*.
210 Section 5.1.4(1)(b) of the *Integrated Planning Act 1997*.

- Fifth, ICPs are limited by a consideration of alternative funding mechanisms in accordance with the requirement that infrastructure charges should be restricted to facilities where consumer choice is constrained for reasons of health and safety or where there are compelling savings in long term provision costs.[211]
- Finally ICPs rely on the concept of a benchmark development sequence to determine the timing or staging of residential development and indicate preferred areas for development in three five year stages.[212]

Problems with the Existing System

A recent review of the infrastructure charging provisions under IPA has described them as "*onerous and overly complex*".[213] However, it has been recognised that there is a need to trade off a complex but sophisticated system of infrastructure charging against a transparent easy to use system given that a more complex system of charges is necessary to respond to the characteristics of individual local communities and their specific infrastructure needs.[214]

One of the many criticisms of the current ICP framework under IPA centres on the way in which IPA fails to integrate infrastructure with planning and development.[215] The provisions relating to infrastructure are dispersed throughout IPA making it difficult to obtain a clear comprehension of the conceptual regime through which infrastructure is to be provided.

Another problem with the current system is the somewhat ambiguous relationship between "*capital costs*" (initial capital investment) and the maintenance regime. For example, there is an argument that the maintenance required to ensure the sufficient establishment of landscaping should be considered as part of the capital costs of landscape implementation.[216] Another example can be seen in the evolving road maintenance and construction technologies which can mean that very significant maintenance works (short of reconstruction) can produce similar increases in design life when compared with complete asset replacement.[217]

Another problem arises from the user pays charging philosophy underlying ICPs. The user pays philosophy requires that charges must not be more than the proportion of the cost of the infrastructure item that reasonably can be apportioned to the premises for which the charge is fixed, taking into account the likely share of the usage of the infrastructure item in respect of the premises.[218] Unfortunately in the real world the catchment or benefit region for particular infrastructure items rarely has a sharply defined edge.[219] This is especially the case with local community purpose infrastructure (parks etc) where usage is determined by distance. Similar issues arise with local transport infrastructure.

The reliance of ICPs on a local government's benchmark development sequence has also had its problems. The concept of a benchmark development sequence requires the identification of likely areas of development and the infrastructure required for those areas over a 15 year period. This has been perceived by local governments to be a difficult political and practical task given the level of detail required.[220]

Furthermore a local government's benchmark development sequence is based on the efficient (ie the most cost effective) provision of infrastructure. Unfortunately, this methodology does not take into account the operational costs of the infrastructure. For example, in the case of local transport infrastructure it does not take into account costs to the travelling public, costs to the economy, loss of life or even greenhouse impacts. Accordingly, ICPs can be used to fund infrastructure which on a full cost/benefit analysis is not in the best interests of the community. However, it should be said that this is not so much a criticism of ICPs but rather a criticism of the infrastructure planning system established under IPA.

Another criticism of ICPs is that they are inflexible by nature. Infrastructure charges can only be levied after preparing an ICP. Therefore it is necessary for all details of the cost and timing of works being charged for to be provided in advance. In the case of minor works (such as footpaths and reticulation pipes) it is often not feasible to do this because details of costs and timing are usually not available until shortly before the works are required.[221]

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211 Department of Communication and Information, Local Government, Planning and Sport, Position Paper - *Infrastructure Charges Plans: Issues and Principles* April 2000, 6.
212 Department of Communication and Information, Local Government, Planning and Sport, Position Paper - *Infrastructure Charges Plans: Issues and Principles* April 2000, 4.
213 Department of Local Government and Planning, *Review of Infrastructure Provisions under the Integrated Planning Act 1997*, August 2001, 2.
214 Dollery, B., Witherby, A., Marshall, N., *Section 94 Developer Contributions and Marginal Cost Pricing*, (2000) 18(3) Urban Policy and Research 314.
215 Department of Local Government and Planning, *Review of Infrastructure Provisions under the Integrated Planning Act 1997*, August 2001, 2.
216 Dollery, B., Witherby, A., Marshall, N., *Section 94 Developer Contributions and Marginal Cost Pricing*, (2000) 18(3) Urban Policy and Research 314.
217 Id at 319.
218 Section 5.1.6(2) of the *Integrated Planning Act 1997*.
219 Dollery, B., Witherby, A., Marshall, N., *Section 94 Developer Contributions and Marginal Cost Pricing*, (2000) 18(3) Urban Policy and Research 315.
220 Department of Local Government and Planning, *Review of Infrastructure Provisions under the Integrated Planning Act 1997*, August 2001, 3.
221 Department of Local Government and Planning, *Review of Infrastructure Provisions under the Integrated Planning Act 1997*, August 2001, 4.

Infrastructure charges in respect of roads has also been criticised on the basis that IPA currently only allows charging for local government owned roads thereby excluding local roads under State government control. This may lead to inequity as development near some local roads may be liable for infrastructure charges whilst development on other local roads that are State controlled roads will be exempted from infrastructure charges.[222] Windfall gains may therefore accrue to those owners whose developments are fortunate enough to be located on local roads under the control of the State government that are exempt from infrastructure charges.[223]

Despite these criticisms, it is important to recognise that ICPs are an important tool that encourage forward planning by shifting the focus from a reactive system based on infrastructure contributions by developers through development approval conditions to a proactive system of infrastructure charges based on a long term development sequence specified in a planning scheme.

ICPs address many of the problems previously encountered with developer contributions such as accountability, transparency, certainty and double dipping. New concerns however have arisen in relation to the creation and practical application of ICPs.

Proposed changes

The conceptual nature of the existing ICP framework has meant that local governments have encountered practical difficulties in the preparation and application of ICPs in their local government areas. Consequently, various changes have been proposed to assist in the efficient implementation of ICPs and to address the shortcomings of the existing provisions.[224]

Priority service areas

It is proposed that the concept of the benchmark development sequence be removed and replaced by the concept of a priority service area. The priority service area will serve as the central infrastructure component in an IPA planning scheme and will identify logical extensions of urban areas where infrastructure capacity exists, is planned, or can be cost effectively provided.

It is envisaged that the priority service area will be included in the IPA planning scheme as a map and would relate to urban land for the normal range of uses (residential, retail/commercial and industrial uses).[225]

It is also envisaged that the priority service area will be reviewed every four years. A priority service area must identify at least two matters:

- First, the existing developed urban land already serviced with infrastructure must be identified.
- Second, the additional urban land required to accommodate between 10 and 15 years of growth in each of the different use categories must be identified. This additional urban land must satisfy one of three tests:
  - first, it must be a logical extension of the urban fabric; or
  - second, it must be proposed to be serviced; or
  - third, the land must be the most effective to service with infrastructure.

Plans for infrastructure

A priority service area is required to be supported by a plan for infrastructure which identifies the infrastructure required to service expected development at the desired standard of service and which is based on the IPA planning scheme's assumptions about the scale, density and location of future development.[226]

A plan for infrastructure is required to satisfy three objectives:

- First, it must provide a benchmark for the timing, form and scale of future development to enable the assessment of any infrastructure bring forward costs or other cost impact mitigation measures.
- Second, it must result in infrastructure that achieves the desired standard of service in the most efficient manner taking into account the full (ie capital, operating and maintenance) cost of the infrastructure.
- Third, it must provide direct inputs into the preparation of an infrastructure charges plan for the relevant infrastructure network.

A plan for infrastructure will only need to deal with trunk level infrastructure consistent with those items which can be charged for under an infrastructure charges plan.

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222 Ibid.
223 Ibid.
224 Department of Local Government and Planning, *Review of Infrastructure Provisions under the Integrated Planning Act 1997*, August 2001, 4-14.
225 Department of Local Government and Planning, *Review of Infrastructure Provisions under the Integrated Planning Act 1997*, August 2001, 5.
226 Id at 6.

Relationship to IDAS

A priority service area is intended primarily to be an infrastructure planning mechanism and a means for improving integration between infrastructure and land use planning. Development proposals, whether located within or outside a priority service area, will still be assessed in the normal manner against the relevant requirements of the IPA planning scheme and according to the decision making rules specified in IPA.

Local governments will still have the option of conditioning a development proposal to achieve compliance with codes or other requirements of the IPA planning scheme, refusing proposals which compromise the achievement of a planning scheme's desired environmental outcomes, or refusing proposals which are otherwise inconsistent with the intent of the planning scheme, unless there are planning grounds which warrant approval of the proposal despite that conflict. Therefore being inconsistent with a priority service area (or a plan for infrastructure), would not, of itself, constitute grounds for refusal.

A priority service area will also provide the trigger for cost impact assessments for certain developments. Within a priority service area, a cost impact assessment can only be triggered if the scale, density or timing of the proposed development is inconsistent with a plan for infrastructure. For impacts related to the form and scale of development, cost impact mitigation may include any capital costs that are required for additional infrastructure. If there is no plan for infrastructure, a cost impact assessment cannot be triggered for land within the priority service area.

Outside a priority service area, cost impact assessment is possible whether or not a plan for infrastructure exists. In these cases, the full range of cost impact mitigation measures, including capital cost, opportunity cost, capital and operating costs for any temporary works and maintenance costs will be available.

Infrastructure charges for large and growth local governments

Infrastructure charges are principally tools for local governments experiencing significant growth and infrastructure demands. They provide an opportunity to impose charges with certainty based on a local government's plans for capital expenditure on its infrastructure networks. However, it is recognised that infrastructure charges may not be required for areas not experiencing these pressures. Accordingly, alternative options have been proposed.

For large growth local governments, infrastructure charges will be retained as the primary proactive long term infrastructure funding mechanism. If these local governments wish to obtain up front funding for infrastructure in their priority service areas, they must prepare infrastructure charges plans for these areas.

It is recognised that the level of detailed infrastructure information currently required to prepare an infrastructure charges plan imposes significant time, cost and resource demands on local governments. Consequently it is proposed to provide the option for minor infrastructure items and infrastructure items solely benefiting a property to be funded through conditions imposed on development approvals.

Thresholds for higher order infrastructure items for which charges must be levied under an infrastructure charges plan are still to be determined. Public recreation and community land will not be subject to a minimum threshold as all land of this nature is appropriately planned and funded well in advance of provision.

Infrastructure charges for small and low/no growth local governments

For small or low/no growth local governments it is proposed that infrastructure charges plans be optional and the current approach of dealing with development proposals on a case by case basis through the imposition of conditions on development approvals be continued. These local governments will have the ability to recover the costs of infrastructure items through cost impact conditions on development approvals.

If it is intended to condition a development approval for an infrastructure item on a regular basis, a development infrastructure policy will be required. A development infrastructure policy is intended to be a planning scheme policy which is prepared in accordance with the process specified in Schedule 3 of IPA. Development infrastructure policies will be equivalent to existing "*headworks contribution policies*", but based on infrastructure charges plan principles and methodology tailored to the circumstances of small or low/no growth local governments and applicable to the full range of development infrastructure items.

If it is not intended to impose conditions on development approvals on a regular basis they can be dealt with on a case by case basis without the need for a development infrastructure policy.

Low growth areas within ICP local governments

It is also acknowledged that some large and/or growth local governments may have townships or other localities within their areas experiencing low or limited growth, but which are serviced with infrastructure. These local governments will have the option of seeking the Minister's approval to levy infrastructure charges in these areas through a development infrastructure policy rather than an infrastructure charges plan.

It is envisaged that approvals of this nature would only be granted by the Minister in exceptional circumstances, such as where there are joint infrastructure funding/provision arrangements with an adjoining local government which has a development infrastructure policy, or where a development infrastructure policy is the most appropriate mechanism to preserve existing infrastructure funding agreements with landowners.

Public recreational land

The proposed reforms also make provision for the embellishment of public recreational land:

- First, public recreation infrastructure will be defined to include "*land, capital works or land and capital works*".
- Second, capital works for public recreation infrastructure will be defined to include items such as basic landscaping, playground equipment and shade structures, games and sports facilities, playing fields and courts, picnic facilities, circulation and access facilities.

Infrastructure charging for roads

In relation to infrastructure charges for roads, it is proposed that charges will be imposed according to their function rather than their ownership. Roads fulfilling a defined *'local'* function can be included within the infrastructure charging framework regardless of ownership. Other State government roads serving non-local functions would continue to be taxpayer funded.

Alternative Methods of Funding Infrastructure

The current requirement in IPA that an infrastructure charges plan evaluate alternative methods of funding infrastructure items is also intended to be removed and replaced with a requirement that alternative methods merely be considered rather than be evaluated.[227]

Lifecycle Costs

Another proposed change is to the requirement to calculate the lifecycle costs of infrastructure as part of an infrastructure charges plan. Due to the detailed issues involved in the calculation of the lifecycle costs of infrastructure, it is proposed to remove references to lifecycle costs and include minimum lifecycle cost requirements in statutory guidelines.

Capital Costs

It is also proposed to amend the definition of capital cost in Schedule 10 of IPA to include the cost of preparing infrastructure charges plans so that such costs are recoverable through infrastructure charges.

Conditioning Powers

Clarification will also be provided in relation to IPA's conditioning powers. Basic infrastructure items which solely benefit a property or are required to connect a property to a development infrastructure network can be imposed as conditions (subject to the normal reasonable and relevant tests). Examples of this type of infrastructure include water and road connections, internal reticulation, external works along a site frontage and intersection upgradings.

Shared Financing Arrangements

The final reform that I wish to focus on relates to shared financing arrangements. It is proposed to give statutory recognition to agreements between local governments and developers whereby a developer agrees to provide an item of infrastructure (which serves a catchment larger than the development site) on the basis that the developer is reimbursed as further development occurs. Such agreements are to be known as Infrastructure Funding Partnerships and are to have the status of an infrastructure agreement under IPA.

Conclusions

Finally I would like to make some concluding comments regarding the proposed reforms to the current infrastructure charging arrangements under IPA.

First, the proposed reforms will provide significant flexibility in terms of the legal instruments such as development infrastructure policies and development approval conditions that are available to local governments particularly those with low growth rates to impose infrastructure charges. The one size fits all approach of the current infrastructure charging provisions under IPA is unrealistic and will be corrected by the proposed reforms.

Second, in relation to larger local governments, the breaking of the nexus between ICPs and the local government's benchmark development sequence will remove one of the significant hurdles to the completion of ICPs before the March 2003 deadline. The priority service area concept and plan for infrastructure concept are far more flexible than the benchmark development sequence and require far less up front planning and analysis.

Third, whilst infrastructure charges plans are proposed to be simplified through the adoption of guidelines in respect of minimum lifecycle costs the process of preparing infrastructure charges plans remains very conceptual and complex.

[227] See section 5.4.1(1) of IPA.

The black box analysis involved in the preparation of infrastructure charges plans will do little to improve public understanding or industry acceptance of the resulting charges. There is a real need for model instruments to be prepared that are relatively transparent in relation to the methodology that has been adopted. They do not have to be understood by a lawyer but at least a competent professional engineer must be able to interrogate the document and advise an owner as to the reasonableness or otherwise of the infrastructure charges.

This is the task for local government professionals and their advisers. To date there has been much debate and criticism of the infrastructure charging system under IPA. With the impending reforms some of the current criticisms will be addressed. As a result local government professionals will have to respond with solutions. That time is very fast approaching. Indeed the March 2003 deadline is within sight. May the force be with them!

This paper was presented at the Queensland Environmental Law Association seminar, 26 November 2001.

Plan making and development assessment under Queensland's Integrated Planning Act – Implications for the public and private sectors

Ian Wright

This article discusses the evolution of plan making and development assessment under the *Integrated Planning Act 1997* and how these changes have impacted the public and private sectors

November 2001

Introduction

Integrated Planning Act 1997

The *Integrated Planning Act 1997* (**IPA**) commenced operation on 31 March 1998. The IPA repealed the *Local Government (Planning and Environment) Act 1990* (**PEA**) which itself had repealed the *City of Brisbane Town Planning Act 1964* and the town planning and subdivision provisions of the *Local Government Act 1936*.

The IPA, like earlier Queensland planning legislation, creates three main systems:

- a plan making system;
- a development approval system called IDAS;
- a dispute resolution system.

Radical reform

Unlike earlier Queensland planning legislation, the IPA represents a radical shift in the theoretical basis and practical application of planning legislation.

The change in planning theory and practice that is represented by the IPA is embodied in the planning schemes that are to be made under the IPA. As such, the IPA planning scheme represents a significant shift in planning theory and practice from the 1985 planning scheme it replaced.

Themes of this article

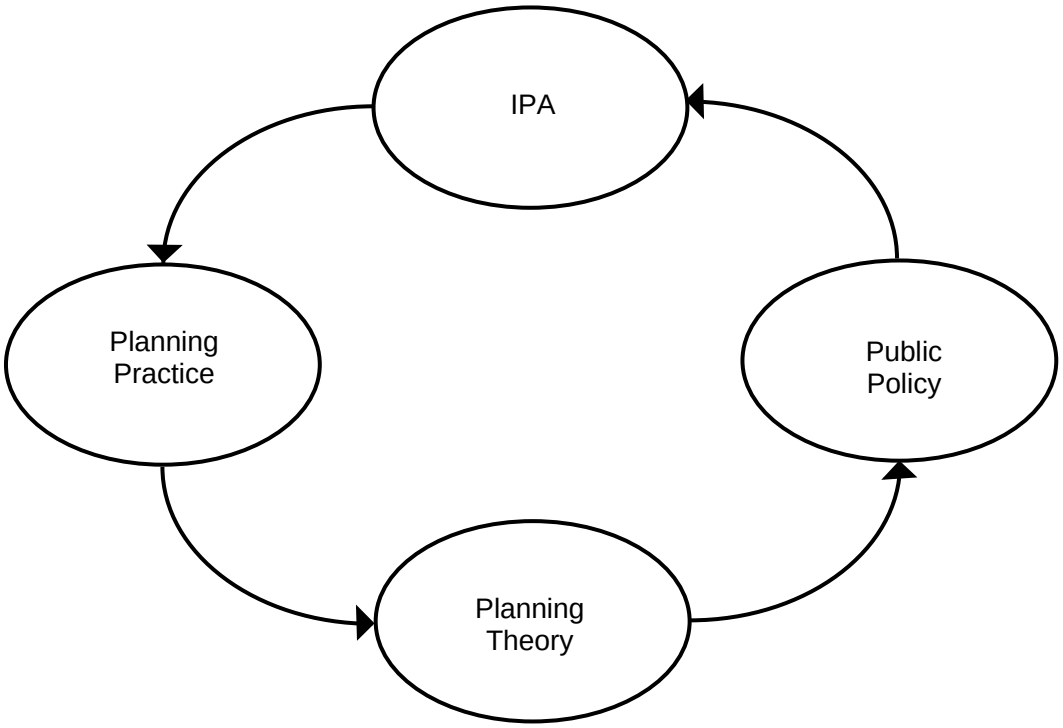
This article examines the changes in planning theory and practice that have been wrought by the IPA and IPA planning schemes. In particular the article explores six themes:

- First, the article will briefly examine the plan making and development assessment systems established by the IPA.
- Second, the article will examine the changes in public policy that have underpinned the plan making and development assessment systems of the IPA.
- Third, the article will examine the changes in the planning theory that have underpinned the changes from the transitional planning schemes made under the PEA to the planning schemes made under the IPA.
- Fourth, the article will examine the opportunities that have been offered to local governments and landowners by the IPA.
- Fifth, the article will consider the implications of the changes wrought by the IPA on local governments, landowners, the community and professionals.
- Finally, the article will examine some of the emerging issues arising from the IPA that all stakeholders will be required to grapple with in the coming years.

Theoretical model

My analysis and discussion of these themes is grounded in the view that laws such as the IPA are inevitably the product of an amalgam of planning practice, planning theory and public policy considerations. These relationships are illustrated in Figure 1 – Theoretical basis for IPA.

Figure 1 Theoretical basis for IPA



Plan making and development assessment under IPA

Plan making and development assessment are the opposite sides of the same coin. That is, development assessment only has reference to those matters that are the subject of the plan making process. To that extent the plan making process determines the extent to which development assessment is relevant.

The IPA does not prescribe a plan. Rather it creates a framework that allows communities across Queensland through their local governments to determine their own plan.

Plan making requirements

The requirements that are imposed on a local government in the preparation of its plan are quite limited:

- First, a planning scheme must coordinate and integrate all matters (including those matters of State and regional dimensions) with the purpose of achieving ecological sustainability.[228] The concept of ecological sustainability will be expanded later in this article.
- Second, a planning scheme must determine the desired environmental outcomes for the planning scheme area (including any locality within the planning scheme area).[229]
- Third, a planning scheme must include measures to facilitate the desired environmental outcomes including the identification of assessable development and the relevant level of assessment for the assessable development.[230]
- Fourth, and this requirement is proposed to be omitted by the proposed IPOLA 2001 amendments, a planning scheme must include performance indicators to measure the planning scheme's achievement of the desired environmental outcomes.[231]
- Finally, for prescribed local governments, a planning scheme must contain a benchmark development sequence.[232]

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228 See s 2.1.3(1)(a) of IPA.
229 See ss 2.1.3(1)(b) and 2.1.3(3)(a) of IPA.
230 See ss 2.1.3(1)(c) and 2.1.3(2) of IPA.
231 See s 2.1.3(1Xd) of IPA and s 10 of IPOLA 2001.
232 See ss 2.1.3(1)(e) and 2.1.3(3)(b) of IPA.

Relationship of planning scheme to development assessment

A planning scheme which is required to be prepared by IPA is therefore critical to the development assessment process in four important respects:

- First, it is the primary determinant of assessable development. Development which is not specified as assessable development under IPA is exempt development.[233] Exempt development is not subject to any planning instrument.[234] As I will discuss later in this article the concept of exempt development represents a significant change in Queensland planning law.
- Second, a planning scheme must classify assessable development into three categories:
  - self-assessable development — development of this type is assessed by a landowner against all applicable codes;[235]
  - code assessable development — development of this type is assessed by the local government in respect of its compliance with the applicable codes and the desired environmental outcomes;[236]
  - impact assessable development — development of this type is assessed by the local government in terms of its environmental effects and its compliance with the planning scheme, in particular the desired environmental outcomes and any relevant codes.[237]
- Third, a planning scheme must identify the applicable codes against which code assessable development must be assessed.
- Fourth, a planning scheme must identify the desired environmental outcomes against which impact assessable development must be assessed.

This analysis demonstrates two important matters that are critical to an understanding of the theoretical and practical changes wrought by the IPA.

- First, the plan making process under the IPA is outcome driven rather than activity based as was the case under earlier Queensland planning legislation.
- Second, development assessment under the IPA is effects based rather than activity based as was the case under earlier Queensland planning legislation.

The change from an activity based plan making and development assessment framework under earlier Queensland planning legislation to the IPA framework of outcome driven planning and effects based development assessment is revolutionary.

Public policy agenda underpinning IPA

IPA has embraced two major public policy goals of the 1990s: public sector reform and ecological sustainability. The former is implicit in the drafting of the IPA whilst the latter is explicitly expressed as the purpose of the IPA. This paper will examine how both public policy goals have influenced the plan making and development assessment frameworks created by the IPA.

Public sector reform

Public sector reform was a mantra of the 1990s. Commonwealth, State and local governments were reformed to increase economic efficiency and economic accountability through a corporatisation process that emphasised downsizing, economic rationalism and customer satisfaction as appropriate goals of the public sector.[238]

Consistent with this agenda, the IPA has sought to increase economic efficiency and economic accountability. This is reflected in a number of significant public policy reforms that were introduced by the IPA.

Reduction in legislation – the IPA introduces within one overarching Statute an integrated and comprehensive decision-making framework that will allow the repeal of some 5000 pages of decision-making processes in other legislation.[239]

Common procedures – the IPA establishes common plan making, development assessment and enforcement procedures that apply to all development (other than mining and casinos).[240]

Integration of government interests – the IPA planning schemes are intended to incorporate all local, State and regional interests as well as the interests of the private sector.[241]

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233 See s 3.1.2(1) of IPA.
234 See s 3.1.4(3)(b) of IPA.
235 See s 3.1.4(2)(a) of IPA.
236 See s 3.5.13 of IPA.
237 See s 3.5.14 of IPA.
238 England P, *Integrated Planning in Queensland*, The Federation Press, Sydney, 2001, p 17.
239 Yearbury K, *Planning for the Millennium*, Proceedings of QELA Seminar on 27 September 1997, p 29.
240 See *Mineral Resources Act 1989* and *Jupiters Casino Agreement Act 1983*.
241 See s 2.1.3(1)(a) of IPA.

Single approval system – the Integrated Development Assessment System (**IDAS**) introduces a single system for processing, assessing and granting approvals whatever the form of development. The IDAS encourages regulatory agencies to codify assessment criteria, promotes a whole of project approach to development assessment and encourages communication between regulatory agencies.[242]

User pays – the costs of development are to be borne by those who incur them. The application of the user pays principle means that fees are levied on applicants for development applications and assessment[243] and infrastructure contributions are levied on applicants through development approvals and infrastructure charges.[244]

Regulatory alternatives – the power to impose a tax on a landowner in the form of an infrastructure charge is limited by the requirement that the infrastructure charge must be in accordance with an infrastructure charges plan that has evaluated alternative ways of funding the development infrastructure item.[245]

Separate regulatory and service functions – the regulatory and provider service functions of development assessment have been separated by providing for the private certification of development applications for building works.[246]

Focus on policy issues – the council's role is to determine the outcomes and the standards beyond which ecological sustainability cannot be maintained, monitor both environmental quality and the effectiveness of government policies and make that information public and enforce adherence to the outcomes and standards. The role of landowners is to determine how they can achieve the outcomes and standards beyond which ecological sustainability cannot be maintained.

Devolution – plan making and development assessment functions are devolved to the level of government with the greatest community of interest which in most cases is the local government being the level of government closest to the problems and to the citizens who will be affected by the problems.

Community participation – plan making and development assessment are subject to public participation processes which entitle any person to make a submission in respect of a planning scheme policy, a State planning policy, a planning scheme or impact assessable development.[247]

Defined timelines – the IDAS specifies strict timelines which produce quicker decisions. This also requires elected members to delegate administrative functions to local government officers so that they can concentrate on policy issues.

The IPA's focus on increased economic efficiency and economic accountability is complemented by a focus on ecological sustainability as the overarching purpose of the IPA. Ecological sustainability is a moralistic and political concept that is intended to moderate the economic rationalism and depoliticisation of the corporatisation focus of the public sector reform process.

Ecological sustainability

As has been indicated earlier, ecological sustainability is stated to be the overarching purpose of the IPA.[248]

Ecological sustainability is defined as a balance that integrates three separate elements:[249]

- *Economic environment* – that is, the protection of ecological processes and natural systems at local, regional, State and other levels.
- *Physical environment* – that is, economic development.
- *Social environment* – that is, the maintenance of the cultural, economic, physical and social wellbeing of people and communities.

The key components of each element are summarised in Figure 2 – The Sustainability Framework. The model clearly illustrates that ecological sustainability is concerned with the inter-relationship between the social, economic and physical environments.

The physical environment is where the natural environment interacts with the community. In this case, the sustainability objective is to ensure liveability. The goal of liveability is achieved when the physical environment has reached a stage where the long term health of the community and the natural environment is being maintained.

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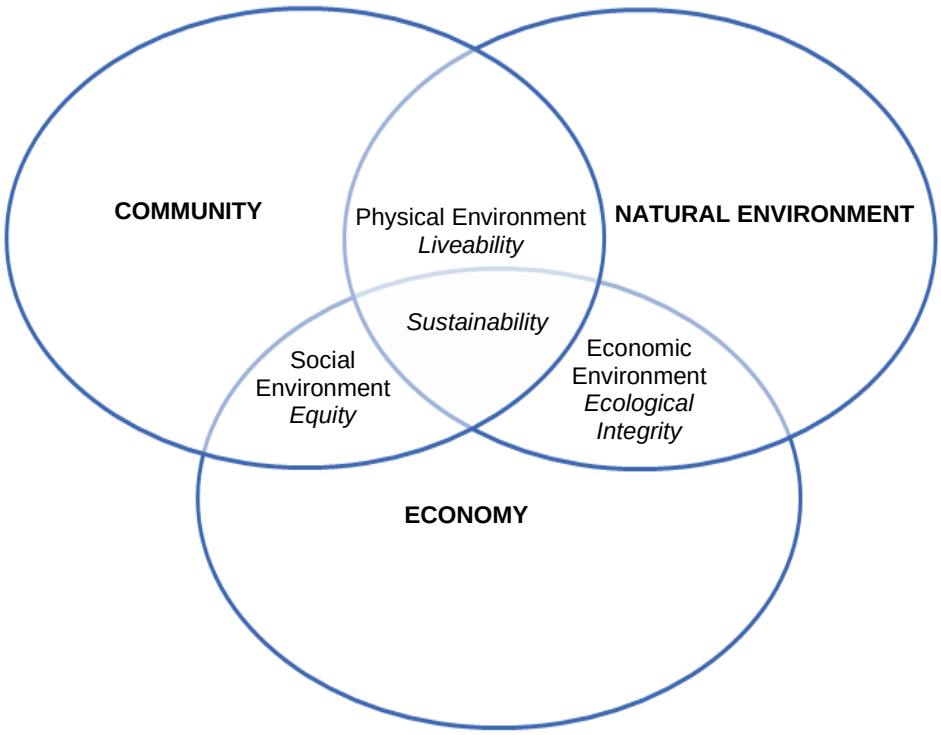
242 Yearbury, K seen 12, p 29.
243 See s 3.2.1(4)(a) of IPA.
244 See ss 6.1.31 and 5.1.7 of IPA.
245 See s 5.1.4 of IPA.
246 See s 5.3.5 of IPA.
247 See s 12 of Sch I (planning schemes), s 3 of Sch 3 (planning scheme policies) and s 3 of Sch 4 (state planning policies) and s 3.4.4 of IPA Impact assessable development.
248 See s 1.2.1 of IPA.
249 See s 1.3.3 of IPA.

The social environment is where the community interacts with the economy. In this case, the sustainability objective is to ensure equity. The goal of equity is achieved when the social environment has reached a state where the long term health of the community and the economic environment is being maintained.

The economic environment is where the economy interacts with the natural environment. In this case, the objective is to ensure ecological integrity. The goal of ecological integrity is achieved when the economic environment reaches a state where both the long-term health of the economy and the natural environment are maintained.

Ecological sustainability is achieved where the social, economic and physical environments are in balance, that is where liveability, ecological integrity and equity exist. See Figure 2.

Figure 2 The Sustainability Framework



The goal of ecological integrity is achieved if:[250]

- the life supporting capacities of our ecosystems, soil and water are conserved, enhanced or restored for present and future generations (ie ecosystem health); and
- biological diversity is protected. The goal of liveability is achieved if:[251]
  - there are diverse, efficient, resilient and strong economies at local, regional and State levels; and
  - the economies allow the communities to meet their present needs while not compromising the ability of future generations to meet their needs (ie intergenerational equity is achieved).

The goal of equity is achieved if:[252]

- well-serviced communities with affordable, efficient, safe and sustainable development are erected and maintained; and
- areas and places of special aesthetic, architectural, cultural, historic, scientific, social or spiritual significance are constructed or enhanced; and

[250] See s 1.3.6(a) of IPA.
[251] See s 1.3.6(b) of IPA.
[252] See s 1.3.6(c) of IPA.

- integrated networks of pleasant and safe public access for aesthetic enjoyment and cultural, recreational or social interaction are provided. The IPA itself makes it clear that legislation cannot of itself achieve ecological sustainability. It can only assist in the achievement of ecological sustainability. Accordingly, the IPA makes it clear that its purpose is not to achieve ecological sustainability but to seek to achieve ecological sustainability by:[253]
  - coordinating and integrating planning at the local, regional and State levels; and
  - managing the process of development; and
  - managing the effects of development on the environment.

IPA achieves this purpose by providing for:

- an integrated planning system;
- an integrated development assessment system (**IDAS**); and
- an integrated dispute resolution system.

Before considering in more detail how ecological sustainability is achieved through the integrated plan making and development assessment systems, it is important to consider the theoretical underpinnings of the IPA and the public policy agenda on which it is based.

Theoretical underpinnings of IPA

Minimalist v instrumental planning

The IPA creates a planning framework that planning theorists have described as instrumental planning. Under this model of planning the goal of planning and planners is to identify society's social, economic and environmental goals and implement physical planning that facilitates these goals.[254]

This approach is to be contrasted with the approach which underpinned earlier Queensland planning legislation such as the *Local Government (Planning and Environment) Act 1990*. The planning framework created by the PEA has been described by planning theorists as minimalist planning.

Under the minimalist model of planning, the goal of planning and planners is to reconcile competing claims for the use of limited land so as to improve the built environment and by implication the quality of human life.[255]

In essence the PEA was concerned with physical outcome planning whilst the IPA is concerned with social outcome planning. Or to put it another way, the PEA was about the planning of development whilst the IPA is about the planning for development. The difference in the wording is subtle but the implications in terms of the planning framework are enormous.

The differences between the planning approaches underpinning the PEA and the IPA are summarised in Table 1 – Comparative Analysis of PEA and IPA Planning Frameworks.

Table 1 Comparative analysis of PEA and IPA planning frameworks

Planning Framework	Local Government (Planning and Environment) Act 1990	Integrated Planning Act 1997
1. Type of planning	Minimalist planning – planning of development	Instrumental Planning – planning for development
2. Purpose of planning	Physical outcome planning: • Create a physical environment that is fundamentally appropriate and aesthetically pleasing. • Assumption that an improved physical environment improves the quality of human life.	Social outcome planning: • Create an environment that achieves the social, economic and environmental goals defined by society. • Assumption that the achievement of ecological sustainability improves the quality of human life.

253 See s 1.2.1 of IPA.
254 England P, see n 11, p 3.
255 England P, see n 11, p 2.

Planning Framework	Local Government (Planning and Environment) Act 1990	Integrated Planning Act 1997
3. Planning approach	Technocratic approach: • Achievement of physical limits is important. • Grounded in the physical sciences (engineering, surveying, architecture and law) where planning is seen as technically orientated.	Analytical approach: • Achievement of societal goals is important. • Grounded in social sciences (geography and planning) where planning is seen as policy and management orientated.
4. Decision makers	Focus on technical issues – defining the physical limits and controls.	Focus on policy issues – defining the outcomes.
5. Planning schemes	Control driven: • Activities are controlled. • Activities that are not regulated are prohibited. • Prohibitions are permitted and necessary. • Prescriptive based controls.	Outcome driven: • Specify the outcomes to be achieved by activities. • Activities that are not regulated are permitted (eg exempt development). • Prohibitions are prohibited.
6. Development assessment	Assess activities	Assess the effects of activities within defined outcomes.
7. Public interest/ private rights	Private property rights are protected: • Property values are protected (eg prohibitions and prescriptive controls). • Compensation for loss of development entitlements.	Public interest is protected – the achievement of societal goals prevail over private property rights.
8. Public participation	Less participatory – public participation is limited to protect private property interests.	More participatory – public participation is critical to determine the outcomes required by society.

Competing philosophies

The divide between the minimalist planning approach of the PEA and the instrumental planning approach of the IPA also represents a tension between two competing philosophies.

The first is the liberal perspective which argues that minimalist regulatory intervention is required to protect individual rights. This is to be compared with the competing conservative perspective which argues that a higher level of regulatory intervention is required to protect the public interest. These competing perspectives are adopted by different stakeholders.

Whilst not wishing to offend anybody, this article suggests that the conservative perspective is held by most residents and environmental groups, many elected representatives, a large number of planners and architects, some lawyers and the current State government.[256]

Again whilst not wishing to offend anybody, it is suggested that the liberal perspective is held by many developers, sectoral groups, some planners and architects, most lawyers, classical economists, companies (particularly large ones), some farmers and the current Commonwealth government. [257]

As such there is an ideological divide between the proponents of the instrumental planning approach under the IPA and the proponents of the minimalist planning approach under the PEA.

For the moment the conservatives hold the upper hand with the current drafting of the IPA. However, there is mush dissatisfaction with the IPA. Accordingly it is increasingly likely that future debate over the IPA will be politicised to such an extent that there is a real likelihood of future reactionary changes to the IPA. The proposed IPOLA 2001 amendments represent the beginning of this change.

The change in the planning approach from the minimalist planning of the PEA to the instrumental planning of the IPA provides significant opportunities as well as significant implications for local governments, landowners and the community.

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[256] Nixon B, *The RMA: An Impending Ideological Crisis* (1998) *Planning Quarterly*, June, p 4.
[257] *Ibid* at 4.

Opportunities presented by IPA

Under the PEA the planning framework was dependent on prescriptive planning and regulation that restricted the type of activities. Under the IPA, the emphasis is instead on the effects that activities will have on the environment.

In other words rather than tell landowners that they have to build houses here or cannot put a business there, the IPA has set up a process for determining the desired environmental outcomes and measures that prescribe environmental quality standards. This framework presents opportunities for both local governments and landowners.

Local governments

Local governments have the following opportunities available to them under the planning framework created by the IPA.

- *Greater flexibility* – first, local government has greater flexibility to achieve ecological sustainability. It is not constrained to regulating activities. It can base its regulation on both the intended outcomes as well as the effects of activities.
- *Reward systems* – second, local government can establish a flexible and transparent system of developer contributions which reward developments with few or no undesirable impacts and penalise those with many.
- *Improved communication* – third, the instrumental planning approach of the IPA provides forums for the community and planners to debate, agree and implement programs which meet the needs and opportunities of the community. This is reflected in the success of the local area planning program undertaken in various Queensland local governments.

Landowners

Apart from local governments, the instrumental planning framework created by the IPA also presents opportunities for landowners.

- *Competitive neutrality* – first, the regulation of activities based on effects rather than the regulation of activities per se means that the playing field for companies and industries is levelled so that one company or industry cannot manipulate the planning framework for its commercial advantage. An example of this was the protection of small businesses through the prohibition under the PEA of developments involving service stations and shops or the prohibition of uses such as taverns, brothels and extractive industries under previous local government planning schemes.
- *Encourages innovation* – second, the focus on outcomes rather than activities provides incentives for developers to come up with efficient and innovative ways of achieving the community's desired environmental outcomes.
- *Freedom of choice* – third, the framework allows people the maximum freedom to make their own decisions regarding the use of their land within defined limits. Within these limits people are provided with the freedom of social and economic choice. This is good for both the environment and business.

However, the opportunities presented to local government and landowners by the IPA is not without its consequences. The instrumental planning framework envisaged by the IPA presents challenges for local governments, developers, and the community as well as professionals.

Implications of the IPA framework

Local governments

The transition to an outcome-driven effects-based planning approach has significant implications for local governments preparing and administering IPA planning schemes.

- *Regulatory alternatives* – first, when making planning schemes, local governments must start from a zero base and question the need for comprehensive regulation by evaluating options, effectiveness, costs and benefits.
- *Integrated approach* – second, IPA planning schemes are intended to be more inclusive documents which represent not only local interests, but also regional and State (and hopefully commonwealth) interests as well.[258] The reader should be able to look at a local government planning scheme and see all the interests of all relevant agencies reflected in the document.[259] To say that this has been elusive to achieve in practice is an understatement. As one writer prophetically noted before the commencement of the IPA:

[258] Schonburg K, *Fine Tuning and Future Directions*, *Proceedings of QELA Seminar* 27 September 1997, p 12.
[259] *Ibid* at 12.

If however local government is left without that degree of commitment from State agencies which the Bill envisages, it will be local government that will suffer the opprobrium attached to the failure of the planning scheme to achieve its objectives.[260]

- *Risk management approach* – third, the presumption that development which is not made assessable development by the planning scheme is exempt development places an onus on the local government to anticipate future types of development which are currently unknown in the market. For example, it is easy to forget that aquaculture and biotechnology were until recently, unknown as separate industries. The need to regulate substantial but unknown developments requires local government to adopt a risk management approach to regulation. It is necessary for local government to consider whether the planning scheme should encompass all possibilities or should it confine its regulatory scope so that unnecessary controls are not foisted on other developments.
- *Adequate information* – fourth, the effectiveness of an outcome and effects based planning scheme is dependent on sufficient information. Quality time series baseline information is needed to assess changes to the state of the environment and the effects of any activities. The lack of robust and reliable information on a wide range of environmental issues (eg water quality, air quality, biodiversity and heritage sites) means that the effectiveness of any outcome driven effects based assessment system has to be suboptimal.
- *Unavoidable complexity* – fifth, the inability to prohibit development, the need to avoid exempt development by anticipating future types of development, and the need to anticipate possible adverse impacts and devise performance outcomes will inevitably result in indirect and convoluted drafting in planning schemes. This will not assist simplicity, plain English or brevity in planning scheme drafting.[261] This will make it more difficult for a plan to be owned by the broader community. Both the recently adopted Brisbane City Plan and the Maroochy City Plan have suffered from these problems.
- *Guidance to applicants* – finally, the inherent complexity of IPA planning schemes and the critical need for quality time series baseline information to assess the effects of activities within an outcome driven planning scheme means that local governments will have to give greater guidance to applicants as to what information is needed.

Developers

Apart from the significant challenges facing local governments in preparing and administering IPA planning schemes, developers are also facing some significant challenges.

- *Adequate information* – first, where a development approval is required, applicants will need to work out the impact their proposal is likely to have on the environment and submit this information with the development application. It is critical to understand that in an effects-based development system decisions depend very much on appropriate and relevant information accompanying a development application. Where the effects on an activity are not properly assessed by an applicant, then a development application will inevitably take longer as the local government will need to require further information in order to satisfy itself that the desired environmental outcomes are not compromised.
- *Cost of approvals* – second, the cost of obtaining development approvals has increased. This reflects the user pay approach embedded in the IPA as reflected in the application fees and infrastructure contributions that are imposed on applicants and landowners but also the reality that the additional information needed for an effects-based development assessment process is more extensive than that which was previously required by planning schemes under the PEA.
- *Private property rights* – third, an underlying and unresolved problem with the implementation of the IPA is that ecological sustainability cannot be achieved without addressing private property issues. Local governments have struck resistance where they have tried to address the management of biodiversity and significant natural areas on private land. Restricting the uses a landowner may peruse, without adequate compensation, has led to a rejection of the IPA's planning approach. The same can be said of the approaches of the State and Commonwealth governments in respect of other environmental matters such as land clearing and water reform where ecological sustainability is being sought to be implemented. Although there is an undeniable need to address environmental issues such as biodiversity, there is also a need to address the concerns of landowners. What is required are changes in attitudes, negotiation and discussion and a better range of regulatory and voluntary protection measures supported by financial and other incentives. This is a critical matter for all levels of government.

Community

In addition to the significant consequences for developers and landowners, IPA planning schemes also present significant issues for the community.

- *Lack of certainty* – first, the effects-based approach can mean landowners and the community have little certainty about what land uses can or cannot occur on adjacent land. This lack of certainty will be particularly contentious in urban environments where the intensification of land uses can significantly affect the amenity values of an area and bring forward a NIMBY reaction from local communities.

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[260] Bowie, *Planning Schemes — Preparation and Content*, *Proceedings of QELA Seminar* 27 September 1997, p 38.
[261] Hanisch J, *Planning Scheme Preparation and Content*, *Proceedings of QELA* Seminar, 27 September 1997, pp 43-44.

- *Increased cost of participation* – second, there are considerable costs for all participants with the current consultation processes in respect of impact assessable development. Currently assessable development is either notified or not notified — there is no middle ground or range of options for limited notification that are determined by the magnitude of the effects and the stakeholder's interest. The "*one size fits all*" approach imposes additional financial, time and emotional costs on the community.
- *Focus on the environment* – third, the IPA and the planning schemes made thereunder focus on the environmental effects of an activity on the biophysical world. They do not focus on broader economic concerns such as the impact on property values or broader social concerns such as the impact of gambling, alcohol or adult entertainment on society. New ways are needed to draw these broader economic and social concerns into IPA planning schemes.

Professionals

Apart from the challenges facing local governments, landowners and the community, IPA planning schemes also present significant challenges to professionals.

- *Multi-disciplinary approach* – first, the IPA requires a multi-disciplinary approach to plan making and development assessment. It is essential that the technical issues (dominant within the minimalist planning framework of the PEA) and the values-based community issues (dominant within the instrumental planning framework of the IPA) are integrated. This requires professionals to work together in multi-disciplinary teams that are effectively project managed. To implement this approach local governments and private organisations will need to change their structures and systems to enable this integration to occur.
- *Professional development* – second, an effects-based approach is not only a more sophisticated basis of development control requiring the input of other professionals, it also represents a continuing duty to keep pace with professional and scientific knowledge. Standards cannot be treated as gospel, but must be regularly updated.[262]

The challenges presented by the IPA and IPA planning schemes also raise significant practical issues that will have to be addressed by all stakeholders in the coming years.

Issues to be addressed

Methodological problems

The effects-based approach presents significant methodological issues for all stakeholders. These methodological problems have manifested themselves in three main areas.

- *Determination of effects* – first, an effects-based approach works best in large "*green field*" developments. It is not well suited to urban and peri-urban environments where there is a mix of land uses and a higher density of people where cumulative and synergistic effects are difficult to identify and analyse.
- *Determination of outcomes* – second, an outcome-driven planning scheme requires the desired environmental outcomes and measures to be identified. The desired environmental outcomes are a complex mix of Commonwealth, State and local government and private sector actions. It is impossible for local governments to identify these actions in the face of frustration by State regulatory agencies and the private sector.[263]
- *Financial contributions* – third, IPA planning schemes have not meshed well with the long term strategic planning approaches of those State government agencies concerned with infrastructure provision and resource allocation. This is reflected in the poor record of State agencies making community infrastructure designations particularly in respect of infrastructure corridors for roads, power, water and in the designation of resource allocation areas.

Resource allocation and efficiency

The methodological difficulties associated with IPA planning schemes are also compounded by the fact that IPA planning schemes do not (apart from land), regulate the allocation of resources such as water, mineral resources, timber and marine resources.

This makes the achievement of ecological sustainability more difficult and requires IPA planning schemes to be integrated with State government-based resource allocation plans. Unfortunately, there is currently no consistent resource allocation planning framework across the State government in respect of which IPA planning schemes can be integrated.

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262 Fogg, A, *IPA context: Promise and Performance*, Proceedings of QELA Seminar, 27 September 1997, pp 43-44.
263 Bowie, see n 33, p 38.

Resources and capacity

The methodological difficulties associated with IPA planning schemes and the exclusion of resource allocation and efficiency issues from IPA planning schemes is also exacerbated by limited resources and capacity. There are several significant issues here.

- *Data* – first, it is undeniable that quality time series baseline information is needed for an outcome-driven effects-based planning system. However, there is no tradition in local government of collecting this data, much less having a multi-disciplinary process to analyse it.
- *Drafting guidelines* – second, little assistance has been given to local governments on how to write an outcome-driven effects-based planning scheme. There is a desperate need for a model planning scheme. Despite this, the drafting guideline which was only recently issued by the State government provides little enlightenment on the practical issues confronting planning scheme drafters.
- *Policy direction* – third, the State government has not provided any State planning policies or environmental standards to assist in the implementation of IPA planning schemes apart from the State planning policies that were in existence or in the course of being developed prior to the IPA. Furthermore, there is no comprehensive statement as to what effects-based management is or how it is to be achieved.
- *Assessment methodologies* – fourth, the State government has not provided any assistance with respect to the assessment methodologies necessary to assess environmental effects. Further the assessment methodologies in respect of infrastructure provision have not been accepted or implemented to date by local governments.

Dysfunction in the system

The implementation of IPA planning schemes has also been restricted by dysfunction in the plan making and development assessment systems established by the IPA. There are several important issues here.

- *Cheque book assessments* – first, an applicant is able to reach a side deal with affected persons that will have the effect of limiting the information on possible adverse effects on the environment that is available to decision makers. The practice of "*paying off*" potential submitters is contrary to the proper functioning of an effects based approach.
- *Trade competitors* – second, businesses can, for trade competition reasons, frustrate the outcomes of an IPA planning scheme by intervening in the development assessment system through submissions and appeals and through commercial arrangements such as lease covenants. These latter arrangements exist outside the planning scheme and are contrary *to* the proper functioning of an effects based approach. If the planning covenants contemplated by the IPA are required to be consistent with an IPA planning scheme then why should a lease covenant between a tenant and a landlord that is registered under the *Land Title Act 1994* be any different.
- *Environment impact statement* – third, the absence of any requirement on an applicant to submit with a development application a statement of the effects of the development or to respond to a local government request to provide such a statement is contrary to the proper functioning of an effects-based approach. This places an *intolerable* and enormous burden on decision makers. This deficiency has been recognised by the proposed inclusion of the environmental impact statement provisions within IDAS as part of the proposed IPOLA 2001 amendments. This amendment has resulted from the need for the IDAS to be accredited by the Commonwealth government under the *Environment Protection and Biodiversity Conservation Act 1999*.

Lack of certainty

As indicated earlier in this article, one of the significant concerns of an effects-based approach is that, it does not allow persons to know with any certainty what land uses can or cannot be conducted on an adjacent property. This raises several issues.

- *Greater consultation* – first, there is a need for more detailed dialogue with people as to what results the community wants and how that is to be reflected in the planning framework.
- *Amenity and design* – second, there is the potential for land uses to be developed which do not cause adverse effects but which the community considers to be incompatible with existing development. In respect of these areas and developments, local governments must place a higher priority on design and amenity issues. This is obviously the case with mixed use areas but is probably more critical in areas of relatively homogenous character such as residential areas.

Overplanning

The concern about certainty coupled with the restriction on prohibitions and the need to cater for future unknown development and worse case scenarios has caused local governments to overplan. This raises several issues.

- *Risk assessment* – first, local governments should use a risk based assessment with an 80/20 rule regarding adverse effects to determine the effects and the activities it wishes to regulate. Ultimately, planning schemes should free up processes for economic development not constrain development.

- *Regulatory alternatives* – second, there is a need for local governments to consider other non-regulatory mechanisms to achieve the desired *outcomes*. This should involve the utilisation of a strategic planning mechanism alongside the IPA planning scheme to consider a range of options and alternatives. As such IPA planning schemes should be part of a broader strategic planning process rather than the outcome of it.

Perceptions

Finally, it is important to talk about perception. Those who would disagree with the views expressed in this article will find plenty to argue with. What they will find hard to argue against is the experience and perception of the people who operate within the system. The writer's perceptions are as follows:

- First the concept of ecological sustainability is not well understood by most participants.
- Second, a planning scheme which places emphasis on the effects a proposed activity will or might have on the environment rather than the activity itself is unsettling to most participants, particularly the community.
- Third, a "*business as usual approach*" especially in relation to the unwillingness of applicants to commit financial resources both in respect of the information to be provided with development applications and in respect of the community consultation to be undertaken, may signal an unwillingness to work towards the goal of ecological sustainability. Or it may simply reflect the current state of uncertainty. Whilst the jury is still out on this matter it is the view of the author that it is the latter.

Conclusions

The IPA is a visionary piece of legislation which embraces the goals of public sector reform and ecological sustainability.

The IPA reflects a paradigm shift from the minimalist planning approach of the PEA to an instrumental planning approach based on the identification and achievement of society's social, economic and environmental goals.

This paradigm shift is reflected in IPA planning schemes which are intended to be "*behaviour forcing*" legislation. That is they require a shift in people's understanding of the concept of ecological sustainability before they will be able to be effective.

The IPA and IPA planning schemes present significant opportunities. They also present significant consequences for all stakeholders. The issues that are emerging also represent significant challenges for all stakeholders.

An assessment of the effectiveness of IPA planning schemes in making the paradigm shift required by the IPA cannot be made at this time. It will clearly take another 10 years before progress towards an ecologically sustainable society in Queensland local government areas can be fully measured.

What can be said however, is that whatever the deficiencies of IPA planning schemes are, and no doubt there are some, it surely must be a significant improvement on planning schemes prepared under the PEA. As such the IPA planning schemes represent a significant step forward in the achievement of ecological sustainability in Queensland.

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Review of recent developments in planning law including infrastructure contributions, community infrastructure and ministerial call in powers

Ian Wright

This article discusses the recent updates to planning law with particular focus on infrastructure contributions, the management of places with cultural heritage significance, a recent decision in the Planning and Environment Court, discussion on the progress of Queensland local governments concerning the Planning Scheme Review and how recent amendments to IPA affect community infrastructure and ministerial call in powers

December 2001

Infrastructure contributions

Introduction

Under the repealed *Local Government (Planning and Environment) Act 1990* and the transitional provisions under the *Integrated Planning Act 1997* (**IPA**), it has been common for local governments to impose on development approvals a condition that an applicant must pay infrastructure contributions as a result of a proposed development. A recent decision in the Planning and Environment Court has identified certain circumstances when a local government may be required to refund the infrastructure contributions that it has obtained from an applicant. This is primarily where the planning intentions for an area in which a development is (or proposed to be) located have changed to the extent that the infrastructure for which the contribution was levied is no longer required.

In *Keenbill Pty Ltd v Redland Shire Council* [2001] QPEC 004 (Application No. 4029 of 2000, judgment delivered on 7 February 2001) there was an application to the Planning and Environment Court pursuant to section 3.5.33 of the IPA to cancel certain conditions that were imposed upon a previous approval to reconfigure land. The approval included two conditions in relation to infrastructure contributions. Condition B11 required the applicant to provide a contribution to the Road Works Infrastructure Charge in the sum of $3,023 per allotment, prior to the council signing and sealing the plan of survey. Condition B14 required the applicant to dedicate as park an area of land which was indicated on a plan. However in substitution of the full land dedication, a pro rata contribution commensurate with the number of allotments could be provided (calculated at that time to be $30,290). The development had been constructed and the contributions had already been paid to the council at the time of the hearing.

The applicant argued that important changes had occurred to the council's planning strategies for the area in which the subject land was located. It was submitted that those changes had effectively removed the basis upon which the above conditions were imposed. The applicant sought declaratory relief which in effect would have required the council to refund the infrastructure contributions that had been paid to it. The applicant argued that the council held the contributions paid to it on trust for the purpose of spending the money on the purpose for which it was paid. Further, that the trust had failed because the council no longer intended to acquire the open space and drainage reserve or to carry out the external roadworks envisaged when the approval was granted. The applicants argued that upon failure of the primary purpose of the trust, there arose a secondary trust to repay the money to the applicant.

While the applicant was ultimately unsuccessful on the basis that there had not been a failure of a trust because the council could still spend the contributions for the original purposes, the case does highlight a number of important practical considerations for local governments in formulating new planning strategies and in drafting conditions on development approvals. It is important that local governments take into account whether any new planning strategies would result in previously planned infrastructure no longer being required, especially where contributions have already been obtained for that infrastructure. There is a possibility that if local governments introduce new planning strategies which effectively remove the need for infrastructure for which contributions were previously obtained, those contributions may have to be refunded.

Further, local governments should be careful in the drafting of conditions which they impose upon development approvals in relation to obtaining infrastructure contributions. This is because, if a trust is created, the wording of the condition will determine the scope of the trust. Therefore, in drafting conditions, local governments should take a broad approach in identifying what infrastructure contributions can be used for.

Managing places of cultural heritage significance

The Environmental Protection Agency (**EPA**) has developed guidelines to assist local governments in the management of places of cultural heritage significance.

The IPA sets out the procedure to be followed by local governments when making or amending planning schemes. The core matters which are required to be taken into account in making or amending planning schemes include land use and development, infrastructure and valuable features. The definition of "*valuable features*" includes:

> *Areas or places of cultural heritage significance (such as areas or places of Indigenous cultural significance, or aesthetic, architectural, historical, scientific, social or technological significance, to the present generation or past or future generations)*.

The EPA recently published guidelines to assist local governments to identify and manage areas of cultural heritage significance, and therefore meet their obligations under the IPA. The EPA recognises that cultural heritage places should be managed through planning schemes if local governments are to achieve best practice heritage management. The EPA guidelines suggest that an IPA planning scheme should contain an inventory of places of local heritage significance and of known indigenous heritage significance. The scheme should also include a spatial definition of areas that have the potential to be of indigenous heritage value. The guidelines encourage the development and management of these areas in a manner that allows the local communities to continue to gain economic benefit from these areas without compromising the preservation of their cultural values.

The EPA guidelines provide local governments with options to match their available resources and information. The EPA Cultural Branch can provide advice to local governments to ensure that their level of management is appropriate to the value of the affected place. The guidelines suggest a three stage process to undertake a survey of local historical and cultural heritage. The three stages include: the preparation of a historical context report; the identification of places of potential cultural heritage significance; and the assessment of cultural heritage significance. A more detailed explanation of each of these three stages then follows.

Commencement of developments subject to an appeal

The Planning and Environment Court in Brisbane recently handed down a decision which allowed a development to commence, even though the development application was subject to an appeal yet to be decided by the court. The decision was made by the court on 26 July 2001 in the matter of *Mingara Pty Ltd v Brisbane City Council* [2001] QPEC 052.

Background

In October 2000, Mingara Pty Ltd (**Mingara**) applied to the Brisbane City Council (**council**) for development approvals in order to develop land for use as an aged care village. The applicant sought:

- a development permit for configuring a lot;
- a preliminary approval for building work; and
- a development permit for the material change of use.

On 1 May 2001, a negotiated decision notice was issued to Mingara in which council gave approval for the three development approvals sought by the applicant. The decision was subject to a condition in which Mingara was to provide council with a monetary contribution for parkland. Mingara appealed this condition. Mingara then sought an order from the court that development could commence, prior to the appeal being decided.

Law

Where a negotiated decision notice or development approval is the subject of an appeal, it is deemed, pursuant to section 5.3.5.19(c) of the IPA, that the development approval takes effect only when the appeal is finally decided. However, an application can be made to the court for this to be mitigated to some degree under section 4.1.47(2) of the IPA. If the court is satisfied that the outcome of the appeal would not be affected if development was to commence prior to the appeal being decided, the court may allow that part of the development to begin before the appeal is decided. In this case, Mingara sought a dispensation from the court pursuant to section 4.1.47(2) of the IPA to commence development the subject of the three approvals. Mingara did not seek an order relating to the building work.

Decision

The court ordered that Mingara could commence development the subject of the appeal, but limited it to:

- a development permit for reconfiguring a lot; and
- a development permit for the material change of use.

Conclusion

This decision indicates a progressive approach by the court demonstrating that it is prepared to use its discretion under the rules of the IPA. A court may permit development, the subject of an appeal, to commence before the appeal is decided where the outcome of the appeal would not be affected. In this case, the outcome of the appeal would not have been affected as the appeal related to the amount of the monetary contribution sought by council.

Will the IPA deadline be met?

The commencement of the IPA saw the beginning of a State-wide planning scheme review. Under the IPA, every local government authority must develop an IPA consistent planning scheme by 30 March 2003. With less than two years remaining to meet these requirements, how are Queensland's 125 local governments progressing?

To date, only four local governments have successfully adopted planning schemes that are consistent with IPA. They are:

- Warwick (10 December 1999);
- Maryborough (10 April 2000);
- Maroochy (1 June 2000); and
- Brisbane (30 October 2001).

The procedure for developing an IPA-consistent planning scheme is time-consuming and costly. It also involves extensive consultations with both the public and State government bodies such as the Environmental Protection Agency and the Department of Local Government and Planning. Despite the difficulties and expense, the majority of local governments may be well placed to meet the March 2003 deadline. Sixty-six local governments are currently drafting their planning scheme in preparation for public display and for the receipt of submissions from government agencies and the general public. Forty-three local governments are at the more preliminary statement of proposals stage, while twelve local governments are yet to commence their IPA-consistent planning scheme development.

However, while the IPA was originally promoted as an excellent opportunity for innovative planning, there are now some concerns about the lack of commonality between IPA-consistent planning schemes. The IPA does not require such consistency in the structuring of the schemes or even in the terms of the schemes. The Department of Local Government and Planning (**DLGP**) considers that the development of templates for such things as codes or tables of development would be both cost-effective and allow time for more important strategic planning. It is likely that some degree of uniformity will occur if the majority of local governments look to the experiences of the four local governments that currently have IPA-consistent planning schemes. But as yet no formal templates have been developed. With 121 IPA-consistent planning schemes still to be adopted by March 2003, local governments, planners and State government bodies can look forward to a busy eighteen months ahead.

Community infrastructure and ministerial call in powers

The recently passed *State Development and Other Legislation Amendment Act 2001* (**SDOLA**) amended a number of Acts including the *Integrated Planning Act 1997* (**IPA**). This article examines the implications of the IPA amendments as they relate to the designation of land for community infrastructure and ministerial call in powers.

Designation of land for community infrastructure

Chapter 2, Part 6 of IPA, dealing with designation of land for community infrastructure, was amended by SDOLA.

Section 2.6.8 of IPA deals specifically with circumstances in which the Minister may proceed straight to designation of land for community infrastructure, by the process defined in Schedule 7 of IPA – Process for Ministerial Designation if consultation has previously been carried out. Development under this designation is exempt development and therefore is not required to undergo the same approval process as assessable development, such as requiring impact assessment under a planning scheme. The circumstances in which the Minister could proceed straight to designation previously were if the Minister were satisfied that either:

(a) the Coordinator General has, under the *State Development and Public Works Organisation Act 1971*, section 29K, prepared a report evaluating an Environmental Impact Statement (**EIS**) for a project that includes the community infrastructure; or

(b) the process under the *Environmental Protection Act 1994* chapter 3, part 1 has been completed for an EIS for a project that includes community infrastructure; or

(c) the impacts of the infrastructure or the construction of the infrastructure have been assessed under Chapter 3 of IPA; and that

(d) public consultation has already been carried out about infrastructure under paragraph (a).

Each of these circumstances provides for community consultation either as part of the Environmental Impact Assessment Process, or under the Integrated Development Assessment System in IPA.

Amendment by the SDOLA

SDOLA adds the following first circumstance at (a):

> *The Co-ordinator-General has, under the State Development and Public Works Organisation Act 1971, section 29A, carried out a co-ordination in relation to the community infrastructure*.

S29A of the *State Development and Public Works Organisation Act 1971*, states that the Coordinator-General shall, of the Coordinator-General's own motion or at the direction of the Minister, coordinate departments of the government and local bodies throughout the State in activities directed towards ensuring that a proper account is taken of the environmental effects of the development. This, in effect, creates a circumstance where the Minister can proceed straight to designation of land for community infrastructure with the government and local bodies ensuring that a proper account of the environmental effects is taken, and therefore avoid the guidelines and mandatory community consultation processes within the normal impact assessment approval processes.

It is still a requirement of section 2.6.8(b) of IPA that public consultation has already been carried out regarding the infrastructure in the circumstances set out in paragraph (a). However, "*public consultation*" is not defined.

The Environmental Impact Assessment Process and Approval Process under Chapter 3 of IPA allows the community to participate at various stages of development applications. The community has the right to make submissions regarding development applications at an early stage and to appeal the final decision made. They are also invited to comment on the terms of reference required for a project should impact assessment be required. Timeframes are specified for each stage of community involvement. The public consultation referred to in s2.6.8(b) of IPA, provides no such timeframes and, without these time frames, the public's ability to make submissions or appeal any decision made appears to be at the discretion of the Minister.

Lang Park development application

The decision to amend IPA in this manner has created controversy in the wake of the recent Lang Park development application. The Lang Park development was declared to be a matter of State interest and the Minister for State Development therefore exercised his power to call in the development.

The ministerial call in power is outlined in Chapter 3, Part 6 of IPA. The effect of the call in is that the Minister can review the project and make a decision. Further, any appeals on foot at the time of the call in are of no further effect. The two appeals on foot at the time of the call in of the Lang Park development can no longer proceed to the Planning and Environment Court for determination. There is no further right to appeal once the call in has taken place.

The SDOLA amendments to IPA creating a further avenue for fast tracking major development have thus caused concern amongst the community as to the accountability of government and participation of the public in future major developments.

This paper was published as a Planning Law Update in the Queensland Planner 41:4, December 2001.

Summary of recent developments in planning law focussing on the Prostitution Act 1999 and Liquor Act 1992

Ian Wright

This article discusses the recent developments in planning law with a particular focus on various amendments to legislation and their impacts and a recent decision in the Planning and Environment Court

March 2002

Prostitution Act 1999

Introduction

Part 4 of the *Prostitution Act 1999* regulates development approvals for brothels. Section 64(1) sets out the situations in which the assessment manager must refuse development applications for a material change of use of a premises for a brothel. The *Prostitution Amendment Act 2001* introduced new provisions into the Act with the intention of improving the processes for determining applications for development approvals for brothels. The new provisions aim to achieve this by:

- defining the term "*industrial area*", which is the basis upon which the assessment manager determines whether the development application is code assessable or impact assessable;
- specifying how exclusionary distances from residential areas and other places are to be measured (for the purposes of section 64 of the Act); and
- introducing into Part 4 a streamlined review process for decisions about code assessable applications, namely the appointment of an independent assessor.

It is intended that the *Integrated Planning Act 1997* will continue to apply to development applications for brothels. However, the Prostitution Act will prevail to the extent of any inconsistency.

Definition of "industrial area"

The amendments clarify that for the purposes of the application of IPA to a development application, industrial areas are not merely limited to heavy industry. The amendments list examples of industrial areas, indicating that light industry constitutes an industrial area for the purposes of the Act.

Measuring distance from residential areas

Amended section 64(1) of the Act now states that a development application must be refused if the brothel will be:

- within 200m of residential areas, residential buildings and schools, places of worship, hospitals etc as measured using the shortest route a person may take; or
- within 100m of residential buildings, schools, hospitals etc as measured in a straight line.

The amendments make it clear that the term "*residential building*" excludes caretakers residences on industrial land.

Streamlined review process for code assessable applications

The amendments introduce a streamlined review process for decisions about code assessable applications. Review of decisions about impact assessable applications will remain within the jurisdiction of the Planning and Environment Court. However, appeals against decisions made with respect to code assessable applications will now be decided by an independent assessor in accordance with the new provisions (sections 64A to 64V) of the Act. The object of the new appeal provisions is to provide for easily accessible, informal, fair, speedy and just reviews of decisions about code assessable development applications. The independent assessor will be appointed by the Minister and must be a lawyer of at least five years standing with sufficient expertise and experience in town planning. The independent assessor will not be subject to control or direction by anyone in the performance of his or her functions. In situations of conflict of interest, the independent assessor is not to decide an appeal.

Applicants for code assessable development applications may appeal to the independent assessor against the same decisions as listed in section 4.1.27 of IPA, namely:

- the assessment manager's refusal or part refusal of an application;

- a matter stated in a development approval, including any condition;
- a decision to give a preliminary approval when a development permit was applied for;
- the length of the currency period; or
- a deemed refusal.

The appeal must be started within 20 business days of the decision notice being given. Appeals cannot be made to the Planning and Environment Court. However, an applicant is still able to make an application under section 4.1.21 of IPA for a declaration as to the meaning, effect or enforcement of a condition of a development approval. Section 64L sets out the procedures for starting an appeal. Notice of the appeal is to be given to the other party within five business days. Under section 640 the assessment manager must provide the assessors registrar with all documents relating to the aspect of the development application being appealed.

The procedures of the independent assessor need not proceed in a formal way and are not bound by rules of evidence. However, they must comply with natural justice by, for example, giving the parties reasonable opportunity to make oral submissions by using any reasonable form of contemporaneous communication. The independent assessor may inform himself or herself in the way he or she considers appropriate; may seek the views of any person; and may give directions about the conduct of the appeal which he or she considers reasonably necessary. Provision is made for the independent assessor to extend the time period for any particular step of the appeal. Each party is to bear their own costs.

Within ten business days of receiving material from the assessment manager, the independent assessor must make a preliminary assessment. Copies of and reasons for the preliminary assessment must be provided to both sides.

Similar situations – contrasting remedies

Long-time critics of Queensland's high-cost, totally judicialised planning appeals system will be intrigued by the refreshingly sensible low-cost appeal arrangements proposed by the Prostitution Act amendments. As Ian Wright's update spells out, brothel applicants – unlike other development applicants and citizen objectors – will be able to appeal to an experienced professional assessor charged with informing himself or herself of the merits of the matter in the most appropriate way without being constrained by esoteric court procedures and the formal rules of evidence. Hardline morals campaigners may wonder why the brothel industry is to be so favoured. So will ordinary citizens and community groups for whom absurdly formalised planning appeals to the Planning and Environment Court are a prohibitively expensive deterrent.

Parties then have 10 business days to make written submissions about the assessment. The independent assessor must then decide the appeal within five days.

In making a decision, the independent assessor may consider:

- the laws and policies applying when the application was made;
- the materials made available to the assessment manager; and
- any new material submitted by the parties to the appeal.

The independent assessor may make any orders he or she considers appropriate such as confirming the decision, changing the decision, setting aside the decision and making a new decision. There is no right of appeal from the decision made by the independent assessor. However, this is not intended to exclude the judicial review of a decision of the independent assessor pursuant to the *Judicial Review Act 1991*.

Liquor Act amendments

Recent amendments to the *Liquor Act 1992*, which came into force on 1 July 2001, have expanded section 116 of the Act. Applications are now required to be examined in terms of social interest rather than public need. This includes an assessment of any possible health and social ramifications upon the local community. The likely benefits of the application will be measured against any potential disadvantages for the local community, which will take into consideration the community's vulnerable groups. Previously, applications for new licences, detached bottle shops and permanent extensions of trading hours were considered in relation to public need and were examined against the needs of the community in terms of the availability of liquor facilities.

There are two types of Public Interest Assessments (**PIA**) being *'standard'* and *'full'* assessments. The *'full'* PIA will require a comprehensive community consultation program which is to be undertaken by the Applicant. A full PIA is mandatory for the following applications:

- general licences;
- on-premises (cabaret) licences;
- any other licence category where entertainment is to be provided after 8.00 pm where the noise level generated will exceed 90dBA;
- extended hours permit for trading on a regular basis after 2:00 am.

A full PIA must contain:

- delineation of the local community area;
- social profile of the local community area;
- assessment of community risk;
- the likely health and social impacts (positive and negative impacts);
- consultation with residents and businesses within 200 metres of the site;
- consultation via a survey with residents in the local community area;
- consultation with key advisers.

Every applicant for a licence (other than a club), a detached bottle shop or an extended hours permit will at least be required to submit a standard PIA which provides details on the health and social impact of their proposal. However, some of these applicants may later be requested to submit a full PIA to the Chief Executive after advertising has been carried out and the application has been examined. Usually, such a request for a full PIA will occur when various concerns remain, including:

- the number and nature of objections received;
- size, nature, location or internal layout of the premises;
- the application is the first of its kind in the locality;
- location of the proposed application within 200 metres of sensitive facilities of concern;
- if the application is for an area where there is a high concentration of licensed premises.

Public interest submissions do not carry any appeal rights. However, objections in respect to amenity or disturbances still have appeal rights to the Chief Executive's decision.

Commencement of developments subject to an appeal

Background

The Planning and Environment Court in Brisbane recently handed down a decision which allowed a development to commence, even though the development application was subject to an appeal yet to be decided by the court. The decision was made by the court on 26 July 2001 in the matter of *Mingara Pty Ltd v Brisbane City Council* [2001] QPEC 052.

In October 2000, Mingara Pty Ltd applied to the Brisbane City Council for development approvals in order to develop land for use as an aged care village. The applicant sought:

- a development permit for reconfiguring a lot;
- a preliminary approval for building work; and
- a development permit for the material change of use.

On 1 May 2001, a negotiated decision notice was issued to Mingara in which council gave approval for the three development approvals sought by the applicant. The decision was subject to a condition in which Mingara was to provide council with a monetary contribution for parkland. Mingara appealed this condition. Mingara then sought an order from the court that development could commence, prior to the appeal being decided.

Where a negotiated decision notice or development approval is the subject of an appeal, it is deemed, pursuant to section .5.3.5.19(c) of the IPA, that the development approval takes effect only when the appeal is finally decided. However, an application can be made to the court for this to be mitigated to some degree under section 4.1.47(2) of IPA . If the court is satisfied that the outcome of the appeal would not be affected if development was to commence prior to the appeal being decided, the court may allow that part of the development to begin before the appeal is decided. In this case, Mingara sought a dispensation from the court pursuant to s.4.1.47(2) of IPA to commence development the subject of the three approvals. Mingara did not seek an order relating to the building work.

The court ordered that Mingara could commence development the subject of the appeal, but limited it to a development permit for reconfiguring a lot and a development permit for the material change of use. This decision indicates a progressive approach by the court demonstrating that it is prepared to use its discretion under the rules of IPA. A court may permit development the subject of an appeal, to commence before the appeal is decided where the outcome of the appeal would not be affected. In this case, the outcome of the appeal would not have been affected as the appeal related to the amount of the monetary contribution sought by council.

Community infrastructure and ministerial call in powers

Background

The recently passed *State Development and Other Legislation Amendment Act 2001* (**SDOLA**) amended a number of Acts including the Designation of Land for Community Infrastructure and Ministerial Call in Powers of the *Integrated Planning Act 1997*. Chapter 2, Part 6 of IPA, dealing with Designation of Land for Community Infrastructure, was amended by the SDOLA. Section 2.6.8 of IPA deals specifically with circumstances in which the Minister may proceed straight to designation of land for community infrastructure, by the process outlined in Schedule 7 of IPA – Process for Ministerial Designation, if consultation has previously been carried out. Development under this designation is exempt development and therefore is not required to undergo the same approval process as assessable development, such as requiring impact assessment under a planning scheme.

Pre-amendment provisions

The circumstances in which the Minister could proceed straight to designation previously were if the Minister were satisfied that either:

(a) the Coordinator General has, under the *State Development and Public Works Organisation Act 1971*, section 29K, prepared a report evaluating an Environmental Impact Statement (**EIS**) for a project that includes the community infrastructure; or

(b) the process under the *Environmental Protection Act 1994*, Chapter 3, Part 1 has been completed for an EIS for a project that includes community infrastructure; or

(c) the impacts of the infrastructure or the construction of the infrastructure have been assessed under Chapter 3 of IPA; and that

(d) public consultation has already been carried out about infrastructure under paragraph (a).

Each of these circumstances provide for community consultation either as part of the environmental impact assessment process, or under the Integrated Development Assessment System in IPA.

Amendment by the SDOLA

The SDOLA adds the following first circumstance at (a):

> *The Coordinator-General has, under the State Development and Public Works Organisation Act 1971, section 29A, carried out a coordination in relation to the community infrastructure.*

S29A of the *State Development and Public Works Organisation Act 1971*, states that the Coordinator-General shall, of the Coordinator-General's own motion or at the direction of the Minister, coordinate departments of the government and local bodies throughout the State in activities directed towards ensuring that a proper account is taken of the environmental effects of the development. This, in effect, creates a circumstance where the Minister can proceed straight to designation of land for community infrastructure with the government and local bodies ensuring that a proper account of the environmental effects is taken, and therefore avoid the guidelines and mandatory community consultation processes within the normal impact assessment approval processes. It is still a requirement of section 2.6.8(b) of IPA that public consultation has already been carried out regarding the infrastructure in the circumstances set out in paragraph (a). However, "*public consultation*" is not defined.

The environmental impact assessment process and approval process under Chapter 3 of IPA allows the community to participate at various stages of development applications. The community has the right to make submissions regarding development applications at an early stage and to appeal the final decision made. They are also invited to comment on the terms of reference required for a project should impact assessment be required. Timeframes are specified for each stage of community involvement. The public consultation referred to in s2.6.8(b) of IPA, provides no such timeframes and, without these timeframes, the public's ability to make submissions or appeal any decision made appears to be at the discretion of the Minister.

Contracting for the provision of infrastructure

Local Governments are faced with the onerous responsibility of satisfying the private and community infrastructure needs of society. Funding is critical in the provision of this infrastructure. It determines the financial independence of local governments as well as the rate and type of development within local government areas.

IPA defines "*infrastructure*" as including land, facilities, services and works used for supporting economic activity and meeting environmental needs.

Infrastructure agreements

IPA allows infrastructure agreements to be entered into as an alternative to infrastructure funding mechanisms in the Act.

An infrastructure agreement:

- may attach to land and bind successors in title;

- is not invalid because its fulfilment depends on the exercise of a discretion by a public sector entity about an existing or future development application; and
- to the extent it is inconsistent with a development approval, it will override the development approval.

As infrastructure agreements will override development approvals to the extent of any inconsistency, they provide certainty to both local governments and developers.

Infrastructure agreements may be entered into about:

- funding a development infrastructure item in an infrastructure charges plan other than by an infrastructure charge;
- supplying a development infrastructure item to a different standard than the standard stated for the item in an infrastructure charges plan;
- supplying a development infrastructure item not identified in an infrastructure charges plan (whether or not an infrastructure charges plan has been prepared for the planning scheme); or
- supplying infrastructure other than development infrastructure items.

IPA defines a "*development infrastructure item*" broadly to be land or capital works for:

- urban water cycle management infrastructure (for example, water supply, sewerage, collecting water, treating water, stream managing, disposing of waters and flood mitigation);
- transport infrastructure (for example, roads, vehicle lay-bys, traffic control devices, dedicated public transport corridors, public parking facilities predominantly serving a local area, cycle ways, pathways and ferry terminals); and
- infrastructure for local community purposes.

Whilst infrastructure agreements may be entered into in respect of all kinds of development applications, they are particularly useful in respect of large scale development applications whereby a developer is seeking by a preliminary approval to override the planning scheme to make development code or self-assessable.

Given the requirement that conditions be relevant or reasonably required by a development, it is important that local governments where they resolve to approve a development application agree with a developer by way of an infrastructure agreement, the type, size and timing of infrastructure to be provided for the development. If the provision of infrastructure is not agreed in advance:

- the developer may appeal the requirement for the provision of infrastructure to the Planning and Environment Court; or
- it may be difficult for a local government to later show that the provision of infrastructure is required by a particular development application.

For example, there may be sufficient capacity in the council's existing water supply to service 10,000 of the proposed 40,000 residents of a master planned community. It is proposed that when the population of the development exceeds 10,000 persons the developer will provide a water treatment plant for the development. Unless the provision of this infrastructure is determined in advance, it would be difficult to require the provision of a water treatment plant for 30,000 people on the approval of a code assessable development application for a single dwelling house, if the approval of the dwelling house would increase the population of the development above 10,000 persons.

Standardised agreements

There are a number of technical requirements in respect of infrastructure agreements. However these can be standardised into precedent agreements so that they may be prepared quickly to meet particular requirements. Infrastructure agreements are an important tool available to local governments to ensure certainty in respect of the provision of infrastructure. It is important that local governments be familiar with the circumstances in which they may be used.

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Review of the impact of 'restricted dogs' legislation and how local laws are made and enforced

Ian Wright | Samantha Johnson

This article discusses the recent developments in planning law with a particular focus on how new legislation will impact owners of 'restricted dogs' and also how local laws are made and enforced

June 2002

Dangerous dogs

In recent years there have been an increasing number of dog attacks that have been attributed to particular breeds of dog. These have attracted widespread concern in the community and in all levels of government. Victims of dog attacks can suffer injuries ranging from minor punctures and abrasions to more serious injuries requiring plastic surgery. In some cases, particularly when children are attacked, dog maulings have resulted in the death of the victim.

Local governments have taken action through their local laws by:

- prohibiting certain breeds of dog from the area;
- declaring dogs that have been involved in attacks on animals or people as dangerous; and
- issuing of "*destruction of dog*" orders against dangerous dogs that attack again or are not effectively controlled or contained.

However, these measures have been significantly enhanced by the passage of new legislation, innocuously titled the *Local Government and Other Legislation Amendment Bill (No. 2) 2001*, which was passed on 11 December 2001. This new legislation specifically targets "*restricted dogs*", those dogs which the Federal government currently bans the importation of into Australia. These dogs are:

- dogo Argentine;
- fila Brasileiro;
- Japanese tosa;
- the American Pit Bull or Pit Bull Terrier; and
- cross-breed or off-spring of the above dogs, whether or not the dog appears to be a dog of that type or breed.

The purpose of these new laws is community safety. This is to be achieved by:

- prohibiting the acquisition, breeding and supply of restricted dogs;
- compulsory de-sexing of restricted dogs;
- imposing conditions on keeping and the control of restricted dogs; and
- allowing for the seizure and destruction of restricted dogs in particular circumstances.

The legislation requires the owner of a restricted dog to apply annually to the local government for a "*restricted dog permit*". In deciding whether to grant the restricted dog permit, the local government will consider numerous factors including the age of the owner, whether the residence is a detached dwelling where someone usually lives and whether the residence has a proper enclosure which will contain the dog. In addition, there must be signage at or near the entrance to the property stating that a restricted dog is kept on the premises. If the restricted dog is removed from the premises, then it is required to be muzzled when in a public place unless it is enclosed in a vehicle which prevents any part of its body from being outside the vehicle.

Under these new laws, the Queensland courts will be able to impose fines of up to $22,500 on people convicted of abandoning a restricted dog or encouraging a restricted dog to attack or cause fear to another person or animal. Furthermore, the legislation provides that local governments can enact local laws which impose higher standards on restricted dog owners than those contained within this new legislation. The introduction of these new laws regarding restricted dogs has enhanced the powers of the local governments and the courts to impose significant financial penalties for breaching these laws. It is hoped that the number of dog attacks that are attributed to these breeds will be significantly reduced as a result of this legislation.

The making and enforcement of local laws

The role of local laws

Local laws are the expression of the limited legislative powers of local governments granted by the *Local Government Act 1993* (**LGA**). Previously known as a "*by-law*" or "*ordinance*", the term "*local law*" is currently defined in the LGA as, "*a law made by a local government*" (section 850). Local laws are statutory instruments that are given the force of law pursuant to the *Statutory Instruments Act 1992*.

Traditionally, local laws are laws that are adopted by local governments which reflect the needs of the community and ensure the good rule and government of the local government area. Each local government adopts local laws to address particular community requirements or concerns within its local government area. As a result, local governments have local laws covering every possible issue arising from their jurisdiction. Some examples of issues addressed by local laws in Queensland include swimming pools, council meetings, roads, noise control, dogs and vegetation management.

Local laws contain a number of different mechanisms to address these particular community requirements or concerns including the setting of procedures and conditions, the creation of rights, obligations and offences, the establishment of permit or licence regimes to regulate certain activities, making provision for the issuing of compliance or abatement notices and the prescribing of penalties for non-compliance.

Types of local laws

There are four types of local laws: model local laws, interim local laws, other local laws and subordinate local laws.

Model local laws are those that have been prescribed by the Minister as suitable for adoption by local governments as a local law. The model local laws address issues that are common to many local governments. On 10 November 2000, the Department of Local Government and Planning published 21 proposed model local laws in the Government Gazette. There is no obligation in the LGA on local governments to adopt the model local laws, nor to use them as a basis for developing their own local laws.

However, local governments can simply adopt the model local laws rather than draft new local laws. Once a local government has adopted the model local laws, these local laws may be amended or repealed by that local government in the same manner as for any other local law of that local government.

Interim local laws are those local laws that are made by local governments and adopted for a limited period while the local government undertakes public consultation before permanently adopting the interim local law. Interim local laws are usually made where an immediate public health or safety risk emerges. One example of the use of an interim local law is to prevent broadscale tree clearing during the public consultation process of the proposed introduction of a vegetation protection local law. The process for making these laws is much quicker than the making of a local law, with the local government only having to obtain the Minister's consent to the use of the interim local law process before adopting the law. The local government must then proceed to make the interim local law into a local law pursuant to the usual local law making powers.

Other local laws are those laws that are independently drafted and adopted by local governments to deal with particular issues in their local government area. This is instead of simply adopting the model local laws. Also, other local laws include those local laws that are made to end or repeal existing local laws. The LGA establishes a step by step process for the making of these laws.

Subordinate local laws were originally known as "*local law policies*", but amendments to the LGA in 1999 changed the terminology to better reflect the legislative nature of these laws. Subordinate local laws are laws made by a local government about a matter which a local law expressly states that the local government may make about the matter. Subordinate local laws provide the detailed information required for the operation of a local law.

The relationship between subordinate local laws and local laws is similar to that of a Regulation and an Act of Parliament. If a local government adopts a model local law, it is essential for that local government to then provide the specific details required for its local government area in a subordinate local law drafted to attach to that model local law. An example of the relationship between local laws and subordinate local laws is that of a local law that allows a local government to require that certain animals specified in a subordinate local law be registered. A subordinate local law may then provide that all dogs within the local government area must be registered pursuant to that local law.

Local law-making powers

The local law making powers of local governments are fairly wide. Section 25 of the LGA provides that "*each local government has jurisdiction ... to make local laws for, and otherwise ensure, the good rule and government of its territorial unit*." In addition to this, section 26 of the LGA provides that the jurisdiction of local government includes jurisdiction to make local laws with respect to any matter "*necessary or convenient to be prescribed or exercised for carrying out or giving effect to its local laws*." This wide jurisdiction is, however, limited by later sections of the LGA.

Limitations on local law-making powers

The power of local governments to make local laws and subordinate local laws is expressly limited in the LGA by the following:

- a local government cannot make a local law that the Parliament could not validly make (section 30 of the LGA);
- a local government cannot make a local law that excludes or limits the future repeal or amendment of the local law (section 30 of the LGA);
- if a State law and a local law (whether made before or after the State law) are inconsistent, the State law overrides the local law to the extent of the inconsistency (section 31 of the LGA);
- a local government may not make a local law or a subordinate local law that establishes a process about development (within the meaning of the *Integrated Planning Act 1997*) (section 854 of the LGA);
- the Minister for Local Government and Planning must be satisfied that the local law deals satisfactorily with State interests (sections 856 and 872 of the LGA). The LGA defines State interests to include:
  - the effect on the economic, social or environmental interests of the State or region;
  - ensuring that there is an effective, efficient and accountable system of local government; and
  - the local law must comply with the fundamental legislative principles identified in the *Legislative Standards Act 1992*; and
- a local government must review all proposed local laws to identify any possible anti-competitive provisions within the local law (Chapter 12, division 5, part 2 of the LGA). A provision of a local law that is anti-competitive in nature is one that creates a barrier to entry to a market or a barrier to competition within a market. If a local government wants to retain an anti-competitive provision in a proposed local law, it must pass a resolution that it is in the public interest to do so and that the inclusion of the anti-competitive provision is the most appropriate way of achieving the local law's objectives.

Making a local law

Once a local government is satisfied that it has jurisdiction to make a local law on a particular subject the drafting of the local law (and any associated subordinate local laws) is the responsibility of that local government. Issues to be included in local laws may be identified by local governments in a number of ways, including via community or industry groups or by way of councillor or council officer community consultation.

Chapter 12 of the LGA specifies the process by which a local law is to be made. Generally a local law will undergo the following process (sections 866 to 874 of the LGA):

- the local law is proposed by the local government;
- the proposed local law is reviewed by the Department of Local Government and Planning to ensure consistency with State interests and compliance with drafting standards;
- the proposed local law is placed on public display and public consultation is undertaken;
- the final proposed local law is reviewed by the Department of Local Government and Planning;
- the local government makes the proposed local law; and
- final public notice is given of the making of the proposed local law.

This same process also applies for local laws that are made to repeal or amend existing local laws.

A similar process is established by sections 877 to 883 of the LGA for the making of subordinate local laws, the main difference being that proposed subordinate local laws are not reviewed by the Department of Local Government and Planning. It is for this reason that matters which are to be included in subordinate local laws are restricted by the local law pursuant to which they are made. In this way, the LGA assumes that the issues that a local law specifies a subordinate local law may include are simply local issues that are not likely to impact on State interests. Thus subordinate local laws cannot be used as a means to extend a local law's control.

Both local laws and subordinate local laws have to be drafted in a manner that is consistent with the LGA in terms of the words and expressions used in the law. Local laws and subordinate local laws should also comply with the *Acts Interpretation Act 1954* and the *Statutory Instruments Act 1992*. One example of the strict drafting procedures imposed by the LGA and the other State legislation is that of terminology. A local government should not be referred to in a local law or subordinate local law as "*Council*", unless it is the Brisbane City Council (pursuant to the *City of Brisbane Act 1924*).

To assist local governments in drafting local laws and subordinate local laws, the then Department of Communication and Information, Local Government and Planning published a Local Law Manual (2nd ed) in 1999 that provides guidance on the making and drafting of local laws. Similarly, the Office of the Queensland Parliamentary Counsel published "*Guidelines for Drafting Local Laws and Subordinate Local Laws*" on 1 January 2000. These guidelines provide advice with respect to the structure of a local law or subordinate local law, their relationship with the LGA, some tips as to the writing of the text and special chapters on enforcement provisions and definitions.

Review and expiry of local laws

The LGA imposes a requirement upon local governments to review their local laws and subordinate local laws every 10 years to identify any redundant provisions. The first review date has been set at 1 January 2008. Any local law or subordinate local law that is in force at that date will expire on 31 December 2010 (ie 3 years later) unless it expires earlier, or unless it is repealed or the local government conducts a review of that local law or subordinate local law and passes a resolution and publishes a notice stating that a review has been conducted and the local government did not identify any redundant provisions. Subsequent review and expiry dates have been set at periods of every 10 years after the first review date, which ensure local laws are consistent with other statutory instruments. It should be noted that this does not prevent local governments reviewing, and, if necessary, amending. their local laws and subordinate local laws at any time to ensure they are still relevant and meet the community need.

Enforcement of local laws

Each local law sets out how the local government will deal with a breach of the provisions of that local law. Local governments have the power to create offences within local laws and to prosecute an individual for an offence against a local law. Such prosecutions generally arise from complaints raised with a local government. Upon receipt of a complaint, an "*authorised person*" for the purposes of the relevant local law will investigate the complaint to determine whether to proceed with enforcement action. The options for enforcement include on the spot fines, proceedings in court, compliance notices, abatement notices and seizure of goods. In addition, most local laws now provide for a right of review of the local government's decisions (either through the law itself, through the courts or through a review body).

Generally local governments ensure that their penalty provisions are realistic and enable the local government to administer on the spot fines pursuant to the *State Penalties Enforcement Act 1999* and the *State Penalties Enforcement Regulation 2000* (**SPER**). The SPER recognises local laws as being legislation to which the SPER applies. The amount of an on the spot infringement notice fine is calculated in accordance with a formula set down in section 12 of the SPER which uses the maximum penalty provided for the offence in the local law. However. the maximum penalty that a local government can specify in a local law and still be able to utilise the SPER system is 50 penalty units.

Conclusion

Although all local governments were obliged to conduct a relatively recent review of their local laws pursuant to a series of amendments to the LGA in 1997, 1998 and 1999, it is important for local governments to continually review and update their local laws to reflect changes to community requirements or concerns.

While the next review date for local laws and subordinate local laws in 2008 is some years away, local governments should be mindful of the way in which their local laws and subordinate local laws interact with other local government instruments. This is particularly pertinent with respect to each local government's planning scheme and the looming date for completion of their IPA planning schemes in March 2003 pursuant to the *Integrated Planning Act 1997*. While the introduction of section 854 in the LGA prohibited new local laws or amendments to existing local laws from establishing processes about development after 30 March 1998, many local governments have existing local laws and subordinate local laws that do regulate development. These laws do not contravene section 854 of the LGA. However, the Minister for Local Government and Planning has encouraged local governments when preparing their IPA planning schemes to also review their local laws and subordinate local laws and relocate those provisions that regulate development into their IPA planning scheme as codes. Similarly, local governments, when drafting codes for their IPA planning schemes, should also consider the interaction of local laws with any development approvals process and "*flag*", where necessary within their IPA planning schemes, local laws that may be applicable to given situations.

A review of local laws and subordinate local laws is a considerable task and one made more difficult by the subtlety of the legislation that both limits local government's local law making powers and prescribes specific requirements for the drafting of local laws.

At all times, local governments need to remember that they are drafting legislative instruments that create offences and pursuant to which such offences are enforced, whether by way of on the spot fines or in the Magistrates Court. It is on this basis that local governments should start formulating plans with respect to the review of their local laws and subordinate local laws, whether such review is to be conducted in conjunction with the local government's IPA planning scheme or for the purposes of the 2008 review, and begin consultation with their legal advisers.

If local governments and their legal advisers give sufficient preparation and forethought to the drafting or redrafting of local laws and subordinate local laws, particularly with respect to their integration with planning schemes, we anticipate that many local governments will be able to streamline their current local laws and subordinate local laws, review existing enforcement mechanisms, and reduce the need for costly court appearances to defend decisions made pursuant to local laws.

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On-site sewerage treatment systems – A local government problem

Belinda McIntyre | Samantha Hall | Ian Wright

This article discusses the topic of on-site sewage treatment systems and how local governments regulate them. This article looks at the impacts of on-site sewage treatment facilities if improperly maintained, the legislative framework surrounding on-site sewage treatment and lastly the local government's liability concerning these types of facilities

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Introduction

On-site sewerage treatment involves the treatment of domestic wastewater on private property and the land application of the treated effluent. This generally occurs in areas which are not served by local government sewerage services.

An important issue surrounding on-site sewerage treatment facilities is the regular maintenance of these facilities to ensure that they operate correctly. On-site sewerage facilities which are poorly operated and maintained can pose considerable risks to public health, the environment and community amenity.

In Queensland, a large number of legislative instruments are relevant to the regulation of on-site sewerage treatment. These instruments impose obligations on landowners and service contractors with respect to maintenance and reporting, set standards and requirements for facilities, and enable local governments to implement regulatory regimes for on-site sewerage treatment systems.

However, there remains a reluctance on the part of State and local governments to implement the statutory powers granted by these legislative instruments. Given the present uncertainty as to whether local governments are under a legal duty to exercise such statutory powers, it is the thesis of this paper that local governments should adopt a precautionary approach to on-site sewerage treatment. This would involve implementing a local law regime with associated policies and procedures in order to reduce the risk of harm that results from on-site sewerage treatment systems.

This paper addresses four matters. First, it considers the potential impacts which may result from faulty or improperly maintained on-site sewerage treatment facilities. Second, it outlines the legislative framework in Queensland with respect to the regulation of on-site sewerage treatment facilities and their impacts. Thirdly, it discusses the decisions in the Great Lakes cases[264] and the implications of these decisions for local governments.

Finally, a number of practical actions are suggested by which local governments may reduce their risk of liability for harm caused by on-site sewerage treatment facilities.

Impacts of improperly maintained on-site sewerage treatment facilities

The failure or improper maintenance of on-site sewerage treatment facilities can have dire consequences for community amenity, public health and the environment. These impacts may include:

- raw sewerage discharge;
- water contamination;
- unpleasant odours;
- soil degradation;
- decreased suitability of waterways for recreational use;
- excessive aquatic plant growth, algal blooms and fish kills;
- spread of disease by bacteria, viruses, parasites and other organisms in the waste water;
- breeding grounds for insects; and
- associated health-related and clean-up expenses.[265]

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264 *Ryan v Great Lakes Council* [1999] FCA 177 and *Graham Barclay Oysters Pty Ltd v Ryan* [2000] FCA 1099.

265 Anon http://www.goldcoast.q1d.gov.au/attachment/OSSF brochure web.pdf and Anon, *On-Site Sewage Treatment Program for Homeowners*, published by the University of Minesota", http://www.extension.umn.edu/mnimpacts/impact.asp?projectID=2480

According to recent studies, a large percentage of on-site sewerage treatment systems fail due to lack of maintenance, rather than as a result of technological faults.[266] Therefore, the regulation of the maintenance and operation of on-site sewerage treatment facilities is obviously an important issue for State and local governments in order to avoid the adverse impacts previously noted.

Numerous legislative instruments give local governments the power to regulate on-site sewerage treatment, including the ability to enforce these powers and to impose standards for the installation and operation of such facilities. This paper proposes to deal with this legislative framework in only general terms.

The legislative framework

The legislative framework with respect to the regulation of on-site sewerage treatment in Queensland consists of State legislation and associated codes and guidelines, as well as local government local laws and planning instruments. One of the most important elements of the legislative framework is the *Standard Sewerage Law* which is proposed to be replaced by the *Plumbing and Drainage Act 2002* in 2003. However on the premise that you cannot predict the future especially where governments are involved this paper focuses on the current law under the *Standard Sewerage Law*.

Standard Sewerage Law

Part 4 of the *Standard Sewerage Law* relates to on-site sewerage facilities.[267] The *Standard Sewerage Law* grants various powers to local governments and establishes requirements, such as design requirements, with which on-site sewerage facilities must comply. In addition, the *Standard Sewerage Law* also imposes obligations on owners and service providers with respect to the operation and maintenance of on-site sewerage facilities.

Powers of local government

The *Standard Sewerage Law* gives local governments the power to require owners to install on-site sewerage facilities.[268] It also imposes a regulatory regime under which local governments are required to approve the installation, change or removal of on-site sewerage facilities,[269] and may impose conditions on such approvals with respect to matters such as effluent disposal and operation, and service and maintenance of the system. The ability of a local government to approve the installation of an on-site sewerage treatment facility is limited, however, in that an approval can only be given if the premises cannot be served by a sewerage system[270] and the on-site sewerage treatment system complies with any relevant requirements, such as model requirements.[271]

Requirements for on-site sewerage facilities

Significantly the *Standard Sewerage Law* requires that installation and operation of an on-site sewerage treatment facility comply with the On-site Sewerage Code.[272] The *Standard Sewerage Law* also enables local governments to give model approvals for particular prefabricated item models[273] or particular types of built items[274] and to set specific requirements with respect to the operation, installation and maintenance of that model or type.[275]

Obligations of landowners and service people

The *Standard Sewerage Law* also imposes obligations on landowners to take all reasonable steps to keep facilities in good working order and to have facilities repaired if the landowner becomes aware that a facility is defective.[276] The *Standard Sewerage Law* also imposes obligations on service people, namely the requirement that they give to the relevant local government a report on the condition of any facilities which are serviced. A copy of this report must also be given to the landowner.[277] In addition to the provisions outlined above, the *Standard Sewerage Law* also regulates:

- the disposal of the contents of on-site sewerage facilities;[278]
- the substances which can be discharged into on-site sewerage facilities;[279]

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266 S West (2001) *Centralised Management: The Key to Successful On-site Sewerage Service*, *Sydney Water Corporation On-site '01 Conference*, Armidale, September 2001, http://www.awa.asn.au/NSIG/sewage/presl.pdf

267 Note that the *Standard Sewerage Law* does not apply to the operation of an on-site sewerage facility which is an environmentally relevant activity pursuant to the *Environmental Protection Act 1994*.

268 Section 16 (Notice to connect to sewerage system or install on-site sewerage facility) of the *Standard Sewerage Law*.

269 Section 72 (Approval needed) of the *Standard Sewerage Law*.

270 Section 73 (Limitations on Local Government approval) of the *Standard Sewerage Law*.

271 Section 82 (Installation of on-site sewage treatment plant) of the *Standard Sewerage Law*.

272 Section 76 (Standard for on-site sewerage facilities) of the *Standard Sewerage Law*.

273 Section 77 (Model approval) of the *Standard Sewerage Law*.

274 Section 79 (Type specification approval) of the *Standard Sewerage Law*.

275 Sections 78 (Model requirements) and 80 (Type specification requirements) of the *Standard Sewerage Law*.

276 Section 88 (Operation and maintenance) of the *Standard Sewerage Law*.

277 Section 89 (Servicing on-site sewerage facilities) of the *Standard Sewerage Law*.

278 Sections 83 (Disposal of contents of on-site sewerage facility) and 85 (On-site sewerage facilities in sewered areas) of the *Standard Sewerage Law*.

279 Section 91 (Permissible and prohibited discharges) of the *Standard Sewerage Law*.

- the disconnection and removal of on-site sewerage facilities where the relevant premises becomes connected to the local government's sewerage system; and
- the location of on-site sewerage facilities.[280]

On-site Sewerage Code

An important part of the regime of the Standard Sewerage Law is the On-site Sewerage Code.

The On-site Sewerage Code specifies technical requirements for the design, installation, operation and sustainable management of on-site sewerage facilities, together with the responsibilities and requirements of local governments in this regard.[281]

The On-site Sewerage Code is basically a performance code for meeting public health and environmental objectives, which it achieves by setting out performance objectives and requirements that are supported by acceptable solutions.

The On-site Sewerage Code also identifies and provides guidance on the responsibility levels and process stages for site and soil evaluation, the design, installation, operation and maintenance of on-site sewerage facilities, and local government approvals.[282]

Environmental Protection Act 1994

Supplementing the Standard Sewerage Law is the *Environmental Protection Act 1994*. Under the *Environmental Protection Act 1994* the operation of facilities which have the capacity to treat the sewerage of more than twenty persons is an environmentally relevant activity which requires an environmental licence.

The general environmental duty provisions and the offence provisions of the *Environmental Protection Act 1994* are also relevant to this issue.[283] The *Environmental Protection Act 1994* imposes a general environmental duty on all persons to take reasonable and practicable measures to prevent or minimise harm to the environment. Therefore, it would be an offence under the *Environmental Protection Act 1994* to fail to maintain an on-site sewerage treatment facility where that failure results in environmental harm or environmental nuisance.

Environmental Protection (Water) Policy 1997

The *Environmental Protection Act 1994* is supplemented by the *Environmental Protection (Water) Policy 1997* (**Water EPP**). The Water EPP requires local governments to consider the cumulative impacts of the on-site land application of effluent on the environment when assessing and approving development applications under the *Integrated Planning Act 1997*. The Water EPP also requires the protection and enhancement of the environmental values of Queensland waters. In particular it is an offence to deposit or release solid or liquid waste from an on-site sewerage facility into a gutter, stormwater drain or waters or any other place where such waste could reasonably be expected to be washed into a gutter, stormwater drain or waters.[284]

Health Act 1937

Further supplementing the *Standard Sewerage Law* and the *Environmental Protection Act 1994* is the *Health Act 1937*. The *Health Act 1937* contains provisions relating to situations considered to be a nuisance or injurious or prejudicial to health or a breeding ground for mosquitoes, including the accumulation of water, waste and run off from a premises.[285]

Pursuant to the *Health Act 1937*, local governments are granted powers to inspect premises and to deal with nuisance situations, including the power to direct landowners to undertake alterations or repairs and to undertake such works in the event of non-compliance.[286]

Local laws

Whilst the Standard Sewerage Law requires local governments to approve the installation, change or removal of on-site sewerage treatment facilities and the *Environmental Protection Act 1994* and the *Health Act 1937* empowers local governments to act reactively when harm is caused by a malfunctioning facility, there is a real need for local governments to deal proactively with such issues.

As indicated earlier, on-site sewerage facilities generally do not fail because of technological faults or installation problems. Rather, they fail due to a lack of maintenance on the part of the persons who own and operate the facilities.

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280 Section 87 (Location) of the *Standard Sewerage Law*.
281 Section 1.1 (Scope) of the On-site Sewerage Code.
282 Section 3.1 (Scope) of the On-site Sewerage Code.
283 Section 319 (General environmental duty) and Chapter 9, Part 3 (Other offences relating to environmental harm) of the *Environmental Protection Act 1994*.
284 Section 31 of the *Environmental Protection (Water) Policy 1997*.
285 Part 3 Division 7 of the *Health Act 1937*.
286 Section 94 (Examination of stormwater drains etc) of the *Health Act 1937*.

Local governments have the ability to proactively deal with issues such as maintenance failure through the implementation of a local law regime under the *Local Government Act 1936*. A local law could establish a registration regime whereby on-site sewerage treatment facilities are required to be registered and owners are required to perform certain works to achieve registration such as the preparation of maintenance and servicing reports.

An example of such a local law is Beaudesert Shire Council's Subordinate Local Law No. 7.10 (On-site Sewerage Facility), established under its licensing local law. The purpose of this local law is to ensure that on-site sewerage facilities are operating effectively and efficiently so as to protect public health and the environment.[287] It achieves this by setting out situations in which the local government may grant a licence for the operation of an on-site sewerage facility. The local law empowers the council to impose conditions on licences with respect to issues such as:

- standards for effluent;
- disposal and use of effluent;
- escape of effluent;
- design, details of construction, materials and methods used for the construction of the on-site sewerage facility;
- inspections and tests by the local government;
- requiring the landowner to enter into a service contract; and
- nuisance (including odour nuisance).[288]

Another example is the Gold Coast City Council's proposed Local Law No. 42 (On-Site Sewerage Facility). The purpose of the proposed local law is to ensure that the operation and servicing of on-site sewerage facilities does not adversely affect the community's minimum standards in terms of health, safety and amenity and does not result in environmental harm. The proposed local law will establish a registration regime for on-site sewerage treatment facilities which contains provisions with respect to standards, monitoring, enforcement and owner education.

Miscellaneous

Other legislative instruments relevant to the regulation of on-site sewerage facilities include:

- the *Integrated Planning Act 1997*, which defines drainage work as including the installation, repair, alteration or removal of an on-site sewerage system and is therefore development for the purposes of the *Integrated Planning Act 1997*;[289]
- local government planning schemes;
- Guidelines for effluent quality;
- Guidelines for Horizontal and Vertical Separation Distance;
- draft Guidelines for the Use and Disposal of Greywater in Unsewered Areas;
- AS/NZS 1546 (On-site Domestic Wastewater Treatment Units); and
- AS/NZS 1547 (On-site Domestic Wastewater Management).

It is therefore clear that there exists in Queensland a comprehensive legislative framework with respect to on-site sewerage treatment facilities. The Standard Sewerage Law and accompanying codes, guidelines and local laws, provide local governments with a variety of powers to monitor on-site sewerage treatment facilities and to enforce standards and requirements in this regard. These legislative instruments, in addition to the *Environmental Protection Act 1994* and *Health Act 1937*, also enable local governments to take action where harm to the environment or the public health has occurred. In particular, the legislative framework is comprehensive with respect to ensuring that on-site sewerage treatment systems meet high technological and design standards and enabling State and local governments to take action where on-site sewerage treatment systems result in environmental harm or harm to public health.

However, despite the existence of statutory powers with respect to the ongoing regulation of on-site sewerage treatment systems, there remains a reluctance on the part of the State and local governments to implement these statutory powers. As stated earlier in this paper, on-site sewerage treatment systems largely fail due to lack of regular maintenance, rather than technological faults. It is therefore essential that State and local governments convert these statutory powers into sound policies and local laws in order to address this problem and avoid the

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287 Section 2 (Objects) of Beaudesert Shire Council's Subordinate Local Law No. 7.10 (On-site Sewerage Facility).

288 Sections 6 (Grant of a licence) and 7 (Conditions of a licence) of Beaudesert Shire Council's Subordinate Local Law No. 7.10 (On-site Sewerage Facility).

289 Section 1.3.5 (Definitions for terms used in "development") of the *Integrated Planning Act 1997*. Please note, however, that the *Integrated Planning Act 1997* is proposed to be amended by the *Plumbing and Drainage Bill 2002.*

risk of harm to the environment or the public health being caused by poorly maintained on-site sewerage treatment systems. Furthermore, the failure to utilise such powers in appropriate circumstances may give rise to legal risk issues as illustrated by the recent decisions in the Great Lakes cases.

Local government liability for on-site sewerage treatment

The Great Lakes cases involved a class action by over 400 people who contracted the Hepatitis A virus from oysters grown within the Myall Lakes which had been contaminated by faecal matter from septic tanks. The action was commenced against the Great Lakes Council, the State of New South Wales and the owners and distributors of the oysters. The local government in this case had statutory powers to require and perform work to ensure that sewerage systems complied with the relevant standards, as well as a power to take any action necessary to remove, disperse, destroy or mitigate any pollution to waters. Furthermore, pursuant to the New South Wales *Clean Waters Act 1970*, the local government was able to enter premises for the purposes of investigating discharges. There was also evidence to show that the local government had knowledge of the specific septic tank problems as well as an awareness of the general health significance of septic tank pollution. Importantly, the local government had received complaints about the septic tanks but had not investigated these complaints.

Federal Court

This case was firstly heard before a single judge of the Federal Court, where it was held that the State, the local government and the oyster growers were all liable in negligence to the plaintiffs who had contracted Hepatitis A as a result of consuming the oysters.[290]

With respect to the local government, the Federal Court held that the powers conferred on local governments by legislation and regulations may create a duty to act to minimise serious risks to health or property. While the local government's duty to act in this matter was held not to be absolute, the local government was nevertheless held in this case to be under a duty to take reasonable steps to minimise human faecal contamination of the lake, as the local government knew or should have known that a failure to perform that duty could adversely affect oyster consumers. The Federal Court acknowledged that while there were a number of probable causes or sources of the contamination, all of the sources were within the local government's control. The local government was therefore held to be liable as the local government was aware of the problem and allowed the continuation of pollution from those sources by failing to exercise its powers in a responsible manner.

Appeal to the Full Federal Court

This matter was then heard on appeal by the Full Federal Court.[291] While the liability of the oyster growers and the State was upheld on appeal, the majority of the Full Federal Court overturned the earlier decision that the local government was liable in negligence.

Lindgren and Kiefel J held that the local government did not owe a duty of care to the plaintiffs on the grounds that the local government's statutory powers concerning water pollution and public health did not oblige the local government to prevent the risk of persons contracting Hepatitis A from contaminated water.

According to Lindgren J, the local government did not owe a duty of care to take reasonable steps to minimise faecal contamination of the lake as the notion of minimisation was too broad to found a duty of care. Furthermore, the non-specificity of the source of the contamination highlighted the indeterminate nature of the burden that the duty would impose.

Lindgren J held that, in practice, imposing such a duty of care on local governments would require the identification of every source of faecal pollution, the exercise of the local government's powers in relation to the sources identified to the fullest extent possible, and the maintenance of that system by taking those steps sufficiently, frequently and promptly. In light of the fact that local governments possess many equivalent powers under various legislative instruments, Lindgren J held that such a duty would impose an undue financial burden on the local government. In essence, Lindgren appears to support the proposition that public authorities should not be held liable for the non-exercise of discretionary statutory powers.

Kiefel J's reasons for holding that the local government was not liable were more specific than those of Lindgren J. According to Kiefel J, the local government's statutory powers to prevent pollution of the lake did not have as their purpose the prevention of harm to oysters or the protection of consumers. Accordingly, there was no obligation on the local government to use its powers to achieve those ends.

Lee J comprised the minority in this case, holding that the local government owed a duty of care to exercise the statutory powers vested in it so as to reduce or minimise the acceptable level of the risk of harm caused by the consumption of oysters from the lake. Lee J formed this conclusion on the basis that:

- the local government was aware that faecal matter was entering the lake;
- the local government knew of the risk it posed to those who consumed the oysters from the lake;
- the local government had statutory powers to manage the waters of the lake for the protection of public health;

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290 *Ryan v Great Lakes* Council [1999] FCA 177.
291 *Graham Barclay Oysters Pty Ltd v Ryan* [2000] FCA 1099.

- the statutory powers were sufficient to reduce the risk to consumers of oysters to a reasonable or acceptable level; and
- the local government did not exercise its statutory powers.

Appeal to the High Court

The plaintiffs appealed the decision of the Full Federal Court to the High Court. The appeal was heard by the High Court in March 2002, however no judgment has yet been handed down. The combined effect of the Federal Court's decision at first instance and on appeal is that four judges of the Federal Court are equally divided on the issue of the liability of the council for failing to exercise its statutory powers.

Over the past few years, the High Court has been increasing the ambit of circumstances in which local governments are held to owe a duty of care. Accordingly, there are reasonable prospects of the High Court overturning the Full Federal Court's decision and holding the council liable in negligence.

However, until such time as the High Court hands down its decision, it remains uncertain whether local governments will be held liable in negligence for harm which results from a failure to properly regulate and ensure the proper maintenance of on-site sewerage treatment facilities.

Implications for local governments

In light of the current uncertainties surrounding the issue of the duty of local governments to exercise their statutory powers, it is advisable that local governments adopt a precautionary approach. As express powers exist in legislative instruments such as the *Standard Sewerage Law* and the *Health Act 1973* for local governments to ensure the proper installation and maintenance of on-site sewerage treatment facilities in order to protect the health and safety of the public, there is a possibility that local governments which fail to exercise these statutory powers to prevent harm being caused will be held liable where such harm occurs. Therefore, it is essential that all local governments implement policies, procedures and local laws for dealing with any serious risks which come to the local government's attention.

In order to reduce the risk of any potential liability, local governments must implement risk assessment and risk management policies,[292] including the implementation of reporting and accountability systems, follow-up procedures and continuous improvement processes.[293] Such systems and processes are essential to ensure that where faulty or poorly maintained systems are brought to the attention of the local government, they are properly recorded and acted upon by the local government. It is also important that local governments adopt an effective system of monitoring and consider implementing suitable education programs for landowners. By implementing such policies, procedures and local laws, local governments should reduce their risk of liability in the event that harm results from on-site sewerage treatment facilities.

Conclusions

On-site sewerage facilities which are not properly operated or regularly maintained may cause significant harm to the environment, public health and also to community amenity. In Queensland, there exists a comprehensive legislative framework enabling local governments to regulate the installation of on-site sewerage treatment facilities and problems that arise from their operation. The Standard Sewerage Law and associated codes and guidelines give local governments the power to regulate the installation, operation and maintenance of on-site sewerage treatment facilities. Furthermore, the *Health Act 1937*, the *Environmental Protection Act 1994* and the Water EPP are also important in enabling local governments to regulate discharges from on-site sewerage treatment facilities and to take action where harm is caused by such facilities.

However, despite the existence of these legislative instruments, there remains a reluctance on the part of State and local governments to implement legal regimes which are designed to address the cause of the ensuing harm, namely the failure by the owners and operators of the on-site sewerage treatment facilities to adequately maintain the facilities.

As poorly maintained on-site sewerage treatment facilities may result in serious harm to the environment and public health, it is essential that State and local governments urgently take action to implement their statutory powers and to introduce new legal regimes, such as through local laws, to ensure that the operation and maintenance of on-site sewerage facilities is strictly regulated. The protection of the public and the environment requires that this issue be addressed now before an event such as that which occurred in the Great Lakes district happens in Queensland. Governments did not act on the public health risks of residential accommodation services until after the fire at the Childers Backpackers. Let's hope that a similar tragedy does not occur before action is taken to deal with this growing public health and environmental issue.

This paper was presented at the Queensland On-Site Wastewater Treatment symposium, 21 November 2002.

[292] C Bush (2001) *How far do growers need to go to ensure food safety?* 12(1) Australian Product Liability Reporter 11 at 12.
[293] Tony van Merwyk and Tony Wilson (1999) *Liability of local authorities for the exercise of statutory powers*, 13(1) Australian Property Law Bulletin 93.

Summary of recent developments in planning law including rezoning conditions, management of the Brisbane river catchment and fraudulent planning submissions

Ian Wright

This article discusses the recent developments in planning law with a particular focus on rezoning conditions, non-relaxable conditions in town planning schemes, the existing legislative framework for the management of the Brisbane River catchment and the impacts of making a fraudulent planning submission

December 2002

Rezoning conditions found not to run with land

The principle that rezoning conditions run with the land and bind successors in title – a fundamental tenet of planning legislation in Queensland which has been enshrined in planning legislation since the introduction of the *Local Government (Planning and Environment) Act 1990* – has been dealt a savage blow by a decision of the Planning and Environment Court in Cairns.

In the case of *Mimehaven Pty Ltd v Cairns City Council* (P & E Application 5 of 2001, unreported, 12/12/01) White DCJ held that the conditions of a rezoning approval made under a 1993 Planning Scheme ceased to have any effect once a new planning scheme was gazetted in 1996. The decision has significant implications for the planning system in Queensland.

Facts

In 1993 a planning scheme for the Mulgrave Shire Council was gazetted. Included in the Tourist Facilities (Caravan Park, Dwelling and 63 Tourist Site) zone under that scheme was a property at Stratford Parade, Cairns. The property was used as a caravan park at that time. In 1994 an application was made (pursuant to the provisions of the *Local Government (Planning and Environment) Act 1990* (**P&E Act**)) to rezone the Stratford Parade property to the Medium Density Residential zone to allow a multiple unit development. The application was the subject of a consent order made in the Planning and Environment Court on 11 November 1994 approving the rezoning subject to conditions, including, relevantly, requirements to pay headworks contributions prior to the issue of a building approval. The rezoning was gazetted on 10 February 1995.

The caravan park use ceased in February 1995. The property remained vacant and unused until 2001. On 29 November 1996 a new planning scheme was introduced. Under the new scheme the property was included in Residential 3 zone, there being no Medium Density Residential zone. Although in both schemes the zone in which the property was included allowed for the most intense form of residential development, there were differences in the zone descriptions and statements of intent.

In 2001 the Cairns City Council (which as a result of local authority amalgamation then administered the 1996 scheme) received notification from a private certifier that a multiple dwelling unit project had been approved at the property. During council's town planning audit of the approval, council determined that there were headworks contributions payable under the 1994 rezoning. Council sought to enforce the headworks conditions. The developer resisted payment of the headworks contributions on the basis that the conditions attaching to the 1994 rezoning approval no longer applied and it was entitled to develop the land under the provisions of the 1996 Scheme without complying with them. The developer sought declaratory relief before the Planning and Environment Court on the issue.

The decision

Section 4.4(13) of the P&E Act provided that conditions imposed by a local authority upon a rezoning application attached to the land and were binding on successors in title.

In finding for the developer, the Judge did not dispute that the Mulgrave Shire Council had the power to impose the conditions at the time of the 1994 application or that the approval had become, in effect, an amendment to the 1993 scheme upon its gazettal in 1995.

Despite noting that he had not been referred to any provision of the P&E Act that suggested the effect of s4.4(13) upon the rezoning approval would in any way expressly cease upon the introduction of the 1996 Scheme, His Honour found:

> *The conditions under consideration were conditions of an amendment to the 1993 scheme by way of rezoning. That rezoning was brought into effect fully in 1995. It continued to have effect up until the introduction of the 1996 scheme irrespective of whether the original applicant for rezoning or any other person carried out the development upon which the application for rezoning was based. But the 1994 approval and the resulting rezoning ceased to have any effect as part of the respondents' planning scheme upon the 1996 scheme coming into force. It would be a remarkable state of affairs if subsection 4.4(13) intended that conditions of a rezoning were to continue to attach to the land and to bind all successors in title even though the rezoning giving rise to the condition had lapsed.*

In the Judge's view, the gazettal of the 1996 scheme had the effect of repealing the 1993 scheme, except in limited circumstances set out in section 3.4 of the P&E Act in which rights acquired before the new planning scheme continued. He found that if the introduction of the new scheme rendered a prior rezoning approval ineffective then it must be taken to have rendered the conditions of approval ineffective as well.

Section 3.4(3) provided that:

> *Where a local authority (and where necessary the Governor in Council) has approved an application (or an amendment to a planning scheme as the case may be) prior to the prescribed date and the rights conferred under the approval have not been exercised prior to the prescribed date -*
>
> *(a) the rights conferred by the approval may be exercised in accordance with the approval so granted within the period specified in s4.13(18), 5.2(1) or 5.3(1) as is applicable notwithstanding that in the case of an approval granted by the local authority would be contrary to the new planning scheme, and*
>
> *(b) the use of the premises pursuant to those rights is to be taken to be a use in existence immediately prior to the prescribed date.*

The Judge took the view that section 3.4(3) only had application if the approval would otherwise be contrary to the new planning scheme. If the approval was not contrary to the scheme, it became irrelevant and any future development was governed by the new scheme. The section did not limit the rights arising under a new planning scheme. The only circumstance in the Judge's view under which the conditions of the rezoning approval could apply was if the rights given by the approval were exercised. His Honour found that in the present case the developer was exercising its rights under the 1996 scheme and not the 1994 rezoning. The development approved in 2001 was substantially different to that which had been proposed in support of the 1994 application (and subsequent approval). Further the Judge relied on the fact that one of several differences between the 1993 Medium Density Residential and 1996 Residential 3 zones was that the development upon which the 1994 rezoning had been based was a Column 2 (permitted subject to conditions) use under the 1993 scheme whereas the 2001 development was as of right under the 1996 scheme. The Judge also considered the transitional provisions of IPA and concluded that the relevant provision (section 6.1.24(2)) had no application.

Finally the Judge turned his mind to the provisions of the 1996 scheme itself which contained a provision specifically seeking to preserve earlier conditions of approval upon the commencement of the 1996 scheme. Section 4.3 of the scheme provided that the conditions of any rezoning approval which attached to the land immediately before the commencement of the 1996 scheme would continue to attach to the land so long as, amongst other matters, the land retained the same zoning as it had immediately prior to the commencement of the scheme.

The Judge found that, although there were features of the Residential 3 zone which were similar to the Medium Density Residential zone, looking at the details of the two zones and considering their total effect, it was not possible to say that the property retained the "*same zoning*". Ultimately the Judge concluded that the applicant was not bound by the conditions of the 1994 rezoning approval.

Discussion

The ramifications of the decision in the Mimehaven case are potentially significant for planning in Queensland. Although the development particulars might not be repeated, the broader chain of events is by no means uncommon. Any local authority which has given a rezoning approval under the provisions of the P&E Act and then subsequently adopted a new scheme could well find itself in a similar situation. Figures are not readily available. However, without a doubt there will be a considerable number of approvals throughout Queensland which are or may be affected by the decision.

The principle that the conditions of approval run with the. land and bind successors in title was specifically introduced to ensure that conditions of approval were binding and could be enforced despite changes in ownership of the rezoned property. The provision gave certainty to the planning regime in Queensland allowing local authorities to ensure, as far as possible, orderly development in a local authority area and lessen the impact of development on amenity and community infrastructure. In finding that conditions of approval are effectively "*superseded*" by the commencement of a new planning scheme, the decision strikes at the very foundation of this principle, and potentially makes enforcement of conditions by a local authority problematic.

Whilst there is a certain logic in the Judge's reasoning, there are nevertheless arguments against the view he has taken of the legislation. Given the very serious implications of the decision, the council appealed the matter to the Court of Appeal. The appeal was heard in March 2002. The Court of Appeal upheld the decision of the Planning and Environment Court albeit on different grounds. Accordingly, the legal principles established by the Planning and Environment Court have not been endorsed by the Court of Appeal. Therefore whilst the Judge's decision is persuasive it is not binding on the other members of the Planning and Environment Court. Accordingly the legal principles established in this decision remain to be tested before the Court of Appeal.

Non-relaxable provisions in town planning schemes

The recent decision of the Queensland Court of Appeal in *Weightman v Gold Coast City Council & Anor* [2002] QCA 234 confirmed that non-relaxable provisions in transitional planning schemes are to be given considerable weight despite section 6.1.2(3) of the *Integrated Planning Act 1997* (**IPA**) which provides that a prohibited use in a transitional planning scheme is "*taken to be an expression of policy that the use is inconsistent with the intent of the zone in which the use is prohibited*". However, in the event of a conflict, the significance to be given to the planning scheme will ultimately be determined by balancing competing considerations.

Facts

The applicant (appellant) appealed against the decision of the Gold Coast City Council (**council**) to approve a development application by the second respondent, Gordon Lakelands Pty Ltd (**developer**) for a preliminary approval of a material change of use for 61 residential units, 101 car parking spaces, a restaurant and a church. The proposal was for a building which ranged in height between three and four storeys. The applicant objected on the basis that the inclusion of a fourth storey component conflicted with the planning scheme and was entirely out of keeping with the character of development in the area.

In the first instance the Planning and Environment Court dismissed the appeal on the basis that the applicant's requirement to establish sufficient planning grounds to justify approval was not of the highest order and that if general compliance with the relevant objectives of the planning scheme was not enough then sufficient planning grounds had been demonstrated. The appeal to the Court of Appeal was brought on the basis that the Planning and Environment Court had failed to properly apply the test imposed by section 4.4(5A) of the *Local Government (Planning and Environment) Act 1990* (**P&E Act**) as applied by section 6.1.30 of the IPA.

The legislation

Section 6.1.2(3) provides that a prohibited use in a former planning scheme is taken to be an expression of policy that the use is inconsistent with the intent of the zone in which the use is prohibited in the transitional planning scheme. Section 6.1.30 of the IPA provides that the application must be decided under subsections 4.4(5) and (5A) of the P&E Act. Section 4.4(5A) provides that:

> *The local government must refuse to approve the application if:*
>
> *(a) the application conflicts with any relevant strategic plan or development control plan; and*
>
> *(b) there are not sufficient planning grounds to justify approving the application despite the conflict*.

The relevant provision of the planning scheme provided that the permitted height of any multi-unit building, town house development should not exceed three storeys, which might be relaxed or increased in certain circumstances. One of those. circumstances applied in the current case.

The presiding Judges unanimously held that the word "*must*" is, in section 4.4(5A), used in the imperative sense thus making it mandatory to refuse to approve an application in the circumstances set out.

Atkinson J, with whom McMurdo P agreed, held that the primary trial judge wrongly took into account factors which were relevant only if non-compliance with the eight requirements was permitted. De Jersey CJ found that the trial judge's consideration of those factors was a convenient and careful way of determining whether there were sufficient planning grounds to approve the application despite the conflict with the planning scheme.

Sufficient planning grounds

In determining the weight to be given to a provision of the transitional planning scheme their Honours referred to *Vynotas Pty Ltd v Brisbane City Council* [2001] 1 Qd R 108 and *Grosser v Council of the City of the Gold Coast* [2001] QCA 423 and concluded that even though not binding, the transitional planning scheme still carried considerable weight. Atkinson J held that in order to determine whether there are sufficient planning grounds to justify approving the application despite the conflict, the decision maker should:

- examine the nature and extent of the conflict;
- determine whether there are any planning grounds which are relevant to the part of the application which is in conflict with the planning scheme and if the conflict can be justified on those planning grounds; and
- determine whether the planning grounds in favour of the application as a whole are, on balance, sufficient to justify approving the application notwithstanding the conflict.

Atkinson J found that because the planning scheme and relevant development control plan specifically provided that developments exceeding three storeys were prohibited, an application for a building with four storeys would be a major conflict and not merely a minor conflict as the primary trial judge had held. Atkinson J, with whom McMurdo P agreed, found that the trial judge misconstrued the planning scheme which was an error of law and that it undoubtedly affected his decision. De Jersey CJ, who dissented, agreed that the conflict could not reasonably be categorised as minor despite the planning scheme not being binding. However, he was satisfied that there were sufficient grounds to justify the approval despite the fact that the importance of the planning scheme had been understated.

Conclusion

This case confirms that the non-relaxable provisions of a transitional planning scheme will be given considerable weight in determining a development in accordance with decisions in *Vynotas and Grosser*.

In determining whether there are sufficient planning grounds to justify approving an application despite a conflict it is essential that appropriate weight be given to the provisions of the planning scheme and that the provisions are properly construed. However, the significance to be given to the planning scheme will ultimately be determined by the weighting of competing considerations. Some assistance may be derived from the three step test enunciated by Atkinson J in Weightman in assessing whether there is justification to approve an application despite a conflict with a non-relaxable provision of a transitional planning scheme.

While it is imperative that all relevant considerations are taken into account by the authority and that they are appropriately weighted to determine whether there are sufficient grounds to justify approving an application despite a conflict with the planning scheme, it is difficult to escape the proposition that the weighing process is extremely subjective.

Brisbane river catchment management complexity

The Brisbane River Catchment covers an area of 13,560km^2, extending along the coastline from Caloundra to Logan City and as far inland as Boonah, Gatton and Kilcoy. With a population of approximately 1.5 million, the catchment is subject to a variety of land and water activities, many of which have impacted and are continuing to impact on the water quality of the Brisbane River and its tributaries. However, the existing jurisdictional and legislative framework relevant to the management of water quality is complex and non-comprehensive and therefore inadequate to protect water quality in the Brisbane River catchment.

Water quality in the Brisbane River catchment

The land and water activities which have the most significant impact on the water quality of the Brisbane River and its tributaries, and which therefore need most to be regulated, can be broadly categorised as:

- water extraction and dams;
- agriculture;
- urban and industrial development;
- river transport; and
- dredging and mineral extraction.

The major water quality issues facing the Brisbane River are sediments and turbidity, nutrients and bacteria/microbial quality, with levels exceeding national guidelines for primary contact and for the protection of aquatic ecosystems. Other water quality issues include toxic chemicals and metals.

The legislative and jurisdictional framework

Overall, there are more than 40 legislative instruments and 25 governmental authorities which have some role to play, either directly or indirectly, in protecting water quality in the Brisbane River catchment. Most of the issues relevant to water quality are covered in some way in the legislative instruments and most issues come within the jurisdiction of at least one governmental authority. However, there are two major gaps in the legislative and jurisdictional framework, namely instruments or agencies dealing with overall transport planning and with the management of water flows in tidal areas or environmental flows.

Furthermore, a number of the legislative instruments afford only indirect protection of water quality. For example, the *Fisheries Act 1994* provides for the protection of fisheries and fish habitats, and this can be used indirectly to protect water quality. Other examples include the *Rural Lands Protection Act 1985* (management of certain plants and animals on riparian corridors) and the *Land Act 1994* (tree clearing permits). In this way, water quality protection is often dependent on indirect powers. Similarly, a number of Acts merely establish powers to create regulations, by-laws or management plans for the protection of water quality. For example, the *Beach Protection Act 1968* and the *Coastal Protection and Management Act 1995* both establish the power to develop coastal management plans. However, many of these powers have yet to be exercised.

A further problem with the legislative and jurisdictional framework relevant to the Brisbane River Catchment is its extreme complexity. It involves numerous overlaps both in the content of the legislative instruments and in the roles of governmental authorities. The areas in which the most severe overlaps occur are:

- management of riparian areas;
- management of the water quality of the water supply;
- management of contaminants, particularly non-point sources;
- water supply;
- water conservation;
- land use management;
- management of water activities;
- river infrastructure; and
- dredging.

Another area of complexity is the fact that different pieces of legislation apply to different parts of the Brisbane River. For example, with respect to managing riparian corridors (including riparian vegetation) the *Fisheries Act 1994* applies to tidal and non-tidal areas; the *Coastal Protection and Management Act 1995* applies to tidal rivers and foreshores up to 100 metres below the high water mark; the *Land Act 1994* applies to State-owned land; and the *Beach Protection Act 1968* applies to beds and banks of rivers and lakes below the high tide mark and up to 400 metres above the high tide mark. In addition, sitting over these are the *Environmental Protection Act 1994* and the *Nature Conservation Act 1992*. Jurisdictional responsibilities are similarly divided, giving rise to a fragmented, water-surface-based division of responsibility.

Conclusion

The existing legislative and jurisdictional framework may not be adequate to enable protection of the water quality in the Brisbane River Catchment. The current framework is too complex, fragmented and fraught with jurisdictional overlaps to work effectively or efficiently, with adequate accountability for decision makers. The land and water activities impacting on water quality are diverse, and require a framework which coordinates planning and decision making to ensure comprehensive regulation of these activities and their impacts.

Fraudulent planning submissions

During the notification period for a development application, the public may make written submissions to the assessment manager about the application. The assessment manager must accept a submission if the submission is a "*properly made submission*". A properly made submission is one that is made in writing and is signed by each person who made the submission. A submission signed by a person other than the person who made the submission may not only be improperly made, but may constitute fraud.

Criminal offence

By signing a submission, without authority, in the name of another person, a person may commit an offence under the Criminal Code. Section 494 of the Criminal Code is concerned with the offence of making documents without authority. It provides that any person who, with intent to defraud, without lawful authority or excuse, signs any document for or in the name or on account of another person, whether by procuration or otherwise, is guilty of a crime and is liable to imprisonment for seven years.

A crime is also committed under section 488 of the Criminal Code when a person who, with intent to defraud, forges a document or utters a forged document. The maximum penalty for committing this crime is three years imprisonment if no other punishment is provided.

Duty to report to council

If a council officer discovers that a submission has been signed by a person, without the authority of the person making the submission, the question may be asked whether there is a duty for the council officer to report the incident to council. Council officers do not have a statutory duty to report allegations of fraud to the council. They do, however, have a duty to report such matters as they consider appropriate to the council. Whether or not it is appropriate to report the incident to council will depend on the circumstances.

Duty to report to police

The *Local Government Act 1993* (**LGA**) sets out specific obligations for local government employees and councillors in the performance of their duties. Section 1138 of the LGA requires an employee to act in a way that shows a proper concern for the public interest and section 229 of the LGA requires that councillors act in the public interest.

Accordingly, whilst council officers and councillors do not have a statutory duty to report allegations of fraud to the police and will not commit an offence under the Criminal Code in not reporting the allegations, it is likely that it would be in the public interest for them to refer the allegations to the police. In this regard council officers and councillors are different to other members of the community who are not obliged to act in the public interest.

Conclusion

Council officers do not have a statutory duty to report allegations of fraud to the council. Their duty is to report such matters to the council as they consider appropriate.

While there is no statutory duty to report an allegation of fraud to police, council officers and councillors are required to act in the public interest. It is likely that it would be in the public interest for council officers and councillors to report allegations of fraud to the police.

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Policy and legislative framework of IPA

Ian Wright

This article discusses the evolution of the policy and legislative framework of IPA and how recent reform impacts both State and local government legislation

February 2003

Introduction

Integrated Planning Act 1997

The *Integrated Planning Act 1997* (**IPA**) commenced operation on 31 March 1998. The IPA repealed the *Local Government (Planning and Environment) Act 1990* (**PEA**) which itself had repealed the *City of Brisbane Town Planning Act 1964* and the town planning and subdivision provisions of the *Local Government Act 1936*.

The IPA, like earlier Queensland planning legislation, establishes a statutory planning system based on three elements:

- an integrated plan making system;
- an integrated development assessment system called IDAS;
- an integrated dispute resolution system.

Radical reform

However, unlike earlier Queensland planning legislation, the IPA represents a radical shift in the theoretical basis and practical application of planning legislation.

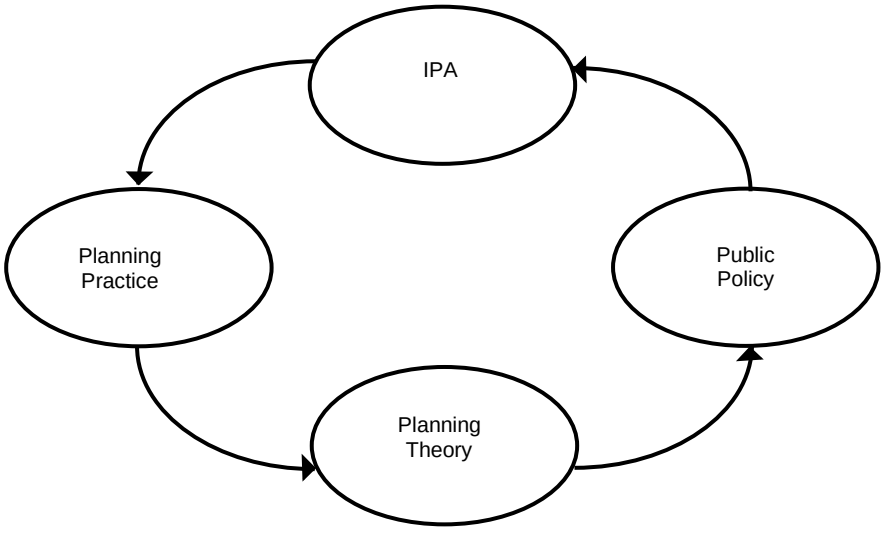
The change in planning theory and practice that is represented by the IPA is embodied in the planning schemes that are to be made under the IPA. As such IPA planning schemes such as the *Maroochy Plan 2000* represent a significant shift in planning theory and practice from the 1985 planning scheme it replaced.

Theoretical underpinnings of IPA

Theoretical model

The following analysis and discussion of IPA is grounded in the view that laws such as the IPA are inevitably the product of an amalgam of planning practice, planning theory and public policy considerations. These relationships are illustrated in Figure 1 – Theoretical basis for IPA.

Figure 1 Theoretical basis for IPA



Minimalist v instrumental planning

The IPA creates a planning framework that planning theorists have described as instrumental planning. Under this model of planning the goal of planning and planners is to identify society's social, economic and environmental goals and implement physical planning that facilitates these goals.[294]

This approach is to be contrasted with the approach which underpinned earlier Queensland planning legislation such as the *Local Government (Planning and Environment) Act 1990*. The planning framework created by the PEA has been described by planning theorists as minimalist planning.

Under the minimalist model of planning, the goal of planning and planners is to reconcile competing claims for the use of limited land so as to improve the built environment and by implication the quality of human life.[295]

In essence the PEA was concerned with physical outcome planning whilst the IPA is concerned with social outcome planning. Or to put it another way, the PEA was about the planning of development whilst the IPA is about the planning for development. The difference in the wording is subtle but the implications in terms of the planning framework are enormous.

The differences between the planning approaches underpinning the PEA and the IPA are summarised in Table 1: Comparative analysis of the PEA and IPA planning frameworks.

Table 1 Comparative analysis of the PEA and IPA planning frameworks

Planning Framework	Local Government (Planning and Environment Act) 1990	Integrated Planning Act 1997
1 Type of planning	Minimalist planning – planning of development	Instrumental planning – planning for development
2 Purpose of planning	Physical outcome planning: • Create a physical environment that is fundamentally appropriate and aesthetically pleasing. • Assumption that an improved physical environment improves the quality of human life.	Social outcome planning: • Create an environment that achieves the social, economic and environmental goals defined by society. • Assumption that the achievement of ecological sustainability improves the quality of human life.
3 Planning approach	Technocratic approach: • Achievement of physical limits is important. • Grounded in the physical sciences (engineering, surveying, architecture and law) where planning is seen as technically orientated.	Analytical approach: • Achievement of societal goals is important. • Grounded in social sciences (geography and planning) where planning is seen as policy and management orientated.
4 Decision makers	Focus on technical issues – defining the physical limits and controls.	Focus on policy issues – defining the outcomes.
5 Planning schemes	Control driven: • Activities are controlled. • Activities that are not regulated are prohibited. • Prohibitions are permitted and necessary. • Prescriptive based controls.	Outcome driven: • Specify the outcomes to be achieved by activities. • Activities that are not regulated are permitted (eg exempt development). • Prohibitions are prohibited. • Performance based controls.
6 Development assessment	Assess activities.	Assess the effects of activities within defined outcomes.

[294] England P. (2002:3).
[295] England P. (2001:2).

Planning Framework	Local Government (Planning and Environment Act) 1990	Integrated Planning Act 1997
7 Public interest / private rights	Private property rights are protected: • Property values are protected (eg prohibitions and prescriptive controls). • Compensation for the loss of development entitlements.	Public interest is protected – the achievement of societal goals prevails over private property rights.
8 Public participation	Less participatory – public participation is limited to protect private property interests.	More participatory – public participation is critical to determine the outcomes required by society.

Competing philosophies

The divide between the minimalist planning approach of the PEA and the instrumental planning approach of the IPA also represents a tension between two competing philosophies.

The first is the liberal perspective which argues that minimalist regulatory intervention is required to protect individual rights. This is to be compared with the competing conservative perspective which argues that a higher level of regulatory intervention is required to protect the public interest. These competing perspectives are adopted by different stakeholders.

Whilst not wishing to offend anybody, as a generalisation it can be said that the conservative perspective is held by most residents and environmental groups, many elected representatives, a large number of planners and architects, some lawyers and the current State government.[296]

Again whilst not wishing to offend anybody, it can be said as a generalisation that the liberal perspective is held by many developers, sectoral groups, some planners and architects, most lawyers, classical economists, companies (particularly large ones), some farmers and the current Commonwealth government.[297]

As such there is an ideological divide between the proponents of the instrumental planning approach under the IPA and the proponents of the minimalist planning approach under the PEA.

For the moment the conservatives hold the upper hand with the current drafting of the IPA. However, there is much dissatisfaction with the IPA. Accordingly it is increasingly likely that future debate over the IPA will be politicised to such an extent that there is a real likelihood of future reactionary changes to the IPA. The proposed IPOLA 2001 amendments represent the beginning of this change.

Public policy agenda underpinning IPA

Public policy goals

IPA has embraced two major public policy goals of the 1990s: ecological sustainability and public sector reform. Ecological sustainability is explicitly expressed as the purpose of the IPA whilst public sector reform is implicit in the drafting of IPA. Both these public policy goals have influenced the plan making and development assessment frameworks created by the IPA.

Public sector reform

Public sector reform was a mantra of the 1990s. Commonwealth, State and local governments were reformed to increase economic efficiency and economic accountability through a corporatisation process that emphasised downsizing, economic rationalism and customer satisfaction as appropriate goals of the public sector.[298]

Consistent with this agenda, the IPA has sought to increase economic efficiency and economic accountability. This is reflected in a number of significant public policy reforms that were introduced by the IPA.

- *Reduction in legislation* – the IPA introduces within one overarching Statute an integrated and comprehensive decision making framework that will allow the repeal of some 5000 pages of decision making processes in other legislation.[299]
- *Common procedures* – the IPA establishes common plan making, development assessment and enforcement procedures that apply to all development (other than mining and casinos).[300]

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296 Nixon B. (1998:4) *The RMA: An Impending Ideological Crisis*, Planning Quarterly, June.
297 Nixon B. (1998:4).
298 England P. (2001:17) *Integrated Planning in Queensland*, The Federation Press.
299 Yearbury, K (1997:29) *Planning for the Millennium, Proceedings of QELA Seminar* on 27 September 1997.
300 See *Mineral Resources Act 1989* and *Jupiters Casino Agreement Act 1983*.

- *Integration of government interests* – the IPA planning schemes are intended to incorporate all local, State and regional interests as well as the interests of the private sector.[301]
- *Single approval system* – the Integrated Development Assessment System (**IDAS**) introduces a single system for processing, assessing and granting approvals whatever the form of development. IDAS encourages regulatory agencies to codify assessment criteria, promotes a whole of project approach to development assessment and encourages communication between regulatory agencies.[302]
- *User pays* – the costs of development are to be borne by those who incur them. The application of the user pays principle means that fees are levied on applicants for development applications and assessment[303] and infrastructure contributions are levied on applicants through development approvals and infrastructure charges.[304]
- *Regulatory alternatives* – the power to impose a tax on a landowner in the form of an infrastructure charge is limited by the requirement that the infrastructure charge must be in accordance with an infrastructure charges plan that has evaluated alternative ways of funding the development infrastructure item.[305]
- *Separate regulatory and service functions* – the regulatory and provider service functions of development assessment have been separated by providing for the private certification of development applications for building work.[306]
- *Focus on policy issues* – the council's role is to determine the outcomes and the standards beyond which ecological sustainability cannot be maintained, monitor both environmental quality and the effectiveness of government policies and make that information public, and enforce adherence to the outcomes and standards. The role of landowners is to determine how they can achieve the outcomes and standards beyond which ecological sustainability cannot be maintained.
- *Devolution* – plan making and development assessment functions are devolved to the level of government with the greatest community of interest which in most cases is the local government being the level of government closest to the problems and to the citizens who will be affected by the problems.
- *Community participation* – plan making and development assessment are subject to public participation processes which entitle any person to make a submission in respect of a planning scheme policy, a State planning policy, a planning scheme or impact assessable development.[307]
- *Defined timelines* – IDAS specifies strict timelines which produce quicker decisions. This also requires elected members to delegate administrative functions to local government officers so that they can concentrate on policy issues.

The IPA's focus on increased economic efficiency and economic accountability is complemented by a focus on ecological sustainability as the overarching purpose of the IPA. Ecological sustainability is a moralistic and political concept that is intended to moderate the economic rationalism and depoliticisation of the corporatisation focus of the public sector reform process.

Ecological sustainability

As stated earlier ecological sustainability is the overarching purpose of the IPA.[308]

Ecological sustainability is defined as a balance that integrates three separate elements:[309]

- *economic environment* – that is the protection of ecological processes and natural systems at local, regional, State and other levels;
- *physical environment* – that is economic development;
- *social environment* – that is the maintenance of the cultural, economic, physical and social wellbeing of people and communities.

The key components of each element are summarised in Figure 2: The sustainability framework. The model clearly illustrates that ecological sustainability is concerned with the inter-relationship between the social, economic and physical environments.

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301 See section 2.1.3(1)(a) of IPA.
302 Yearbury, K (1997:29).
303 See section 3.2.1(4)(a) of IPA.
304 See sections 6.1.31 and 5.1.7 of IPA.
305 See section 5.1.4 of IPA.
306 See section 5.3.5 of IPA.
307 See section 12 of Schedule 1 (planning schemes), section 3 of Schedule 3 (planning scheme policies) and section 3 of Schedule 4 (state planning policies) and section 3.4.4 (Impact assessable development) of IPA.
308 See section 1.2.1 of IPA.
309 See section 1.3.3 of IPA.

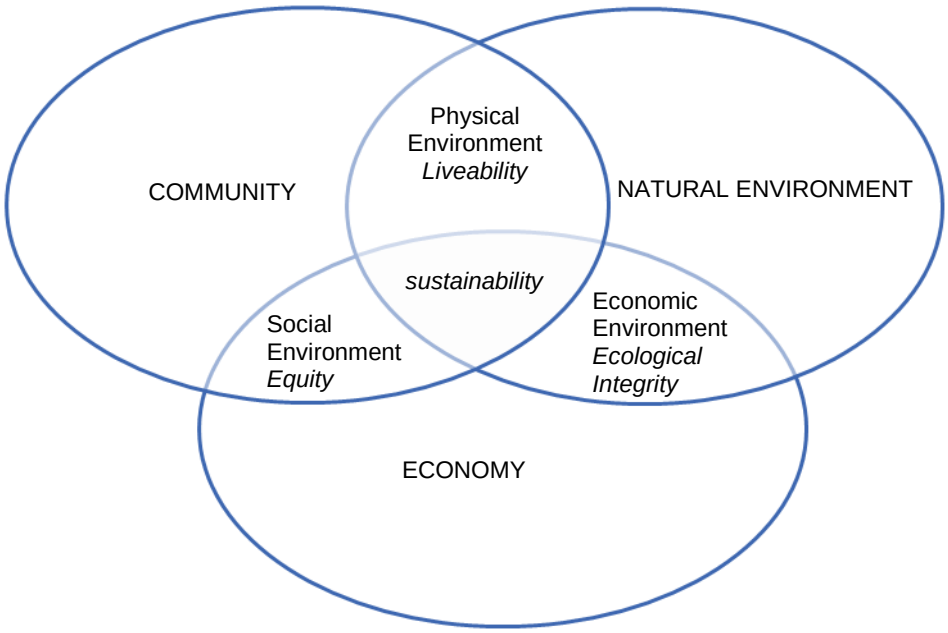
The physical environment is where the natural environment interacts with the community. In this case, the sustainability objective is to ensure liveability. The goal of liveability is achieved when the physical environment has reached a stage where the long term health of the community and the natural environment is being maintained.

The social environment is where the community interacts with the economy. In this case, the sustainability objective is to ensure equity. The goal of equity is achieved when the social environment has reached a state where the long term health of the community and the economic environment is being maintained.

The economic environment is where the economy interacts with the natural environment. In this case, the objective is to ensure ecological integrity. The goal of ecological integrity is achieved when the economic environment reaches a state where both the long term health of the economy and the natural environment are maintained.

Ecological sustainability is achieved where the social, environment and physical environments are in balance, that is where liveability, ecological integrity and equity exist.

Figure 2 The sustainability framework



The goal of ecological integrity is achieved if:[310]

- the life supporting capacities of our ecosystems, soil and water are conserved, enhanced or restored for present and future generations (ie *ecosystem health*); and
- biological diversity is protected.

The goal of liveability is achieved if:[311]

- there are diverse, efficient, resilient and strong economies at local, regional and State levels; and
- the economies allow the communities to meet their present needs while not compromising the ability of future generations to meet their needs (ie intergenerational *equity is achieved*).

The goal of equity is achieved if:[312]

- well-serviced communities with affordable, efficient, safe and sustainable development are erected and maintained; and

[310] See section 1.3.6(a) of IPA.
[311] See section 1.3.6(b) of IPA.
[312] See section 1.3.6(c) of IPA.

- areas and places of special aesthetic, architectural, cultural, historic, scientific, social or spiritual significance are constructed or enhanced; and
- integrated networks of pleasant and safe public access for aesthetic enjoyment and cultural, recreational or social interaction are provided.

The IPA itself makes it clear that legislation cannot of itself achieve ecological sustainability. It can only assist in the achievement of ecological sustainability. Accordingly, the IPA makes it clear that its purpose is not to achieve ecological sustainability but to seek to achieve ecological sustainability by:[313]

- coordinating and integrating planning at the local, regional and State levels; and
- managing the process of development; and
- managing the effects of development on the environment.

Structural elements of IPA

Integrated planning system

IPA seeks to achieve the purpose of ecological sustainability by creating an integrated planning system comprising three elements:

- an integrated plan making system based on local planning instruments;
- an integrated development assessment system called IDAS; and
- an integrated dispute resolution system based on merit appeals, legal reviews and criminal enforcement.

Plan making system

IPA does not prescribe a plan

The plan making system determines the extent to which development assessment and dispute resolution systems are relevant. That is the development assessment and dispute resolution systems only have reference to those matters that are the subject of the plan making process.

The IPA does not prescribe a plan. Rather it creates a framework that allows communities across Queensland through their local governments to prepare their own planning instruments.

Plan making requirements

The requirements that are imposed on a local government in the preparation of its planning instruments are quite limited.

- First, a planning scheme must coordinate and integrate all matters (including those matters of State and regional dimensions) with the purpose of achieving ecological sustainability.[314]
- Second, a planning scheme must determine the desired environmental outcomes for the planning scheme area (including any locality within the planning scheme area).[315]
- Third, a planning scheme must include measures to facilitate the desired environmental outcomes including the identification of assessable development and the relevant level of assessment for the assessable development.[316]
- Fourth, and this requirement is proposed to be omitted by the proposed IPOLA 2001 amendments, a planning scheme must include performance indicators to measure the planning scheme's achievement of the desired environmental outcomes.[317]
- Finally, for prescribed local governments, a planning scheme must contain a benchmark development sequence.[318]

Relationship of planning scheme to development assessment and dispute resolution

A planning scheme which is required to be prepared by IPA is therefore critical to the development assessment and dispute resolution systems in four important respects.

- First, a planning scheme is the primary determinator of assessable development. Development which is not specified as self-assessment or assessable development under IPA is exempt development.[319] Exempt development is not subject to any planning instrument.[320] As such exempt development is not subject to the development assessment and dispute resolution systems.

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313 See section 1.2.1 of IPA.
314 See section 2.1.3(1)(a) of IPA.
315 See sections 2.1.3(1)(b) and 2.1.3(3)(a) of IPA.
316 See sections 2.1.3(1)(c) and 2.1.3(2) of IPA.
317 See section 2.1.3(1)(d) of IPA and section 10 of IPOLA 2001.
318 See sections 2.1.3(1)(e) and 2.1.3(3)(b) of IPA.
319 See section 3.1.2(1) of IPA.
320 See section 3.1.4(3)(b) of IPA.

- Second, a planning scheme must classify assessable development into three categories:
  - *self-assessable development* – development of this type is assessed by a landowner against all applicable codes;[321]
  - *code assessable development* – development of this type is assessed by the local government in respect of its compliance with the applicable codes and the desired environmental outcomes;[322]
  - *impact assessable development* – development of this type is assessed by the local government in terms of its environmental effects and its compliance with the planning scheme in particular the desired environmental outcomes and any relevant codes.[323]
- Third a planning scheme must identify the applicable codes against which self-assessable and code assessable development must be assessed.
- Fourth, a planning scheme must identify the desired environmental outcomes against which impact assessable development must be assessed.

This analysis demonstrates two important matters that are critical to an understanding of the theoretical and practical changes wrought by the IPA.

- First, the plan making process under the IPA is outcome driven rather than activity based as was the case under earlier Queensland planning legislation.
- Second, development assessment and dispute resolution under the IPA is effects based rather than activity based as was the case under earlier Queensland planning legislation.

The change from an activity based planning system under earlier Queensland planning legislation to the IPA framework of outcome driven planning and effects based development assessment and dispute resolution is revolutionary.

Development assessment and dispute resolution systems

The IPA provides for the creation of a single Integrated Development Assessment System (**IDAS**) for State and local government approval processes.

IDAS provides a framework within which all issues about decisions made in relation to a development can be resolved at one time.

IDAS is complemented by an integrated dispute resolution system that provides specific mechanisms in the forms of merit appeals, legal review and criminal enforcement for resolving all development related disputes.

Implementation of the integrated planning system

The implementation of the integrated planning, development assessment and dispute resolution systems of the IPA has necessitated the reform of State and local government legislation.

As a result, State and local government legislation containing planning assessment and dispute resolution processes is being repealed or progressively amended to remove those processes and incorporate the matters dealt with by that legislation into the IPA framework.

State policy and legislative reform process

Legislative framework

Legislative and executive roles of local government

Local governments are created by State legislation which has invested local governments with legislative and executive roles.

Local governments have a legislative role under the IPA to prepare planning schemes and under the *Local Government Act 1993* to make local laws.

Local governments also have an executive role under the IPA to administer and enforce planning schemes and under the *Local Government Act 1993* to administer and enforce local laws (and through them subordinate local laws).

However the legislative and executive roles of local government are expressly limited by the IPA and the *Local Government Act 1993*.

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321 See section 3.1.4(3)(a) of 1PA.
322 See section 3.5.13 of IPA.
323 See section 3.5.14 of IPA.

The limitations introduced by this legislation on the legislative roles of local governments in particular has resulted in significant reform of local government planning schemes and local laws.

The review of local government planning schemes and local laws has been mirrored by the review of State legislation.

Legislative review framework

The review of State and local government legislation is based on a framework which is summarised in Table 2: Reform of State and local government laws.

Table 2 Reform of State and local government laws

Elements of law	Local laws	IPA	State laws	Examples of State laws
Policy	Policy reflected in the objects of local law.	Planning scheme and planning scheme policies.	State laws provide for the making of plans and policies under State laws that are required to be included in planning schemes or are deemed to be State planning policies.	• State and Regional Vegetation Management Plans – *Vegetation Management Act 1999*. • State and Regional Coastal Management Plans – *Coastal Protection and Management Act 1995*. • Water resource plans – *Water Act 2000*.
Development requirements	Development requirements are transferred to planning schemes or planning scheme policies. Operational requirements are retained in local laws.	Planning schemes and planning scheme policies are to contain all development requirements of a local government.	Development requirements are transferred to applicable codes in Regulations under State laws.	• Standard Building Regulation (Building Code of Australia) – *Building Act 1975*. • Standard Water Law & Standard Sewerage Law – *Sewerage and Water Supply Act 1949*. • Food Hygiene Regulations (National Food Code) – *Food Act 1981*. • Prostitution Regulations (Prostitution Code) – *Prostitution Act 1999*. • *Water Act 2000* (Dams, Bores etc).
Approval processes	Personal licensing.	IDAS – Development approvals.	Personal licensing.	• *Building Act 1975* (Private Certifiers). • *Environmental Protection Act 1994* (ERAs). • *Food Act 1981* (Food Hygiene Licence). • Flammable & Combustible Liquids Regulation (F&C Licence). • *Liquor Act 1992* (Licensed premises). • *Prostitution Act 1999* (Brothels).

Elements of law	Local laws	IPA	State laws	Examples of State laws
				• *Casino Control Act 1982* (Casinos). • *Water Act 2000* (Water allocation).
Enforcement	Powers to enforce compliance with licence and operational requirements specified in the local law.	Powers to enforce compliance with planning scheme and development approvals specified in IPA.	Powers to enforce compliance with applicable codes and licence requirements specified in the State law.	Enforcement powers are specified in each State law and are tailored to suit the subject matter being regulated.

This framework provides for the review of State and local government legislation in four major areas:

- policy requirements;
- development requirements;
- approval processes; and
- enforcement.

The resulting legal framework is based on the following principles:

- Local government policy requirements in respect of development are to be reflected in planning schemes whilst State government policy requirements in respect of development are to be reflected in policies or plans that are to be included in planning schemes or State planning policies.
- Local government development requirements are to be included in planning schemes whilst State government development requirements are to be included as applicable codes in Regulations under State legislation.
- Development approval processes in all State and local government legislation that is inconsistent with IDAS are to be repealed.
- Personal licensing processes may be included in local government local laws or State legislation.
- Consistent enforcement regimes comprising stop orders, compliance notices, directions, infringement notices and complaints and summons are to be introduced.

An important part of the review process is the dichotomy between development approval processes and personal approval processes.

Development approvals attach to the land as opposed to a person. Consequently, development approvals run with the land and may not be transferred. However, successors in title to the land obtain the benefits and burdens of development approvals. Personal approvals, in contrast, attach to a person and not to land. Personal approvals do not run with the land but may be transferred to another person if provided for in the relevant law. As a result a successor in title only obtains the benefits and burdens of a personal approval where the personal approval is transferred to the successor in title.

Review of State government legislation

Status of review process

The PEA was repealed when the IPA commenced. Since that time the development assessment processes in the *Building Act 1975*, *Environmental Protection Act 1994*, *Sewerage and Water Supply Act 1949*, *Transport Infrastructure Act 1994* and *Water Act 2000* have been integrated into IPA.

The following Acts are consequentially being reviewed and amended to remove the development assessment processes and incorporate them into the IPA:

- *Beach Protection Act 1968*;
- *Canals Act 1958*;
- *Coastal Protection and Management Act 1995*;
- *Forestry Act 1959*;
- *Harbours Act 1955*;
- *Land Act 1994*;

- *Queensland Heritage Act 1992*;
- *Sewerage and Water Supply Act 1949*;
- *Stock Act 1915*; and
- *Wet Tropics World Heritage Protection and Management Act 1993*.

Example of State government reform – the EPA

The *Environmental Protection Act 1994* was amended in 1998 by the *Building and Integrated Planning Amendment Act 1998* by the insertion of a new Part 4A and 4B into Chapter 3. The effect of these additions was to require environmental management measures previously issued on an environmental authority under the EPA to be imposed as conditions of a development approval issued under IPA. The amendments to the EPA acted to draw a distinction between Environmentally Relevant Activities (**ERAs**) that involve development and those that do not for the purposes of IPA. Because IDAS does not address non-development ERAs (ie Itinerant and Transport ERAs) they will continue to be treated separately under the EPA. Under Part 4A, IDAS was recognised as the mechanism for assessing the impacts of an activity and for integrating all development and operating conditions of the activity.

This part also introduced a separate requirement for a person to hold a limited EPA licence for a level 1 activity. This licence was a personal licence called an "*Environmental Licence*" and did not, in general, contain development conditions as conditions will appear on the development approval and will run with the land.

The conditions that could be imposed on a personal licence under the EPA were conditions that require a financial assurance (ie a bond) to be paid or an integrated environmental management system to be completed. The power to impose such conditions on personal licences was retained in order to maintain consistency with the existing situation where environmental licences deal with the suitability of applicants and environmental management matters.

These amendments were subsequently amended by the *Environmental Protection and Other Legislation Amendment Bill 2000*, however, the general effect of these parts and the dichotomy between development approvals and personal regulation is preserved by Chapter 4 of the EPA. The provisions of Chapter 4 deal with the integration of environmental regulation under the EPA into the IDAS system under the IPA. Chapter 4 acknowledges that there are a narrow range of matters under the EPA which are not able to be dealt with under IPA (eg financial assurance, personal suitability of applicant and integrated authority issues). Accordingly, for level 1 activities there remains a requirement for a separate personal licence under the EPA, as well as the IDAS development approval. This is termed a licence (with development approval) or a level 1 approval (with development approval).

Review of local government legislation

Local laws

Local laws are essentially laws made by the local government to meet local circumstances. Provision is made for local governments to adopt model local laws published by the Minister (ss 855-858 *Local Government Act 1993*) and also for making interim local laws, which have a short sunset date (ss 8859-8863A *Local Government Act 1993*).

Local Government Act 1993

Section 854 (Local laws and subordinate local laws about development) of the *Local Government Act 1993*, provides as follows:

> ***"Local laws and local law policies about development***
>
> ***854(1)*** *A local government must not, on or after 30 March 1998, pass a resolution to propose to make a local law, or a local law policy, establishing a process about development, within the meaning of the Integrated Planning Act 1997, if the process would be similar to or duplicate all or part of the processes in Chapter 3 of that Act.*
>
> ***(2)*** *A local law or a local law policy, to the extent the law or policy is contrary to subsection (1), is of no effect.*
>
> ***(3)*** *If a provision of a local law or a local law policy deals with development, within the meaning of the Integrated Planning Act 1997 –*
>
> *(a) until a new planning scheme (other than a transitional planning scheme within the meaning of chapter 6 of that Act) has effect in the local government's areas, the provision may be amended or repealed; or*
>
> *(b) on or after a new planning scheme (other than a transitional planning scheme within the meaning of chapter 6 of that Act) has effect in the local government's area, the provision may not be amended but may be repealed.*

> ***(4)*** *Subsection (3) also applies to a local law of a local government if –*
>
> *(a) the area or part of the area of the local government (the "**first local government**") has been amalgamated with another local government's area; and*
>
> *(b) the local law –*
>
> *(i) under a regulation, continues to apply in what was the first local government's area; or*
>
> *(ii) has, by another local law, been applied, with or without amendment, to the entire area of the amalgamated local government areas.*
>
> ***(5)*** *For subsection (1) –*
>
> *"development", until 1 July 2001, does not include the clearing of vegetation on freehold land.*
>
> ***(6)*** *A local law, whether the law is made before or after the commencement of this section, is void to the extent it regulates a subscriber connection.*
>
> ***(7)*** *In subsection (6) –*
>
> *"subscriber connection" means an installation for the sole purpose of connecting a building, structure, caravan or mobile home to a line that forms part of an existing telecommunications network."*

Section 854 (Local laws and subordinate local laws about development) of the *Local Government Act 1993* will, over time, make a significant change to the way in which local governments regulate particular activities. Traditionally, a number of activities such as the erection of advertising devices, the conduct of entertainment venues, the operation of rental and other temporary accommodation, extractive industries and a range of other land use type matters have been regulated under local laws. Usually, these types of laws have evolved from predecessors which were in place long before there was a statutory scheme for the general regulation of land-use matters under a single application process and under the umbrella of a planning scheme.

As the matters regulated by planning schemes grew in scope, no real legislative attention was given to the relationship between planning schemes and these historically derived local laws which, in many cases, effectively duplicated the planning scheme requirement to obtain local government approval to carry out the land use.

It is clear that "*development*" as defined in IPA must be regulated under IPA. However whilst existing local laws relating to development are not automatically repealed, the legislative intention is that such local laws are phased out so that all relevant regulation is carried out under IPA and the planning scheme.

Impact of Section 854

Accordingly, section 854(3) of the *Local Government Act 1993* prevents such laws from being amended after the introduction of an IPA planning scheme under IPA. The practical effect is that while local governments are not compelled to repeal such laws immediately upon the making of a planning scheme under IPA, such laws may not be updated so that any future changes to the relevant regulatory regime will have to involve incorporation of the relevant controls into the IPA planning scheme (and the consequent repeal of the former local law dealing with the subject).

Therefore, the implications for local governments will be:

- Local laws which contain development approval systems rather than purely licensing systems:
  - can be amended and repealed whilst they have a transitional planning scheme in place; and
  - cannot be amended but can be repealed after an IPA planning scheme is in place.
- In preparing new local laws, local governments will have to ensure that a clear distinction is maintained between licensing systems (which are personal and which can be embodied in local laws) and development approval systems (which are not personal and which attach to the land) which must be embodied in the IPA planning scheme and planning scheme policies.

Maroochy policy and legislative framework

Local law framework

The role of local laws

Local laws are the expression of the limited legislative powers of local governments granted by the *Local Government Act 1993* (**LGA**). Previously known as a "by-law" or "*ordinance*", the term "*local law*" is currently defined in the LGA as, "*a law made by a local government*" (section 850). Local laws are statutory instruments that are given the force of law pursuant to the *Statutory Instruments Act 1992*.

Traditionally, local laws are laws that are adopted by local governments which reflect the needs of the community and ensure the good rule and government of the local government area. Each local government adopts local laws to address particular community requirements or concerns within its local government area. As a result, local governments have local laws covering every possible issue arising from their jurisdiction. Some examples of issues addressed by local laws in Maroochy Shire include swimming pools, council meetings, roads, noise control, dogs and vegetation management.

Local laws contain a number of different mechanisms to address these particular community requirements or concerns including the setting of procedures and conditions, the creation of rights, obligations and offences, the establishment of permit or licence regimes to regulate certain activities, making provision for the issuing of compliance or abatement notices and the prescribing of penalties for non-compliance.

Types of local laws

There are four types of local laws: model local laws, interim local laws, other local laws and subordinate local laws.

Model local laws are those that have been prescribed by the Minister as suitable for adoption by local governments as a local law. The model local laws address issues that are common to many local governments. There is no obligation in the LGA on local governments to adopt the model local laws, nor to use them as a basis for developing their own local laws. However, local governments can simply adopt the model local laws rather than draft new local laws. Once a local government has adopted the model local laws, these local laws may be amended or repealed by that local government in the same manner as for any other local law of that local government.

Interim local laws are those local laws that are made by local governments and adopted for a limited period, while the local government undertakes public consultation before permanently adopting the interim local law. Interim local laws are usually made where an immediate public health or safety risk emerges. One example of the use of an interim local law is to prevent broad scale tree clearing during the public consultation process of the proposed introduction of a vegetation protection local law. The process for making these laws is much quicker than the making of a local law, with the local government only having to obtain the Minister's consent to the use of the interim local law process before adopting the law. The local government must then proceed to make the interim local law into a local law pursuant to the usual local law making powers.

Other local laws are those laws that are independently drafted and adopted by local governments to deal with particular issues in their local government area. This is instead of simply adopting the model local laws. Also, other local laws include those local laws that are made to amend or repeal existing local laws. The LGA establishes a step by step process for the making of these laws.

Subordinate local laws were originally known as "*local law policies*" but amendments to the LGA in 1999 changed the terminology to better reflect the legislative nature of these laws. Subordinate local laws are laws made by a local government about a matter which a local law expressly states that the local government may make about the matter. Subordinate local laws provide the detailed information required for the operation of a local law.

The relationship between subordinate local laws and local laws is similar to that of a Regulation and an Act of Parliament. If a local government adopts a model local law, it is essential for that local government to then provide the specific details required for its local government area in a subordinate local law drafted to attach to that model local law. An example of the relationship between local laws and subordinate local laws is that of a local law that allows a local government to require that certain animals specified in a subordinate local law be registered. A subordinate local law may then provide that all dogs within the local government area must be registered pursuant to that local law.

Local law making powers

The local law making powers of local governments are fairly wide. Section 25 of the LGA provides that "*each local government has jurisdiction ... to make local laws for, and otherwise ensure, the good rule and government of, its territorial unit*." In addition to this, section 26 of the LGA provides that the jurisdiction of local government includes jurisdiction to make local laws with respect to any matter "*necessary or convenient to be prescribed or exercised for carrying out or giving effect to its local laws*." This wide jurisdiction is, however, limited by later sections of the LGA.

Limitations on local law making powers

The power of local governments to make local laws and subordinate local laws is expressly limited in the LGA by the following:

- A local government cannot make a local law that the Parliament could not validly make (section 30 of the LGA).
- A local government cannot make a local law that excludes or limits the future repeal or amendment of the local law (section 30 of the LGA).
- If a State law and a local law (whether made before or after the State law) are inconsistent, the State law overrides the local law to the extent of the inconsistency (section 31 of the LGA).

- A local government may not make a local law or a subordinate local law that establishes a process about development (within the meaning of the *Integrated Planning Act 1997*) (section 854 of the LGA).
- The Minister for Local Government and Planning must be satisfied that the local law deals satisfactorily with State interests (sections 856 and 872 of the LGA). The LGA defines State interests to include:
  - the effect on the economic, social or environmental interests of the State or region;
  - ensuring that there is an effective, efficient and accountable system of local government; and
  - the local law must comply with the fundamental legislative principles identified in the *Legislative Standards Act 1992*.
- A local government must review all proposed local laws to identify any possible anti-competitive provisions within the local law (Chapter 12, division 5, part 2 of the LGA). A provision of a local law that is anti-competitive in nature is one that creates a barrier to entry to a market or a barrier to competition within a market. If a local government wants to retain an anti-competitive provision in a proposed local law, it must pass a resolution that it is in the public interest to do so and that the inclusion of the anti-competitive provision is the most appropriate way of achieving the local law's objectives.

Enforcement of local laws

Each local law sets out how the local government will deal with a breach of the provisions of that local law. Local governments have the power to create offences within local laws and to prosecute an individual for an offence against a local law. Such prosecutions generally arise from complaints raised with a local government. Upon receipt of a complaint, an "*authorised person*" for the purposes of the relevant local law, will investigate the complaint to determine whether to proceed with enforcement action. The options for enforcement include on the spot fines, proceedings in court, compliance notices, abatement notices and seizure of goods. In addition, most local laws now provide for a right of review of the local government's decisions (either through the law itself, through the courts or through a review body).

Generally local governments ensure that their penalty provisions are realistic and enable the local government to administer on the sport fines pursuant to the *State Penalties Enforcement Act 1999* and the *State Penalties Enforcement Regulation 2000* (**SPER**). The SPER recognises local laws as being legislation to which the SPER applies. The amount of an on the spot infringement notice fine is calculated in accordance with a formula set down in section 12 of the SPER which uses the maximum penalty provided for the offence in the local law. However, the maximum penalty that a local government can specify in a local law and still be able to utilise the SPER system is 50 penalty units.

Maroochy's local law framework

Maroochy's local law framework is summarised in Table 3: Local law framework. In general terms the local law framework complies with the *Local Government Act 1993*. However an analysis of the local law framework has identified a number of issues that should be considered as part of any subsequent review of the local laws:

- Development requirements are addressed in a number of local laws.
- A number of subordinate local laws seek to regulate matters when these matters are more properly regulated by the local law under which the subordinate local law is made.
- The local laws contain references to legislation that has been amended or repealed.
- Permit processes within the local laws are not consistently structured and some local laws do not contain permit processes.
- Enforcement mechanisms (such as stop orders, compliance notices, directions, inspections, perform work powers and infringement notices) are not consistently provided for in the local laws.
- A style guide consistent with the Department of Local Government and Planning guidelines for the drafting of local laws and subordinate local laws should be adopted by the council.

Table 3 Local law framework

Local Law including Subordinate Local Law	Subject matter of Local Law	Management powers	Approvals processes	Require-ments	Enforcement provisions	Comments
Local Law No. 2 (Administration).	Regulates the administration processes of council's local laws.	Management of local law processes (approvals, legal proceedings, authorised persons, disposal of goods).	A general approvals process is specified for any approval required under a local law.	–	–	

Local Law including Subordinate Local Law	Subject matter of Local Law	Management powers	Approvals processes	Require-ments	Enforcement provisions	Comments
Local Law No. 3 (Meetings) and *Local Law Policy No. 3 (Meetings)*.	Regulates the conduct of council meetings.	Management of council meetings.	–	–	–	LLP contains an offence provision on audio and video recording contrary to the LGA 1993.
Local Law No. 4 (Entertainment Venues) and *Local Law Policy No. 4 (Entertainment Venues)*.	Regulates the operation of entertainment venues.	–	Permit to operate an entertainment venue.	–	Penalties and enforcement mechanisms.	
Local Law No. 5 (Gates and Grids) and *Local Law Policy No. 5 (Gates and Grids).*	Regulates gates and grids on a public road.	Management of gates and grids.	Approval to install a gate or grid on a public road.	–	Penalties but no enforcement mechanisms.	This local law deals with development. Enforcement mechanisms are also needed. LLP also contains provisions which regulated gates and grids contrary to the LGA 1993.
Local Law No. 6 (Libraries) and *Local Law Policy No. 6 (Libraries).*	Regulates the conduct of libraries.	Management of libraries.	Membership of libraries.	–	Penalties but no enforcement mechanisms.	Enforcement mechanisms are needed. The use of internet and electronic materials needs to be considered.
Local Law No. 7 (Keeping and Control of Animals) and *Local Law Policy No. 7 (Keeping and Control of Animals).*	Regulates the keeping of animals.	–	Registration process for animals and permit processes for the keeping of animals and the use of land for a pet shop, cattery or kennel.	–	Penalties but no enforcement requirements.	Development matters are addressed as part of this local law: • Regulation of animals; • Permitting of pet shops, cattery and kennels; • Prescribed enclosure requirement. Enforcement mechanisms are also needed. LLP also contains provisions which regulate the keeping of animals contrary to the LGA 1993.

Local Law including Subordinate Local Law	Subject matter of Local Law	Management powers	Approvals processes	Require-ments	Enforcement provisions	Comments
Local Law No. 8 (Roadside Vending and the use of Roads and Footways) 1996 and *Local Law Policy No. 8 (Roadside Vending and the use of Roads and Footways) 1996.*	Regulates food vehicles and the use of a road or footway for mobile food vending, roadside vending, advertising devices and street stalls.	–	Permit process for the use of a road or footway for: • Mobile food vending; • Roadside vending; • Footpath dining; • Sale of food and drink; • Display or storage of goods; • Street stalls; • Advertising devices; and • Busking. • Permit process to park a vehicle on a footway.	Prohibition on sale of vehicle on a road or footway.	Penalties and enforcement mechanisms.	Development matters are addressed as part of the local law: • Stalls; • Roadside vending; and • Advertising devices.
Local Law No. 9 (Regulated Parking) 2001 and *Subordinate Local Law No. 9 (Regulated Parking).*	Regulates parking.	Management of traffic areas and parking areas.	Permit process for parking in permitted parking areas and in regulated parking areas contrary to an official traffic sign.	Requirements in respect of traffic areas, regulated parking areas, temporary parking restrictions, loading zones and persons with disabilities.	Penalties but no enforcement mechanisms.	Enforcement mechanisms are needed. The SLL contains regulatory provisions contrary to the LGA 1993.
Local Law No. 10 (Tramways) and *Local Law Policy No. 10 (Tramways).*	Regulates tramways.	–	Permit to operate a tramway.	Requirements in respect of indemnity and insurance.	Penalties and enforcement mechanisms.	
Local Law No. 11 (Control of Advertisements).	Regulates the exhibition of advertisements.	–	Permit process to exhibit advertisements.	Requirements for permitted advertisements that can be exhibited without a permit.	Penalties and enforcement mechanisms.	
Local Law No. 12 (Rental Accommodation with Shared Facilities) and *Local Law Policy No. 12 (Rental Accommodation with Shared Facilities).*	Regulation of rental accommodation involving the sharing of facilities.	–	Permit to carry on the business of rental accommodation involving the sharing of facilities.	–	Penalties and enforcement mechanisms.	Local law needs to be reviewed in light of the prescribed accommodation provisions of the *Building Act 1975*.

Local Law including Subordinate Local Law	Subject matter of Local Law	Management powers	Approvals processes	Require-ments	Enforcement provisions	Comments
Local Law No. 13 (Control of pests).	Regulation of pests.	Management of pests.	–	Requirement to comply with control notices and not to sell pests.	Penalties and limited enforcement mechanisms.	Enforcement mechanisms are needed.
Local Law No. 14 (Control of Nuisances) and *Local Law Policy No. 14 (Control of Nuisances).*	Regulates nuisances.	–	Permit process for nuisances.	Requirements in respect of nuisances.	Penalties and enforcement mechanisms.	
Local Law No. 17 (Parks and Reserves) and *Local Law Policy No. 17 (Parks and Reserves)*.	Regulation of activities in parks.	Management of parks.	Permit for activities in parks.	Requirements for opening hours, vehicular access and closure of parks. Power to grant licences for the occupation and use of parks.	Penalties and limited enforcement mechanisms.	Permit process needs to be specified. Licence process specifies a regulatory process which should be a contractual process. Enforcement mechanisms are also needed.
Local Law No. 18 (Cemeteries) and *Local Law Policy No. 18 (Cemeteries).*	Regulation of cemeteries.	Management of cemeteries.	Permit to dispose of human remains, erect memorials and operate a cemetery.	Requirements for disposal of human remains and records to be kept by a cemetery.	Penalties and limited enforcement mechanisms.	Enforcement mechanisms are needed (eg compliance notices, stop orders, inspection, perform work).
Local Law No. 19 (Protection of Vegetation) 1997 and *Local Law Policy No. 19 (Protection of Vegetation).*	Regulation of vegetation in vegetation protection orders and vegetation protection areas.	–	Permit process to damage protected vegetation.	Requirements in respect of making vegetation protection orders and vegetation protection areas.	Penalties and enforcement mechanisms.	Local law needs to be reviewed in light of IPA, the IPA planning scheme and the VMA. There are references to the 1985 Planning Scheme and the PEA.
Local Law No. 20 (Roads) and *Local Law Policy No. 20 (Roads).*	Regulation of the use of roads.	Management of roads.	Permit to alter or improve a local government road and use a road for stock, stormwater, waste and the deposition of goods or materials. Development activities are excluded from the permit provisions.	Requirements in respect of the ownership of road structures and the liability of third parties for damage to road structures.	Penalties and enforcement mechanisms.	

Local Law including Subordinate Local Law	Subject matter of Local Law	Management powers	Approvals processes	Require-ments	Enforcement provisions	Comments
Local Law No. 21 (Domestic Water Carriers) and *Local Law Policy No. 21 (Domestic Water Carriers).*	Regulation of domestic water carriers	–	Permit to carry on the business of domestic water distribution.	Requirements in respect of the approval of water containers, log books and inspections.	Penalties but limited enforcement mechanisms.	Enforcement mechanisms could be reviewed.
Local Law No. 22 (Bathing Reserves) and *Local Law Policy No. 22 (Bathing Reserves).*	Regulates the use of bathing reserves.	Management of bathing reserves.	Permit to carry on a business of hiring out aquatic equipment in a bathing reserve.	Requirements in respect of the use of aquatic equipment and behaviour in bathing reserves.	Penalties and enforcement mechanisms.	LLP contains provisions which authorise an authorised person to take actions which is contrary to the LGA 1993.
Local Law No. 24 (Swimming Pools) and *Local Law Policy No. 24 (Swimming Pools).*	Regulation of the use of swimming pools.	Management of swimming pools.	Permit to operate a public pool.	Requirements to notify council of intention to empty a public pool.	Penalties and enforcement mechanisms.	
Local Law No. 25 (Blasting Operations) and *Local Law Policy No. 25 (Blasting Operations).*	Regulation of blasting activities.	–	Permit to engage in blasting operations and store explosives.	Requirements in respect of precautions against injury or property damage, accidents and the laying of explosives.	Penalties and enforcement mechanisms.	
Local Law No. 26 (Control of Intoxicating Liquor).	Regulation of liquor in a park.	Management of parks.	–	Requirements not to possess intoxicating liquor in a park not authorised for that purpose.	Penalties and enforcement mechanisms.	
Local Law No. 28 (Cemeteries).	Regulation of cemeteries.	Management of cemeteries.	Permit to erect a structure in a cemetery.	Requirements in respect of a plan of the cemetery.	–	This local law needs to be reviewed in the context of *Local Law No. 18 (Cemeteries)*.
Local Law No. 42 (Motels).	Regulation of motels.	–	Registration of a motel.	Requirements in respect of residential units, car parking, furniture, cleanliness and guest registers.	No penalties and no enforcement mechanisms.	This local law needs to be reviewed.

Local Law including Subordinate Local Law	Subject matter of Local Law	Management powers	Approvals processes	Require-ments	Enforcement provisions	Comments
Local Law No. 51 (Council Parking Stations).	Regulation of Council parking stations.	Management of council parking stations.	–	Requirements in respect of the payment of fees, entry of vehicles, speed limits, parking within parking bays, the time period of parking, obeying directions and signs etc.	Penalties and no enforcement mechanisms.	This local law needs to be reviewed in the context of *Local Law No. 9 (Regulated Parking)*.
Local Law No. 55 (Maroochydore Aerodrome).	Regulation of the use of the aerodrome.	Management of the aerodrome.	–	Requirements in respect of the use of the aerodrome, landing fees and the carrying on of activities on the aerodrome.	Penalties but no enforcement mechanisms.	The local law should be updated eg security issues, proper drafting. Enforcement mechanisms are needed.
Local Law No. 56 (Swimming Pools/Spa Pools).	Regulation of the use of swimming pools and spas for public use.	–	Licence to operate a swimming pool or spa for public use.	Requirements in respect of emptying a swimming pool, the provision of dressing, ablution and sanitary facilities, the design of swimming pools.	Penalties but no enforcement mechanisms.	The local law should be reviewed in the context of *Local Law No. 24 (Swimming Pools)*.

IPA Planning Scheme

Introduction

Maroochy Plan 2000 (**Maroochy Plan**) commenced on 1 June 2000. The Maroochy Plan replaced the previous planning scheme that was adopted in 1985 (**1985 Planning Scheme**).

The Maroochy Plan was prepared in the context of the IPA which introduced a new statutory planning regime for which there were no precedents in terms of the preparation of planning schemes.

In structural terms, the Maroochy Plan is similar to the 1985 Planning Scheme although it has been drafted to accord with the provisions of the IPA (see Table 4: IPA planning scheme framework). The respective components of the 1985 Planning Scheme required by the previous planning legislation, the PEA, have been reviewed and rebadged in the Maroochy Plan.

Table 4 IPA planning scheme framework

	1985 planning scheme	Maroochy Plan	Comments
1.	*Strategic planning provisions (comprising 1996 amendment of the 1985 Planning Scheme)* • Vision – identifies the ideal that is being sought by the Planning Scheme.	*Strategic planning provisions (Volume 2)* • Vision – identifies the desired environmental outcomes to be achieved. • Key issues – identifies the matters underpinning the	The strategic planning provisions of the Maroochy Plan are essentially the same as the strategic planning provisions of the 1985 Planning Scheme which were inserted in 1996 except that the vision in the 1996 strategic plan has been amended to

	1985 planning scheme	Maroochy Plan	Comments
	• Key issues – identifies the matters underpinning the strategies, objectives and implementation criteria. • Preferred dominant land uses – identifies those land uses considered appropriate for various areas. • Objectives and implementation criteria – identifies what is desired and how it is to be achieved in respect of each preferred dominant land use. • Strategic plan map – indicates on a cadastral base the preferred dominant land uses.	strategies, objectives and implementation criteria. • Preferred dominant land uses – identifies those land uses considered appropriate for various areas. • Objectives and implementation criteria – identifies what is desired and how it is to be achieved in respect of each preferred dominant land use. • Strategic plan maps – (Map 2.1) indicates on a cadastral base the preferred dominant land uses.	include the desired environmental outcomes to ensure compliance with the IPA. It should be noted that strategic plans have been excluded from later IPA planning schemes with the outcomes specified in the strategic plan being included in the equivalent of Maroochy Plan's planning area provisions.
2.	*Local planning provisions comprising Development Control Plans* • Intent – specify a direction for development at a local level (DCPs 1 to 3 in respect of Maroochydore) or a district level (DCPs in respect of Sippy Downs, Mooloolaba and Blackall Range). • Elements – identifies how the intent is to be achieved by describing intents for character elements. • Precinct intents – identifies specific directions for precincts within the DCP area. • Development standards – specify development standards that override the development standards in the development standard provisions of the 1985 Planning Scheme. These may be mandatory or relaxable. • DCP Map — identifies the land the subject of the DCP and any precincts within the DCP area.	*Local planning provisions comprising Planning Areas (Volume 3)* • Vision statement – identifies the development outcomes to be achieved for the planning area. • Key character elements – identifies how the development outcomes in the vision statement are to be achieved by describing intents for each character element in the planning area. • Statements of desired precinct character – this identifies for each precinct in the planning area: - the intent of the precinct; - the preferred and acceptable uses within each precinct; - a supplementary table of development assessment that overrides the tables of development assessment for each precinct (in Volume 2); - precinct applicable codes – these specify requirements with which development must comply that override the requirements in codes (in Volume 4).	The planning area provisions of Maroochy Plan override: • The tables of development assessment for each precinct in Volume 2; • The codes in Volume 4.

	1985 planning scheme	Maroochy Plan	Comments
3.	*Zoning provisions (Part II of the Schedule)* • Intent of Zone – description of the proposed development in the zone. • Tables of Zones – determines the type of development application in each zone. • Zoning maps – allocates land to a particular zone.	*Precinct provisions (Volume 2)* • Intent of precinct – description of the proposed development in the precinct. • Table of development assessment – determines the level of assessment for development in each precinct subject to the level of assessment being changed if the land is within an SMA or subject to a supplementary table of development assessment in the planning area provisions (in Volume 3). • Scheme maps (Map 1.1) – allocates land to a particular precinct within particular planning areas. • Special Management Area Maps (SMAs) – identifies Comprehensive Assessment SMAs in which development is subject to impact assessment and Specific Assessment SMAs in which development is subject to code assessment.	The precinct provisions of Maroochy Plan are similar to the zoning provisions under the 1985 Planning Scheme except that: • The general statement of intent for each precinct is more specifically defined for each precinct within the planning area provisions in Volume 3; • The table of development assessment is subject to change by the inclusion of the land in an SMA; • SMAs have been introduced which change the level of assessment for development within each SMA.
4.	*Development standards provisions (Part V-VI of Schedule)* • Mandatory development standards specify standards with which development must comply and for which a relaxation may not be sought. • Relaxable development standards – specify standards with which development must comply or for which a relaxation may be sought.	*Codes (Volume 3)* • Purpose – specify the purpose of the code. • Performance criteria – state the outcome that assessable development must achieve. • Acceptable measures – state the measures which self-assessable development must achieve and which code assessable development may achieve to demonstrate compliance with the performance criteria.	The structure and function of the codes under Maroochy Plan is different to that of the development standard provisions under the 1985 Planning Scheme. The effect of the codes on development is as follows: • Self-assessable development must comply with the acceptable measures otherwise it is code assessable development. • Code assessable development must comply with the acceptable measures or the performance criteria otherwise it may be refused. • Impact assessable development must comply with the purpose or either the acceptable measures or the performance criteria unless there are sufficient planning grounds to justify the non-compliance.

	1985 planning scheme	Maroochy Plan	Comments
5.	*Planning scheme policies* • Relaxable development standards – these specify standards which may be relaxed by the council without the need for a relaxation application. • Infrastructure contributions – contributions for water supply, sewerage and other infrastructure (parks).	*Planning scheme policies* • Infrastructure contributions – contributions for water supply, sewerage and other infrastructure (bikeways, road network, stormwater and open space). • Administrative matters – such as the preparation of reports, documents and development applications.	Planning scheme policies under the Maroochy Plan are limited to infrastructure contributions as planning scheme policies under IPA cannot regulate development. The relaxable development standards of planning scheme policies under the 1985 Planning Scheme have been relocated to the codes in the Maroochy Plan.

Strategic planning provisions

The strategic planning provisions of the 1985 Planning Scheme have been replaced with a strategic plan and maps under the Maroochy Plan.[324] The vision statement, key issues statements, strategies, preferred dominant land uses, and objectives and implementation criteria have been duplicated except for the inclusion of desired environmental outcomes within the vision statement of the Maroochy Plan. In general terms, the structure of the strategic plan provisions under both the 1985 Planning Scheme and the Maroochy Plan is identical apart from the desired environmental outcomes that have been included in the vision statement of the Maroochy Plan in order to comply with the requirements of IPA.

Zoning provisions

The zoning provisions and maps of the 1985 Planning Scheme have been replaced with precinct provisions and scheme maps.[325] The intent of zones and tables of development of the 1985 Planning Scheme have been replaced by general precinct intent statements, a table of development assessment for each precinct and special management provisions which change the level of development to code assessable in the case of Specific Assessment SMAs and impact assessable in the case of Comprehensive Assessment SMAs. Once again the structure of the zoning provisions under the 1985 Planning Scheme and the Maroochy Plan is similar apart from the introduction of the Special Management Area provisions.

Development standard provisions

The development standard provisions under the 1985 Planning Scheme have been replaced by applicable code provisions.[326] Unlike the development standard provisions in the 1985 Planning Scheme which could prohibit development (through the adoption of mandatory as opposed to discretionary development standards) the code provisions cannot prohibit development.[327] They can only regulate development.

As such the code provisions adopt a performance based approach whereby development is required to comply with the acceptable measures or the performance criteria and purpose of the code.

In short, the structure and legal effect of the code provisions under the Maroochy Plan is different to the development standards under the 1985 Planning Scheme. These changes have been necessitated as a result of the provisions of the IPA which prevents the Maroochy Plan from prohibiting development.

Planning scheme policies

The planning scheme policies under the 1985 Planning Scheme which specified relaxable development standards have been embodied in the code provisions of the Maroochy Plan.[328] The reason for this is that under the IPA planning scheme policies cannot regulate or prohibit development.[329] Accordingly, the planning scheme policies under the Maroochy Plan are limited to contributions for sewerage, water supply and other types of infrastructure which are specifically provided for under the IPA as well as administrative matters specifying requirements in respect of the preparation of development applications, reports and plans.[330]

Local plans

The various development control plans under the 1985 Planning Scheme have been replaced by planning area provisions under the Maroochy Plan.

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[324] cf section 2.4 of the *Local Government (Planning and Environment) Act 1990*.
[325] cf sections 2.2 and 2.3 of the *Local Government (Planning and Environment) Act 1990*.
[326] cf section 2.2 of the *Local Government (Planning and Environment) Act 1990*.
[327] See section 2.1.23(2) of the *Integrated Planning Act 1997*.
[328] cf section 1A.4 of the *Local Government (Planning and Environment) Act 1990*.
[329] See section 2.1.23(4) of the *Integrated Planning Act 1997*.
[330] See section 6.1.31 of the *Integrated Planning Act 1997*.

Under the 1985 Planning Scheme, development control plans either functioned as strategic planning documents or specified development standards that overrode the development standards of the 1985 Planning Scheme.

The transitioning of the development control plans into the planning area provisions under the Maroochy Plan means that the planning area provisions fall into two categories. Those planning area provisions that simply complement the strategic plan by expressing future planning directions for the planning areas and the precincts comprising the planning areas and those planning area provisions that go further by specifying supplementary tables of development assessment and codes that override the tables of development assessment for precincts and the applicable codes in the code provisions.

In general terms the structure of the local plan provisions under the 1985 Planning Scheme and Maroochy Plan is similar except that the planning area provisions have been extended across the whole of the local government area rather than being limited to those parts of the local government area to which the development control plans under the 1985 Planning Scheme applied.

Summary

In summary, the structure of the Maroochy Plan is similar to that of the 1985 Planning Scheme with any significant changes in content and format being necessitated to accommodate the legislative requirements of the IPA.

This paper was presented at the Maroochy Shire Council seminar on IPA Legislation Framework Training, 12 February 2003.

IPA Planning Scheme Training Workshop No. 1

Ian Wright

This article discusses the workshop undertaken in relation to making and amending of planning schemes

2004

Part A

Setting the agenda: How do proposed local planning instruments fit into the big picture?

Introduction

- Background to workshop:
  - Need for workshop.
  - The Coty Principle:

    The weight to be given to a proposed planning scheme when assessing development applications.
- Using the workshop materials:
  - Process to be followed.
  - Structure of workshop materials.

Legislative background

- Making and amending planning schemes:
  - IPA and PEA compared:
    - PEA – Final decision by Governor in Council.
    - IPA – Final decision by local government.
  - Relevance of PEA cases to the IPA process.
  - Relevance of PEA cases to the IPA process.
- Application of the Coty Principle under the IPA:
  - Impact of the Coty Principle on the Court (*Chellash Pty Ltd v Maroochy Shire Council*).
  - Impact of the Coty Principle on local governments:
    - decisions under IPA planning schemes;
    - decisions under transitional planning schemes.

Part B

Proposed development consistent with existing planning scheme and inconsistent with the proposed planning scheme.

Application of the Coty Principle

- Elements of the Coty Principle.
- Policy basis of the Coty Principle.

Elements of the Coty Principle

Element 1

The proposed planning scheme has reached a stage where it may be considered to express seriously held planning proposals of the local government.

Element 2

The approval of the development application would cut across to a substantial degree the planning proposals contained in the proposed planning scheme so that it would clearly frustrate a new planning intention and render more difficult the ultimate decision as to the form the proposed planning scheme should take.

Element 3

There are not sufficient planning grounds to justify approving the development application despite its conflict with the proposed planning scheme.

Policy basis of the Coty Principle

- Diminish the public's confidence in the planning process.
- Public expectation of implementation of planning proposals as publicly notified.

Element 1

- Background:
  - Coty Principle operates once proposed planning scheme exhibited for public notification.
- Prior to local government adoption of proposed planning scheme – no weight/marginal weight.
- Local government adoption of proposed planning scheme and resolution to put proposed planning scheme on "unofficial public notification" – little weight.
- Local government adoption of the proposed planning scheme and resolution to put proposed planning scheme – little or no weight.
- Proposed planning scheme is on public notification – considerable weight except if substantial departure from existing planning policy.
- Proposed planning scheme has finished public notification and awaiting adoption of proposed planning scheme by the local government – again considerable weight except if significant departure from existing planning scheme.
- Local government adoption of proposed planning scheme and a resolution to forward the proposed planning scheme to the Minister – considerable weight.
- Local government adoption and proposed planning scheme has gone to the Minster for gazettal – full weight.

Element 2

- Background:
  - Determine relevant part of existing and proposed planning schemes.
  - Division of planning scheme.
- Proposed planning scheme provisions.
- Proposed strategic plan.
- Proposed statement of intent for zones.
- Proposed table of zones:
  - self assessable development to impact assessable development (preferred);
  - code assessable development to impact assessable development (preferred);
  - impact assessable development (preferred) to impact assessable development (not preferred);
  - impact assessable development (not preferred) to impact assessable development (not preferred).
- Codes.
- Local plan.

Element 3

- Background.
- Examples of sufficient planning grounds – traffic, economy, need, amenity, need, access, landscaping, flooding, sterility.

Part C

Proposed development inconsistent with the existing planning scheme and consistent with the proposed planning scheme.

Application of the Coty Principle

- Judicial Authority.
- Elements of the Coty Principle.

Judicial Authority

- Courts reluctant to approve a proposed development that conflicts with existing planning scheme.
- Deviation where justified eg:
  - planning strategies overtaken by events and basis for land designation no longer exists;
  - sufficient planning grounds (3.5.14(2)(b) IPA).
- Coty principle recently adopted.

Elements of the Coty Principle

- Element 1 – Has the proposed planning scheme reached a stage w here it may be considered to express seriously held planning proposals of the local government?
- Element 2 – Would approval of the development application render more difficult the ultimate decision as to the form the planning scheme should be?
- Element 3 – Are there sufficient planning grounds to justify approving the development application despite its conflict with the existing planning scheme?

Element 1

- Background:
  - Each case example – proposed planning scheme publicly notified.
  - "Reverse" Coty Principle.
  - Proposed planning schemes not publicly notified – little weight eg:
    - prior to local government adoption;
    - adoption and local government resolution for "unofficial" public notification
    - adoption and resolution to publicly notify.
- Proposed planning scheme is on public notification – considered weight except if substantial departure from existing planning scheme.
- Proposed planning scheme has finished public notification and awaiting adoption of proposed planning scheme by the local government – again considerable weight except if substantial departure from existing planning policy.
- Local government adoption of proposed planning scheme and a resolution to forward the proposed planning scheme to the Minister – considerable weight.
- Local government adoption and proposed planning scheme has gone to the Minister for gazettal – significant to full weight.

Element 2

- Background:
  - Determine relevant part of existing and proposed planning schemes.
  - Division of planning scheme.
- Proposed planning scheme provisions.
- Proposed strategic plan.
- Proposed statement of intent for zones.

- Proposed table of zones:
  - self assessable development to self assessable development;
  - code assessable development to self assessable development;
  - impact assessable development (preferred) to code assessable development;
  - impact assessable development (preferred) to self assessable development;
  - impact assessable development (not preferred) to impact assessable development (not preferred).

Element 3

- Background.
- Section 6.1.29 IPA.
- Examples of sufficient planning grounds – amenity, need, traffic, noise, landscaping.

Part D

Proposed development is inconsistent with both the existing planning scheme and the proposed planning scheme.

Application of the Coty Principle

- Judicial authority:
  - Three elements of the Coty Principle shall be applied.

Element 1

- Background:
  - Courts have given weight to proposed planning schemes that have not been publicly notified (*Leisuremark (Aust) Pty Ltd v Noosa Shire Council*).
- Prior to local government adoption of proposed planning scheme – little weight.
- Local government adoption of the proposed planning scheme and resolution to put the proposed planning scheme on "unofficial" public notice – weight given.
- Local government adoption of proposed planning scheme and resolution to put proposed planning scheme on public notification – some to significant weight.
- Proposed planning scheme is on public notification – considerable weight.
- Proposed planning scheme has finished public notification and awaiting adoption of proposed planning scheme by the local government – considerable weight.
- Local government adoption of proposed planning scheme and a resolution to forward the proposed planning scheme to the Minister – considerable weight.
- Local government adoption and proposed planning scheme has gone to the Minster for gazettal – full weight.

Element 2

- Background:
  - Determine relevant part of existing and proposed planning schemes.
  - Division of planning scheme.
- Proposed planning scheme provisions.
- Proposed strategic plan.
- Proposed statement of intent for zones.
- Proposed table of zones:
  - self assessable development to self assessable development;
  - self assessable development to code assessable development;
  - code assessable development to code assessable development;
  - impact assessable development (preferred) to impact assessable development (not preferred);
  - impact assessable development (not preferred) to impact assessable development (not preferred).

Element 3

- Examples:
  - *Chellash v Maroochy Shire Council*.
  - *R & L Braddock Buildings v Brisbane City Council*.
  - *Provincial Securities v Brisbane City Council*.

Part E

Proposed development is consistent with both the existing planning scheme and the proposed planning scheme.

Policy basis

- Not a usual Coty Principle situation.
- Generally expected that the Coty Principle would not apply.
- *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council* (1994) 85 LGERA 4.
- Court applied two limbs of the Coty Principle.
- Apply Principle where not clear cut.

Element 1

- Has the proposed planning scheme reached a stage where it may be considered to express seriously held planning proposals of the local government?
- Proposed planning scheme on public notification – moderate weight.
- Completed public notification and awaiting Council adoption – significant weight.

Element 2

- Would approval of the development application cut across to a substantial degree the planning proposals contained in the proposed planning scheme?
  - *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council* (1994) 85 LGERA 4.
  - *Westfield v Gold Coast City Council*.

This paper was presented at the Logan City Council seminar on the IPA planning scheme, 2004.

Infrastructure planning and charges – Levying charges on approvals and land

Ian Wright

This article discusses infrastructure planning and charges and the levying of charges on approvals and land

April 2005

Introduction

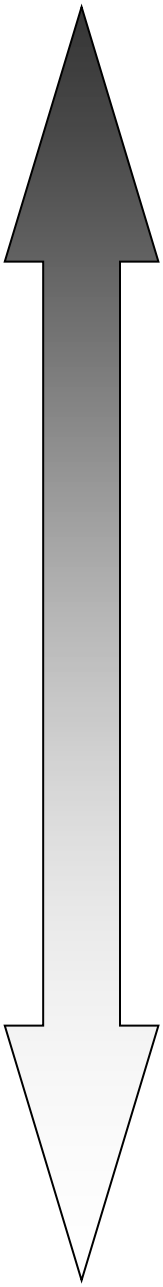
- Infrastructure funding is under pressure.
- Legislative changes have been made to address infrastructure funding.
- Dramatic increases in taxes and charges coming.
- Issues to be discussed:
  - conceptual framework for legislation;
  - problems of traditional funding mechanisms;
  - infrastructure funding under Local Government Act;
  - infrastructure funding under Local Government (Planning and Environment) Act;
  - infrastructure funding under transitional arrangements of Integrated Planning Act;
  - infrastructure funding under Integrated Planning Act.

Conceptual framework

- Infrastructure defined.
- Categories of infrastructure:
  - private benefit infrastructure – user pays;
  - community infrastructure – funded by taxes and rates.
- Infrastructure continuum.

Figure 1 Infrastructure continuum

Items with a high warranted user subsidy component



- Primary Schools
- Secondary Schools
- Metropolitan Open Space
- Emergency Services
- Community Services
- Police
- Community Health Care
- Pre-Schools
- Neighbourhood Centres
- Library Services
- Hospitals
- District Open Space
- Child Care Centres
- Universities and TAFE
- Sporting, Recreation and Cultural Facilities
- Public Transport
- Arterial Roads
- Local Parks
- Dams
- Water Treatment Plants
- Truck Water Mains
- Water Supply Pump Stations, Service
- Reservoirs, Feeder Mains and Lead-in Mains
- Estate Reticulation
- (Sewerage) Water Treatment and Outfall
- Trunk Sewer
- Pump Stations, Intermediate Carriers and Lead-in Mains
- Estate Sewer Reticulation
- District Stormwater Management
- Estate Stormwater Management
- Sub-Arterial Roads
- Distributor Roads
- Trunk Energy
- Estate Roads
- Energy Reticulation
- Telecommunications

Items with a high 'user pays' component

Source: Better Cities Program 1993 – 27-28

Infrastructure funding

- Traditional funding mechanisms.
- Problems of funding mechanisms:
  - subsidies;
  - double dipping;
  - forward planning constrained;
  - increased cost of housing and windfall gains;
  - poor infrastructure delivery;
  - poor maintenance and replacement;
  - backlogs;
  - legal uncertainty.

Infrastructure funding under Local Government Act

- General rate.
- Special rate or special charge.
  - Bases:
    - infrastructure benefits land or occupier – eg surveillance cameras in mall, dredging of canals or lakes;
    - land or occupier contributes to need for infrastructure – eg on street parking.
  - Common law test of reasonableness.
  - Overall plan.
- Differential general rate:
  - different rates to different categories of land;
  - categories based on criteria;
  - rational process required.

Infrastructure funding under Local Government (Planning and Environment) Act

- Limited relevance as repealed on 31 March 1998.
- Infrastructure planning was specified in local planning policies:
  - specific provisions for sewerage, water supply and parkland;
  - general power for other items of infrastructure.
- Infrastructure funding:
  - conditions on development approvals – reasonable or relevant test;
  - conditions for sewerage, water supply and parkland generally lawful if in accordance with local planning policy;
  - conditions for other infrastructure – reasonable or relevant test.
- Example – roadworks conditions unlawful if:
  - development only consuming capacity and not requiring an upgrade; or
  - upgrade caused by growth in the network not development.

Infrastructure planning and funding under IPA

- Infrastructure planning under IPA:
  - IPA planning schemes.
  - Priority infrastructure plans.

- Infrastructure funding under IPA:
  - Conditions on development approvals.
  - Infrastructure charges.
  - Infrastructure agreements.

Transitional infrastructure planning and funding framework under IPA

- Transitional infrastructure planning framework under IPA:
  - planning scheme policies about infrastructure.
- Transitional infrastructure funding framework under IPA:
  - condition for cost of establishment, operation and maintenance of infrastructure;
  - condition must be relevant but not an unreasonable imposition or be reasonably required.
- Challenges to planning scheme policies for transport infrastructure.
- Planning scheme policies impose charges for:
  - consumption of capacity in future network;
  - consumption of capacity in existing network.
- Consumption of future capacity – no nexus and no warrant for upgrading.
- Consumption of existing capacity – no impact and no upgrading;
- Court – uphold or strike down.

Infrastructure planning and funding framework under IPA

- Infrastructure – two types:
  - State infrastructure.
  - Development infrastructure – sewerage, water, transport, parks and community facilities.
- Development infrastructure – two types:
  - Trunk – in priority infrastructure plan.
  - Non-trunk – not in priority infrastructure plan.
- Infrastructure planning framework:
  - Priority infrastructure plan – integrates land use and infrastructure planning.
  - Basis for infrastructure funding framework.
- Infrastructure funding framework:
  - Infrastructure charges.
  - Condition requiring supply of:
    - non-trunk infrastructure;
    - necessary trunk infrastructure;
    - infrastructure by State infrastructure providers.
  - Condition for the cost of:
    - additional trunk infrastructure supplied by local government;
    - additional infrastructure supplied by State infrastructure provider.
- Infrastructure funding framework commences when a priority infrastructure plan included in IPA Planning Scheme.

Infrastructure planning framework under IPA

- Priority infrastructure plan (PIP):
  - infrastructure planning benchmark;
  - basis for infrastructure funding.
- PIP:
  - priority infrastructure area;
  - planning assumptions;
  - desired standards of service;
  - plans of trunk infrastructure;
  - infrastructure charges schedule;
  - State-controlled roads.
- PIP used to assess development application.

Infrastructure charge under IPA infrastructure charges schedule

- Infrastructure charge on trunk infrastructure under an ICS in a PIP.
- Infrastructure charges notice:
  - applicants; or
  - owners of land.
- Notice requiring land to be given to local government:
  - fee simple;
  - trust for local public parks infrastructure or local community facilities.
- Infrastructure charge recovered as a debt or rate.
- Local government must use infrastructure charge on trunk infrastructure.

Infrastructure charges under regulated infrastructure charges schedule

- Low growth local governments may use regulated ICS.
- Regulated infrastructure charge on trunk infrastructure charge under a regulated ICS made by Council resolution.
- Regulated infrastructure charges notice to applicant only.
- Regulated infrastructure charge recovered as a debt or rate.
- Local government must use regulated infrastructure charge to provide infrastructure.

Condition requiring supply of infrastructure

- Conditions requiring:
  - supply of non-trunk infrastructure;
  - supply of necessary trunk infrastructure;
  - supply of infrastructure or works to protect infrastructure;
  - works to protect or maintain State-controlled roads.
- Condition must be relevant but not an unreasonable imposition and reasonably required.

Condition requiring supply of infrastructure – non-trunk infrastructure

- Supply of non-trunk infrastructure:
  - internal infrastructure network;
  - connection to external infrastructure network;
  - protect safety or efficiency of infrastructure network.
- Imposed by local government.

Condition requiring supply of infrastructure – trunk infrastructure

- Supply of trunk infrastructure:
  - trunk infrastructure is inadequate;
  - trunk infrastructure is necessary but not available;
  - trunk infrastructure crosses premises.
- Condition is lawful even if trunk infrastructure is required to service other premises.
- Imposed by local government.

Condition requiring supply of infrastructure – State infrastructure

- Supply of infrastructure or works to protect State infrastructure.
- Imposed by State infrastructure provider.

Condition requiring money for additional infrastructure

- Condition requiring money for cost of:
  - additional trunk infrastructure;
  - additional State infrastructure;
  - protecting State owned or State-controlled transport infrastructure.
- Condition must be relevant but not an unreasonable imposition and reasonably required.
- No condition on establishment, operation or maintenance costs of State infrastructure or development infrastructure.

Cost of additional trunk infrastructure of local government

- Condition can require money if:
  - development is inconsistent with PIP;
  - development imposes additional trunk infrastructure costs on local government;
  - an acknowledgment notice was issued identifying that a condition would be imposed.

Cost of additional infrastructure of State infrastructure provider

- Condition can require money if:
  - development is inconsistent with PIP;
  - development will impose additional infrastructure costs on State infrastructure provider.
- Condition can require money to protector or maintain State-owned or State-controlled transport infrastructure.

Infrastructure agreements

- Infrastructure agreements – an alternative to infrastructure funding mechanisms.
- Infrastructure agreements attach to land and bind successors in title.
- Infrastructure agreement cannot fetter discretion.

Conclusions

Table 1 Summary of infrastructure funding mechanisms

Type of infrastructure	Category of infrastructure as defined by IPA	Infrastructure charging mechanisms						
		Special rate or special charge (LGA)	Differential general rate (LGA)	Conditions of a development approval (PEA)	Conditions of a development approval (Transitional provision of IPA)	Conditions of a development approval (IPA)	Infrastructure charges and regulated infrastructure charge (IPA)	Infrastructure agreement (IPA)
Community infrastructure	State infrastructure being State-controlled roads infrastructure	×	×	✓	✓	✓	×	✓
	State infrastructure being: – State schools infrastructure – public transport infrastructure – emergency services infrastructure	×	×	×	×	✓	×	✓
	Other State infrastructure	×	×	×	×	×	×	✓
Private benefit infrastructure	Development infrastructure	✓	✓	✓	✓	✓	✓	✓
	Other private benefit infrastructure	×	×	✓	✓	✓	×	✓

- Infrastructure funding framework of IPA will dramatically increase infrastructure contributions.
- Infrastructure funding mechanisms will be used.
- Conflicts are inevitable.

This paper was presented at the Queensland Law Society Inaugural Specialists Accreditation conference, 8 April 2005.

Master planned communities – Legal and policy issues

Ian Wright

This article discusses the legal and policy issues surrounding the development and planning of master planned communities. This article particularly focuses on master planned communities in Queensland and the legislative models used for creating master planned communities. The article discusses the legal issues concerning master planned communities and how the preliminary approval process can be used to deliver a master planned community

May 2005

Introduction

The term master planned community is one of the most misused and abused concepts of modern day planning. It is used to describe a range of new communities including new towns, new suburbs, urban infill development, mixed use development, transit oriented development and integrated resort development.

The term is sometimes used to market developments which on any reasonable analysis do not involve any concept of mastery, planning or indeed community.

Although there is no agreement as to the meaning of the term it is recognised that master planned communities can affect regional urban development patterns. As a result State and local governments have introduced urban growth management policies to address the role of master planned communities.

This paper considers some of the significant legal and policy issues associated with the planning and development of master planned communities in Queensland. In this paper I will explore five themes:

- First, I will define master planned community for the purposes of this paper.
- Second, I will consider the planning context for master planned communities in Queensland with a particular focus on South East Queensland.
- Third, I will consider the legislative models for delivering master planned communities in Queensland.
- Fourth, I will discuss the legal issues relevant to delivering a master planned community through the preliminary approval process under the *Integrated Planning Act 1997*.
- Fifthly, I will illustrate how the preliminary approval process can be used to deliver a master planned community.

Planning context for master planned communities

Draft SEQ Regional Plan

The Draft South East Queensland Regional Plan relevantly states as follows:

Principle 2.1 – Urban pattern

Consolidate the region's urban development footprint, provide for discrete urban areas separated by inter-urban breaks. Reduce ad-hoc and dispersed development and improve the links between residential areas, employment locations and transport services.

Strategies

***S2.1** – Consolidate urban development within the Urban Footprint.*

***S2.2** – Prohibit development for urban purposes outside the Urban Footprint.*

***S2.3** – Protect inter-urban breaks to separate and frame discrete urban settlement areas.*

***S2.4** – Contain further rural residential development within designated Urban Footprint and Rural Living Areas.*

Principle 2.2 — Urban growth management

Make more efficient use of land allocated for urban development and ensure that new development is integrated with the delivery of transport, infrastructure, services and employment opportunities.

Strategies

S2.5 *– Consolidate urban development to improve utilisation of land and the efficient provision of infrastructure and services.*

S2.6 *– Integrate land use, infrastructure, transport, employment planning and development.*

S2.7 *– Increase progressively the proportion of new dwellings created by infill and redevelopment of existing urban areas across the region to 40 per cent of all new dwellings constructed between 2004 and 2016, and 50 per cent between 2016 and 2026.*

S2.8 *– Focus higher density and mixed-use development in and around Regional Activity Centres and public transport nodes and routes, including potential Transit Oriented Development (**TOD**) sites.*

S2.9 *– Provide information and services to support increased development densities at Regional Activity Centres and TOD sites.*

S2.10 *– Develop new greenfield sites as integrated communities, not just subdivided land.*

S2.11 *– Major new residential development areas to achieve a minimum net residential density of 15 dwellings per hectare.*

S2.12 *– Prepare Local Growth Management Strategies to identify how and where additional dwellings and employment will be accommodated. …*

Principle 2.5 — Integrated planning of development areas

Major greenfield development and redevelopment areas are planned and developed as integrated communities with good accessibility to services, infrastructure and employment opportunities.

Strategies

S2.21 *– Prepare Structure Plans for all new residential development areas prior to approval of development.*

Principle 2.6 — Housing mix and affordability

Provide for a variety and mix of dwelling type, size and tenure to meet diverse community needs and achieve housing choice and affordability throughout the region.

Strategies

S2.22 *– New residential developments to incorporate a mix of housing types to meet the current and future needs of the community.*

Local planning instruments

The Draft South East Queensland Regional Plan also requires local governments in South East Queensland to prepare two planning strategies to bridge the gap between the broad regional plan framework and the detail of their planning schemes.

Local growth management strategy

The first strategy is a local growth management strategy. This strategy is to achieve the following objectives:[331]

- demonstrate how dwelling targets and associated jobs and infrastructure will be accommodated;
- demonstrate that targets can be achieved through the identification of opportunities for infill and redevelopment including Activity Centres and TODs;
- set priorities for investigation and planning for higher densities, including the identification of potential TODs;
- review land and infrastructure availability in Regional Activity Centres to ensure they perform their intended function;
- prioritise strategies to accommodate the relevant local government area population target and achieve infill targets;
- identify greenfield areas for structure planning;
- investigate the projected housing needs, and the diversity and affordability of housing types required for the future community; and
- identify planning scheme amendments required to meet the goals of the Local Growth Management Strategy.

In essence the local growth management strategy will determine the form, scale and timing of urban development within the urban footprint of each local government area. It will identify the location of transit oriented development, employment locations, housing mix, transport networks and other infrastructure. It will contain measures which are to be included in the local government's planning scheme, corporate plan and capital works program.

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331 Office of Urban Management 2004 Draft South East Queensland Regional Plan, Queensland Government Brisbane, p39.

Structure plans

The local growth management strategy will also identify greenfield residential areas within the urban footprint of the local government area that are to be the subject of structure plans.

Structure plans will ensure that new greenfield residential developments:[332]

- are an acceptable area for urban development;
- will achieve a minimum net density of 15 dwellings per hectare;
- provide a mix of lot sizes and dwelling types;
- have the capacity to be serviced by physical and social infrastructure;
- occur in the appropriate sequence;
- link with the surrounding area;
- respond to development constraints; and
- provide local job opportunities.

In essence, a structure plan will determine the major development corridors, open space and landscape areas and infrastructure for each new greenfield residential area which is identified in the local growth management strategy. The structure plan will contain measures which are to be included in the local government's planning scheme and capital works program.

Planning scheme amendments

The outcomes of the local growth management strategy and structure plans are to be included in the local government's planning scheme. The Draft South East Queensland Regional Plan specifically provides that all major new residential development areas are required to have an approved structure plan prior to development.[333]

Accordingly, in the case of South East Queensland at least, no new master planned community will be able to be approved until the relevant local government has prepared three documents.

- First, a local growth management strategy in respect of its urban footprint that identifies the master planned community as a new residential development area.
- Second, a structure plan in respect of the new residential development area.
- Third, amendments to the local government's planning scheme to reflect the outcomes of the local growth management strategy and the structure plan.

Legislative context for master planned communities

Having considered the planning context for master planned communities I now propose to discuss the legislative models for delivering a master planned community in Queensland.

The legislative models fall into three categories.

Franchise legislation

The first legislative model for delivering a master planned community is franchise legislation. A number of different models have been utilised.

Sanctuary Cove Resort Act 1985

The *Sanctuary Cove Resort Act 1985* divided Sanctuary Cove into zones, specified permitted uses for each zone and provided for the local government to approve a proposed use plan specifying the maximum number of residential lots that may be developed within each zone.

Integrated Resort Development Act 1987

The *Integrated Resort Development Act 1987* provided for the approval by the Governor-in-Council of a scheme in respect of an integrated resort development that specified permitted uses in respect of precincts. It also made provision for an innovative titling and body corporate management system that was subsequently included in the *Body Corporate and Community Management Act 1997*. Examples of resort communities implemented under this legislation include Hope Island, Laguna Keys and Royal Pines.

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[332] Office of Urban Management 2004 Draft South East Queensland Regional Plan, Queensland Government Brisbane, p40.
[333] Office of Urban Management 2004 Draft South East Queensland Regional Plan, Queensland Government Brisbane, p31 and 40.

South Bank Corporation Act 1989

The *South Bank Corporation Act 1989* provided for the approval by the Governor-in-Council of a development plan that is in effect a planning scheme for South Bank and the approval by the South Bank Corporation of development within South Bank.

Local Government (Robina Central Planning Agreement) Act 1992

The *Local Government (Robina Central Planning Agreement) Act 1992* specified an overall concept, including land uses, precincts and density for Robina and provided for the local government to approve more detailed plans in respect of the final development to ensure that it was consistent with the overall concept.

Mixed Use Development Act 1993

The *Mixed Use Development Act 1993* provided for the approval by the local government of a mixed use scheme in relation to different types of development that specified permitted uses in respect of precincts. It also made provision for innovative titling and body corporate management arrangements that are now encapsulated in the *Body Corporate and Community Management Act 1997*. Couran Cove is an example of a master planned community implemented under this legislation.

Planning instruments

The second legislative model for delivering master planned communities is planning instruments. Historically a number of different models have been used.

Rezoning approvals

The simplest mechanism involved applications to amend a planning scheme made under the now repealed *Local Government (Planning and Environment) Act 1990*.[334] This was generally in the form of a rezoning application which was approved by a local government subject to conditions requiring the development of the land to comply with a master plan which specified an overall concept, including land use precincts and densities and provided for final development plans to be approved by the local government prior to building work or as part of the subdivision process. This was by far the most common model for delivering master planned communities prior to the *Integrated Planning Act 1997*. Examples of the master planned communities delivered in this way include the significant master planned communities that were developed on the Gold Coast during the 1980s and 1990s including Pacific Pines at Gaven and Varsity Lakes at Bond University.

Development control plans

More complex arrangements were delivered through development control plans prepared by local governments under the now repealed *Local Government (Planning and Environment) Act 1990*[335] in respect of master planned communities. Whilst these planning instruments differed widely, they generally specified a process for making and approving plans with which development must comply. Examples of master planned communities delivered through development control plans include North Lakes in Brisbane's north, Forest Lake and Springfield Lakes in Brisbane's south and Kawana Waters on the Sunshine Coast.

IPA planning schemes

Whilst it is no longer permissible under the *Integrated Planning Act 1997* for a developer to amend a planning scheme through a rezoning or for a local government to prepare a development control plan, a master planned community can still be delivered under a planning scheme prepared under the *Integrated Planning Act 1997*.

If a local government completes its local growth management strategy and prepares a detailed structure plan for a greenfield residential area, then there is no reason why a local government could not amend its planning scheme to provide for a master planned community through the specification of lower assessment levels for development consistent with the structure plan and through the identification of applicable codes.

Development agreements

The delivery of master planned communities through developer or local government initiated planning scheme amendments are almost always supported by development agreements previously called rezoning agreements in the case of developer initiated amendments or infrastructure agreements in the case of local government initiated amendments. Whereas the planning instruments specified the development entitlements in respect of the master planned community, the development agreements specified the development obligations of the developer of the master planned community. These contractual arrangements were preserved by the *Integrated Planning Act 1997*.[336]

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[334] See section 4.3 of the *Local Government (Planning and Environment) Act 1990* and section 6.1.45AA of the *Integrated Planning Act 1997*.

[335] See section 2.5 of the *Local Government (Planning and Environment) Act 1990* and section 6.1.45A of the *Integrated Planning Act 1997*.

[336] See section 6.1.45 and 6.1.45AA of the *Integrated Planning Act 1997*.

Development approvals

The third and most relevant legislative model for delivering a master planned community is a development approval under the *Integrated Planning Act 1997* (**IPA**).

IPA allows a development application to be made for a preliminary approval which will approve development but does not authorise assessable development to occur.[337] A preliminary approval can also seek to vary the effect of a planning instrument by stating levels of assessment for development and identifying codes for development.[338]

Whilst a preliminary approval of this type does not amend the planning instrument, as was the case with a developer initiated rezoning or a local government amendment of its planning instrument, the levels of assessment and codes identified in the preliminary approval do prevail over the levels of assessment and codes in the planning instrument.[339]

The preliminary approval model therefore seeks to overcome the inflexibilities of the planning instrument model under the now repealed *Local Government Act 1936* and the *Local Government (Planning and Environment) Act 1990* which resulted in the need for franchise legislation.

I will now turn to discuss in more detail the legal issues associated with the preliminary approval process under the *Integrated Planning Act 1997*.

Legal issues in respect of preliminary approvals under IPA

When considering how to deliver a master planned community under the preliminary approval process it is important to take account of the legal issues that arise in relation to the application of this process.

Type of development approval

The first issue relates to the type of development approval that is to be sought. An application for a development permit cannot be used to vary the effect of a local planning instrument. Only an application for a preliminary approval can be used.[340]

Timing of preliminary approval application

The next issue relates to the timing of the preliminary approval. A development application for a preliminary approval that does not state the way in which the local planning instrument is to be effected by the preliminary approval is not a preliminary approval to which section 3.1.6 of IPA applies. Therefore an applicant for a preliminary approval that varies the local planning instrument must apply at the same time for the change to the local planning instrument.

Scope of preliminary approval

The next issue relates to the scope of the preliminary approval that is sought. A preliminary approval can only be sought in respect of development that is assessable development under the local planning instrument. Accordingly a preliminary approval cannot be sought in respect of development that is self-assessable or exempt under the local planning instrument or is made self-assessable or exempt under IPA.[341]

Planning instruments to be effected

The next issue relates to the type of planning instruments which may be varied by a preliminary approval. A preliminary approval may only vary the effect of a local planning instrument being a planning scheme, a planning scheme policy and a temporary planning instrument.[342] Accordingly a preliminary approval cannot vary the effect of the following:

- a superseded planning scheme as a superseded planning scheme is not an existing local planning instrument;
- the IPA;
- a regulation;
- a State code;
- a State planning policy; and
- the South East Queensland Regional Plan.

337 Section 3.1.6(1)(a) and 3.1.5 of *Integrated Planning Act 1997*.
338 Section 3.1.6(1)(b) of the *Integrated Planning Act 1997*.
339 Section 3.1.6(6) of the *Integrated Planning Act 1997*.
340 Section 3.1.6(1) of the *Integrated Planning Act 1997*.
341 Section 3.1.5(1) of the *Integrated Planning Act 1997*.
342 Section 3.1.6(1)(b) and the definition of "local planning instrument" in Schedule 10 of the *Integrated Planning Act 1997*.

Changes to levels of assessment and codes

The next issue relates to the development in respect of which the preliminary approval can state levels of assessment and identify codes. A preliminary approval can only state the level of assessment and codes for development which is assessable development under the local planning instrument.[343] A preliminary approval cannot specify levels of assessment and codes in respect of development which is self-assessable or exempt under the local planning instrument.

Material change of use

The next issue relates to the extent that levels of assessment and codes can be specified for a material change of use. A preliminary approval can state levels of assessment and codes for a material change of use as well as other aspects of development related to the material change of use such as building work, operational work or reconfiguring a lot associated with the material change of use.[344]

Development other than a material change of use

The next issue relates to the extent that levels of assessment and codes can be specified for development other than for a material change of use. If a preliminary approval only relates to development not for a material change of use, it cannot specify levels of assessment and codes for a material change of use.[345]

Extent to which preliminary approval prevails

The next issue relates to the extent that the preliminary approval prevails over the local planning instrument. The preliminary approval only prevails over the local planning instrument to the extent that the levels of assessment and codes in the preliminary approval are different to the local planning instrument.[346] A preliminary approval does not prevail over other parts of a planning instrument such as the desired environmental outcomes, priority infrastructure plan, infrastructure charges schedules or community infrastructure designations.

Effect of preliminary approval

The next issue relates to when the preliminary approval ceases to prevail over the local planning instrument. A preliminary approval will cease to prevail over the local planning instrument when one of three things occur:

- First, the local planning instrument is amended such that it is not different from the preliminary approval.[347]
- Second, all of the assessable development approved by the preliminary approval and authorised by a later development permit is completed.[348]
- Third, the time limit specified in the conditions of the preliminary approval for completing the development ends.[349]

Relationship to IPA

The next issue relates to the relationship between the preliminary approval and the levels of assessment specified in Schedules 8 and 9 of IPA. A preliminary approval is of no effect to the extent that it is inconsistent with Schedules 8 or 9 of IPA.[350] Accordingly that part of a preliminary approval which is consistent with Schedules 8 and 9 of IPA remains in effect.

Referral coordination

The next issue relates to referral coordination. A preliminary approval to which section 3.1.6 applies is subject to referral coordination.[351] This is sensible in relation to the initial preliminary approval application which seeks to vary a local planning instrument which has been approved by the Minister after the extensive State interest process. However it seems excessive to require referral coordination in relation to all subsequent preliminary approval applications as this will involve the State government in the consideration of the design minutia of a master planned community.

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343 Section 3.1.6(2) of the *Integrated Planning Act 1997* states that subsection (3) applies to the extent the application is for development that is a material change of use.

344 Section 3.1.6(3) of the *Integrated Planning Act 1997* contains the phrase "development relating to material change of use". As to the meaning of this phrase see the Explanatory Notes to *Integrated Planning and Other Legislation Amendment Bill 2003*.

345 See section 3.1.6(4)(a) and (5) of the *Integrated Planning Act 1997*.

346 Section 3.1.6(6) of the *Integrated Planning Act 1997*.

347 Section 3.1.6(5) of the *Integrated Planning Act 1997*.

348 Section 3.1.6(7)(a) of the *Integrated Planning Act 1997*. It is interesting to note that this subsection does not contemplate the situation where the development is made self-assessable by the preliminary approval.

349 Section 3.1.6(7)(b) of the *Integrated Planning Act 1997*.

350 Section 3.1.6(8) of the *Integrated Planning Act 1997*.

351 Section 3.3.5(1)(c) of the *Integrated Planning Act 1997*.

Public notification of a preliminary approval application

The next issue relates to the public notification of a preliminary approval application. A preliminary approval to which section 3.1.6 applies is subject to public notification.[352] However public notification is not required in respect of the preliminary approval application if three criteria are satisfied:

- First, a preliminary approval to which section 3.1.6 applies has been given.[353]
- Second, the preliminary approval does not seek to change the level of assessment, or seeks to change the level of assessment from code assessment to self-assessable or seeks to increase the level of assessment.[354]
- Third, a code identified in the preliminary approval is substantially consistent with a code in an earlier preliminary approval.[355]

Assessment materials for preliminary approval application

The next issue relates to the assessment of the preliminary approval application. A preliminary approval application under section 3.1.6 comprises two parts. The first part is the preliminary approval which is subject to code assessment or impact assessment depending on the level of assessment applicable to the assessable development the subject of the preliminary approval. The second part is the variation application which seeks to vary the effect of the local planning instrument. That part of the application is assessed having regard to the following criteria:[356]

- First, the common material.
- Second, the result of the assessment of the preliminary approval part of the application.
- Third, the effect that the variations would have on the rights of submitters in respect of subsequent applications.
- Fourth, the consistency of the proposed variations with the balance of the planning scheme that has not been varied.
- Finally, any State planning policy and the South East Queensland Regional Plan to the extent that they have not been reflected in the planning scheme.

Decision criteria for preliminary approval application

The next issue relates to the decisional criteria to be applied in the determination of the preliminary approval application. The first part of the application being the preliminary approval is determined in accordance with the criteria applicable to code assessment or impact assessment. The second part of the application which seeks to vary the local planning instrument can be approved, approved with variations different to that sought, or refused. The variation application must be refused if the preliminary approval part of the application is refused or the achievement of the desired environmental outcomes would be compromised.

Recording of preliminary approval

The next issue relates to the recording of the preliminary approval. The local government must note the variation approval in its planning scheme and give notice of the notation to the chief executive.[357] The notation is not an amendment of the planning scheme.

Appeal to the court

Finally, an applicant may appeal against the refusal of either part of the preliminary approval application or a matter stated in the preliminary approval such as the statement as to the level of assessment or the identification of a code.[358]

Structuring of preliminary approvals process

Having considered the legal issues associated with a preliminary approval application under section 3.1.6 of IPA, I will consider how the preliminary approvals process could be used to deliver a master planned community.

I will use Couran Cove as an example. The master planning process I propose to adopt is illustrative only in that the master planning process could be implemented in other ways. With that said the master planning for Couran Cove could involve three stages.

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352 Section 3.4.2(1)(a) of the *Integrated Planning Act 1997*.
353 Section 3.4.2(3)(a) of the *Integrated Planning Act 1997*.
354 Section 3.4.2(3)(b) of the *Integrated Planning Act 1997*.
355 Section 3.4.2(3)(c) of the *Integrated Planning Act 1997*.
356 Section 3.5.5A(2) of the *Integrated Planning Act 1997*.
357 Section 3.5.5A(2) of the *Integrated Planning Act 1997*.
358 Section 4.1.27(1)(a) and (b) of the *Integrated Planning Act 1997*.

Structure plan approval

The first stage could involve a preliminary approval application under section 3.1.6 of IPA. The application would firstly seek approval of a structure plan for the resort and second seek to vary the local government's planning scheme by:

- stating that houses are self-assessable but that all other residential uses and non-residential uses such as restaurants, shops, offices and conference centres are code assessable; and
- identifying an urban design code as an applicable code for all uses.

This application would be subject to referral coordination and public notification.

Precinct plan approval

If the preliminary approval was granted, the second stage of the master planning process could involve a further preliminary approval under section 3.1.6 of IPA in respect of each stage of the development. For example in relation to the Villa and Marine Apartment Precinct, the application would seek an approval of a precinct plan for the precinct and would seek to vary the local government's planning scheme by stating that the villas which are code assessable under the first preliminary approval are self-assessable and by identifying a more detailed design code for the villa and marine apartment precinct which is consistent with the urban design code for the resort.

This application would be subject to referral coordination but would not require public notification.

Site development plan

The third stage of the master planning process could involve the approval of a site development plan as part of a development permit for the individual apartment buildings that were stated to be code assessable in the first preliminary approval. This development permit application would be assessed against the urban design code for the resort, detailed design code for the Villa and Marine Apartment Precinct and the earlier preliminary approvals.

This application would not be subject to referral coordination or public notification.

Conclusion

In conclusion then, master planned communities have played and will continue to play an important role in accommodating urban growth in high growth areas especially in South East Queensland.

Master planned communities that meet the identified growth management and development planning principles will result in a more efficient land development pattern that will promote improved access to employment and shopping and other services, the efficient delivery of infrastructure, services and facilities and the preservation of environmentally sensitive areas, rural production areas and open space and landscape areas.

Developments that do not readily meet the identified planning principles are unlikely to be approved under the regional and local government planning instruments that are being prepared under the *Integrated Planning Act 1997*. Furthermore it is probably inappropriate to refer to such developments as being master planned communities.

Those developments that do meet the identified planning principles can be delivered under the *Integrated Planning Act 1997* either by way of an amendment initiated by a local government to its planning scheme or by way of a preliminary approval initiated by a developer under section 3.1.6 of IPA.

Whilst the preliminary approval process is not without its limitations it does provide greater flexibility than was provided under previous legislation. As with most things involving planning and the law the devil is in the detail of the preparation of the preliminary approval application and this is where real value can be delivered or indeed lost.

This paper was presented at the Queensland Environmental Law Association conference, 20 May 2005.

Colin Biggers & Paisley

Demystifying development assessment and IDAS

Ian Wright

This article discusses the components of the development assessment framework which include the Integrated Planning System, Integrated Development Assessment System and the Integrated Dispute Resolution System

July 2005

Introduction

Development assessment framework

- *Integrated Planning Act 1997* creates a development assessment framework.
- Development assessment framework has three components:
  - Integrated Planning System.
  - Integrated Development Assessment System (**IDAS**).
  - Integrated Dispute Resolution System.

Structure of presentation

- Integrated Planning System.
- IDAS.
- Integrated Dispute Resolution System.

Integrated planning system

Overview

- Components of integrated planning system.
- Planning instruments.
- Local planning instruments.
- Planning schemes.
- Caloundra City Plan.
- Regional planning instruments.
- State planning instruments.

Components of the planning system

- Every planning system comprises *planning instruments*.
- An integrated planning system comprises planning instruments at:
  - *local level*;
  - *regional level*;
  - *State level*.
- It is strongly arguable that an integrated planning system should also involves planning instruments at a *national level*. For example:
  - National parks system;
  - World Heritage properties;
  - Infrastructure planning – rail, land and airports.

Planning instruments

Planning instruments are the foundation of the integrated planning system.

Types of planning instruments	Examples	Responsible authority
Local planning instruments	Planning scheme Planning scheme policies	Prepared by local government in consultation with State government
Regional planning instruments	SEQ Regional Plan	Prepared by State government in consultation with local government
State planning instruments	State planning policies	Prepared by State government

Local planning instruments

- Local planning instruments have different roles:
  - Planning scheme – regulates development.
  - Temporary local planning instrument – regulates development for no more than 1 year to enable amendment to planning scheme.
  - Planning scheme policy – specifies standards (and infrastructure contributions until ICS is made) but cannot regulate development.

Planning schemes – Regulation of development

- A planning scheme regulates *development*.
- Development is *an activity* not an outcome.
- Development has five aspects:

Material change of use	Change in use which is material
Reconfiguring a lot	Change in lot dimensions
Building work	Work in relation to a building
Operational work	Work in relation to land
Plumbing and drainage work	Work in relation to services

- A planning scheme regulates development by specifying:
  - *Type of assessment*.
  - *Assessment criteria*.

Planning schemes – Assessment of development

- A planning scheme can specify the *type of assessment for development*.
- There are four types of assessment:

Exempt	No assessment required
Self assessment	Assessment by developer
Code assessment	Assessment by planning authority with no public input
Impact assessment	Assessment by planning authority with public input

- Slate legislation can override a planning scheme and specify a different level of assessment. For example – building work, brothels.

Planning schemes – Assessment criteria

- A planning scheme specifies assessment criteria for each type of assessment.

Exempt	No assessment criteria
Self assessment	*Acceptable solutions* (ie assessment criteria that is a precise criteria that must be complied with) of *applicable codes* (ie codes identified as applicable to the development)
Code assessment	Applicable codes comprising: • *Overall outcomes* – purpose of code • *Specific outcomes* – outcomes that contribute to achievement of overall outcomes • *Probable solutions* – assessment criteria that is a guide for achieving the specific outcomes • *Desired environmental outcomes* – outcome to be achieved for the planning scheme area or relevant locality that cannot be compromised
Impact assessment	• Provisions of planning scheme • Desired environmental outcomes

- State legislation can also specify assessment criteria. For example SBR (Applicable code for building work), Prostitution Act (Applicable code for brothel).

Caloundra City Plan – Development

- Uses are defined (Part 3 of Planning Scheme).
- Uses are divided into use classes:
  - Residential uses;
  - Business and commercial uses;
  - Industrial uses;
  - Rural uses;
  - Community, Sport and Recreation and Other uses.

Caloundra City Plan – Zoning (Part 4 of Planning Scheme)

- Land is *zoned* as follows (Part 4 of Planning Scheme):

Localities	City is divided into coastal areas, townships and rural areas
Planning areas	Each locality is divided into planning areas as follows: • Coastal – 5 planning areas • Township – 6 planning areas • Rural – 5 planning areas

Precincts	Each planning area is divided into precincts from the following precinct classes: • Residential – 4 precincts • Business Centre – 4 precincts • Industry – 2 precincts • Rural – 2 precincts • Emerging Community – 2 precincts • Open Space – 3 precincts • Community – 1 precinct
Sub-precincts	Some precincts are divided into sub-precincts, for example: • Regional business centre precinct – 6 sub-precincts

Caloundra City Plan – Overlays (Part 4 of Planning Scheme)

- Land is affected by overlays as follows (Part 4 of Planning Scheme):
  - Acid Sulfate soils – Land below 5 metres AHD.
  - Aviation affected area – Caloundra airport.
  - Biting insects – Coastal areas.
  - Bushfire hazard management – Rural areas.
  - Coastal management – Coastal areas.
  - Cultural heritage and character areas – Specific sites.
  - Extractive resource areas – Specific sites.
  - Flood management – Flood plains.
  - Habitat and biodiversity – Vegetated areas.
  - Natural waterways and wetlands – Creeks and water bodies.
  - Steep slopes – Specific sites of steeply sloping land.
  - Visual management – Scenic routes/significant views/rural township sense of place.
  - Water resource catchment – Ewen Maddock Dam.

Caloundra City Plan – Assessment of development (Part 4 of Planning Scheme)

- Type of assessment is specified in development assessment tables (in Part 4) for:
  - Precincts;
  - Overlays.
- *Higher assessment level prevails* over lower assessment level as follows:
  - Impact;
  - Code;
  - Self;
  - Exempt.

Caloundra City Plan – Assessment of criteria (Parts 5-9 of Planning Scheme)

Assessment criteria	Self	Code	Impact
Desired environmental outcomes (Part 2 of Planning Scheme)	–	✓	✓

Assessment criteria	Self	Code	Impact
Precinct codes (Part 5 of Planning Scheme)	–	✓	✓
Planning area codes (Part 6 of Planning Scheme)	✓	✓	✓
Overlay codes (Part 7 of Planning Scheme)	–	✓	✓
Use codes (Part 8 of Planning Scheme)	✓	✓	✓
Other codes (Part 9 of Planning Scheme)	✓	✓	✓

Caloundra City Plan – Summary

- Uses divided into five use classes.
- Land is zoned into precincts and affected by overlays.
- Type of assessment is specified in respect of development in each precinct and overlay.
- Assessment criteria specified for self, code and impact assessment.

Regional planning instruments – SEQ Regional Plan

- SEQ Regional plan comprises four elements:
  - Background.
  - Regional land use pattern.
  - Regional policies.
  - Regulatory provisions.

State planning instruments

- State planning policies include:
  - SPP1/92 – Development and conservation of Agricultural Land.
  - SPP1/02 – Development in the vicinity of Certain Airport and Aviation Facilities.
  - SPP2/02 – Planning and Managing Development involving Acid Sulfate Soils.
  - SPP1/03 – Mitigating the Adverse Impacts of Flood, Bushfire and Landslide.
  - SPP1/05 – Conservation of Koalas in south-east Queensland.

SEQ Regional Plan – Statutory planning

- SEQ Regional Plan requires Council to undertake extensive planning:
  - *Planning studies*:
    - Local growth management strategy.
    - Structure plans – urban development areas above 100 hectares.
    - Master plans – smaller sites.
  - *Infrastructure agreements*:
    - State government – recover benefits of regional State infrastructure.
    - Local government – recover benefits of local infrastructure.
  - *IPA planning scheme amendments*.
- Caloundra is ahead of the game.

SEQ Regional Plan – Development assessment

- Regulatory provisions specify assessment levels and assessment criteria.

Development	Assessment levels	Assessment criteria
Urban activities in Regional Landscape and Rural Production Area or Rural Living Area	Impact assessment	Must be located: • adjoining a rural village consistent with planning scheme; or • outside of Urban Footprint because of locational requirements or environmental impacts and there is an overriding need in the public interest
Rural residential purposes in Regional Landscape and Rural Production Area	Impact assessment	Must be an overriding need in the public interest

- Regional land use pattern and regional policies are also relevant in code and impact assessment.

State planning instruments – Planning and development assessment

- State planning policies must be reflected in IPA planning scheme.
- State planning policies are relevant in code and impact assessment.

Summary

- Planning instruments exist at local, regional and state levels.
- Planning instruments *regulate development* which is an action not an outcome.
- Local planning instruments *specify assessment levels* and *assessment criteria* for development.
- State and regional planning instruments must be *reflected in local planning instruments*.
- *State and regional planning instruments* are relevant to code and impact assessment.
- *SEQ Regional Plan* specifies assessment levels and assessment criteria for some development.
- IPA also specifies assessment levels and assessment criteria for some development.

Integrated development assessment system (IDAS)

Overview

- Development approvals processes.
- Participants and roles.
- Development Applications.
- Development assessment.
- Deciding development applications.
- Role of officers.
- Role of councillors.

Development approvals processes

- Three different development approvals processes.
- *IDAS* – Development assessment system for development approvals.

Stages	Function
Application	Determination of properly made application
Information and referral	Request for information by assessment manager and referral agencies and consideration by referral agencies
Notification for impact assessment	Public notification of application
Decision	Consideration and determination by assessment manager

- *Compliance assessment* for operational work conditions of development approvals – Determination as to whether certain operational works comply with codes eg landscaping, crossover, car parking.
- *Approval of plans of subdivision* required by development approvals – Approval of plans of subdivision for reconfiguring a lot.

Participants and roles

- Participants in the development assessment process have the following roles:

Participants	Role	Council roles
Owner	Consents to development application	Council has a discretion to consent or not if it is an owner
Applicant	Lodges development application	Council can be applicant for infrastructure, services, facilities
Advice agency	Referral agency which provides advice to assessment manager	Council can be a referral agency – eg Administering authority under EPA for ERAs
Concurrency agency	Referral agency which can direct decision of assessment manager	Council as a concurrence agency can direct itself as assessment manager
Assessment manager	Decides development application	Major role
Submitter	Person which provides submission to assessment manager	Council can lodge submissions with adjoining local governments

Development applications

- Applicant must make two decisions:
  - choice of application to be lodged;
  - choice of local planning instrument to assess the development application against.

Choice of development application

- Choice of two development applications:
  - *Development permit* – two mandatory parts:
    - Approval part – approves development.
    - Authorisation part – authorises development to occur.
  - *Preliminary approval* – two parts:
    - *Mandatory approval* part:
      - Approves development but does not authorise development to occur.

- Need development permit or optional part to authorise development.
- Examples of use – engineering work for significant development such as subdivisions.

> *Optional part* which affects current local planning instrument:

- Specifies assessment type and criteria for development different to current planning scheme (not superseded planning scheme).
- Examples of use – developments involving staging, multiple uses, alternative configurations, long timeframes (shopping centres, industrial estates, master planned communities, mixed use developments).

Choice of local planning instrument to be assessed against

- Choice of two local planning instruments:
  - Current local planning instrument.
  - Superseded local planning instruments (ie Instrument in existence within two years of the current local planning instrument).
- Superseded local planning instrument will be chosen if assessment type and criteria are lesser than current local planning instrument.
- However cannot seek preliminary approval which affects superseded local planning instrument.

Development assessment

Council must make two decisions in respect of the assessment of a development application:

- *Choice of assessment documents* – If development application (superseded planning scheme), decide to assess the development application against the current local planning instrument or the superseded local planning instruments.
- *Assessment process* – Assess the development application against the assessment matters.

Choice of assessment documents

- Council must balance the extent of non-compliance with its policy position in the current planning scheme with the risk of compensation for loss of yield if assessed against current planning scheme.

Risk matrix			
Extent of non-compliance with current planning scheme	**Risk of compensation**		
	Low	**Medium**	**High**
Low	Current planning scheme	Superseded planning scheme	Superseded planning scheme
Medium	Current planning scheme	Superseded planning scheme	Superseded planning scheme
High	Current planning scheme	Policy decision	Policy decision

Assessment matters

- Development application must be assessed against the assessment matters.

Assessment matters	Development approval requiring code assessment	Development approval requiring impact assessment	Part of preliminary approval overriding a local planning instrument
Common material – Existing development approvals and application documents	✓	✓	✓

Assessment matters	Development approval requiring code assessment	Development approval requiring impact assessment	Part of preliminary approval overriding a local planning instrument
Local planning instruments (current or superseded)	Applicable codes	Whole of planning scheme	Consistency of proposed variations with the planning scheme
Regional planning instruments – SEQ Regional Plan	✓	✓	✓
State planning instruments – State planning policies	✓	✓	✓
Lawful use of premises and adjacent premises	✓	✓	Effect on the rights of submitter in respect of subsequent applications

Deciding development applications

- *Council must refuse* a development application if the development:
  - *conflicts with a State planning policy*, a State code or the SEQ Regional Plan and the Council is directed to refuse the development application by a concurrence agency;
  - *conflicts with the regulatory provisions* of the SEQ Regional Plan;
  - *compromises the desired environmental outcomes* in the planning scheme, unless the development furthers the outcomes in a State Planning Policy or the SEQ Regional Plan, which is not reflected in the planning scheme;
  - is *code assessable* and conflicts with the specific outcomes of an applicable code unless:
    - the conflict with the specific outcomes can be remedied by conditions; or
    - there are enough planning grounds to justify the decision having regard to the purpose of the code (in overall outcomes) or State Planning policies or SEQ Regional Plan if not reflected in the planning scheme;
  - is *impact assessable* and conflicts with the planning scheme unless there are sufficient planning grounds to justify the decision.

Compromising desired environmental outcomes

- Council *must refuse* a code or impact assessable development that *compromises the achievement of a DEO* unless the compromising of the DEO furthers the outcomes of a State planning policy or SEQ Regional Plan not reflected in the planning scheme.
- "*Compromising the achievement of a DEO*" – there must be an obvious and significant cutting across of the DEO so that achievement is plainly compromised.
- Easier to satisfy the test if DEO is drawn in specific terms and relates to particular areas.
- Example – Council approved rural zoned land at Landsborough for industrial purposes under the Transitional Planning Scheme. Would it have been approved under City Plan having regard to DEO.1(2)(b)

  "*Allocated Industry areas at Caloundra West, Kawana Waters, Beerwah and Landsborough are protected and further developed to meet changing industry and technology trends*".

Conflict with an applicable code

- *Council must refuse* a code assessable development that is in conflict with an applicable code (ie the specific outcomes) unless:
  - the conflict can be remedied by conditions; or
  - there are enough grounds to justify the decision having regard to the purpose of the code (ie overall outcomes) or a State planning policy or SEQ Regional Plan that are not reflected in the planning scheme.

- "*Conflict with an applicable code*" – the conflict must be with the specific outcomes as a whole and must be plainly identified and not minor.
- "*Enough planning grounds to justify the decision*" – the approval must further the overall outcomes of the code (ie its purpose) or the outcomes of a State planning policy or the SEQ Regional Plan that are not reflected in the planning scheme.

Conflict with the planning scheme for impact assessment

- *Council must refuse* an impact assessable development that is in conflict with the planning scheme unless there are sufficient planning grounds to justify the decision.
- "*Conflict with the planning scheme*" – the conflict must be with the provisions of the planning scheme as a whole and not an isolated provision and must be plainly identified and not minor.
- "*Sufficient planning grounds to justify the decision*" – the approval must establish positive betterment in terms of planning outcomes which would not otherwise be achievable through the scheme. For example:
  - the outcomes in the planning scheme are inappropriate as a result of new information since the scheme was made, incorrect information was included in the scheme or there is a factual error in the scheme;
  - the Council has departed from the outcomes in the planning scheme;
  - a draft planning instrument specifies different outcomes to that in the planning scheme.

Conditions of development approvals

- Conditions must be:
  - relevant to but not an unreasonable imposition on a development; or
  - reasonably required by the development.
- *A condition satisfies the test* if there is a nexus, identification or relationship between the condition and the development. This exists if:
  - the development will result in a change in the circumstances as they existed prior to the development;
  - the relationship between the development and the changed circumstances is not too remote;
  - the condition reasonably responds to the changed circumstances resulting from the development.
- A condition does not satisfy the test, if the condition:
  - is imposed other than for a planning purpose eg moral or social purpose;
  - is uncertain eg it requires a further decision by the Council;
  - unreasonable eg arbitrary, unjust or exhibits partiality;
  - requires Council to carry out work eg excessive supervision, provide infrastructure, carry out works.

Roles of councillors, officers and consultants

- The Council owes a duty to the public and its officers.
- A *Council can reject the advice* of its officers or consultants as it is the Council's decision which is the IDAS decision.
- A Council which rejects the unanimous advice of its officers or consultants *should give reasons* for its departure in fairness to the public (applicants/submitters) and its officers.
- A Council which does not give reasons does not perform its public duty.

Integrated dispute resolution

Role of councillors and officers

- The Council owes a *duty to the Court*.
- The Council must therefore:
  - take an alive part in court proceedings unless excused by the Court;
  - show respect for the Court and its proceedings;
  - act in accordance with the indications of the Court without the need for formal orders.

Conduct of Court proceedings

- Council takes an active part in Court proceedings by making available its reports and its employed experts to the Court and the parties.
- Council will be exposed to a costs order if the Council:
  - causes an adjournment;
  - defaults in the Court's procedural requirements;
  - introduces new material;
  - does not take an active part in the proceedings;
  - does not discharge its responsibilities in the proceedings.

This paper was presented to the Caloundra City Council, 19 July 2005.

Analysing the impact and role of infrastructure charges on property developments

Ian Wright

This article discusses the impact and role of infrastructure charges on property developments

September 2005

Introduction

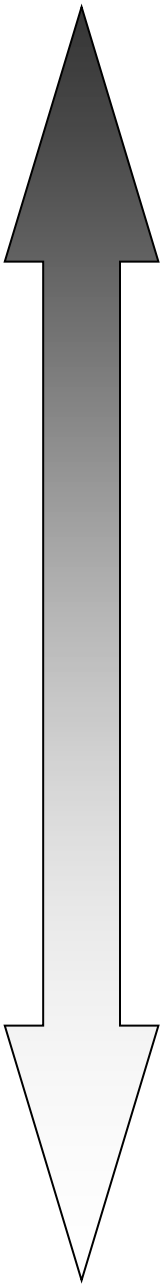
- Infrastructure funding is under pressure.
- Legislative changes have been made to address infrastructure funding.
- Dramatic increases in taxes and charges coming.
- Issues to be discussed:
  - conceptual framework for legislation;
  - problems of traditional funding mechanisms;
  - infrastructure funding under Local Government Act;
  - infrastructure funding under Local Government (Planning and Environment) Act;
  - infrastructure funding under transitional arrangements of Integrated Planning Act;
  - infrastructure funding under Integrated Planning Act.

Conceptual framework

- Infrastructure defined.
- Categories of infrastructure:
  - private benefit infrastructure – user pays;
  - community infrastructure – funded by taxes and rates.
- Infrastructure continuum.

Figure 1 Infrastructure continuum

Items with a high warranted user subsidy component



- Primary Schools
- Secondary Schools
- Metropolitan Open Space
- Emergency Services
- Community Services
- Police
- Community Health Care
- Pre-Schools
- Neighbourhood Centres
- Library Services
- Hospitals
- District Open Space
- Child Care Centres
- Universities and TAFE
- Sporting, Recreation and Cultural Facilities
- Public Transport
- Arterial Roads
- Local Parks
- Dams
- Water Treatment Plants
- Truck Water Mains
- Water Supply Pump Stations, Service
- Reservoirs, Feeder Mains and Lead-in Mains
- Estate Reticulation
- (Sewerage) Water Treatment and Outfall
- Trunk Sewer
- Pump Stations, Intermediate Carriers and Lead-in Mains
- Estate Sewer Reticulation
- District Stormwater Management
- Estate Stormwater Management
- Sub-Arterial Roads
- Distributor Roads
- Trunk Energy
- Estate Roads
- Energy Reticulation
- Telecommunications

Items with a high 'user pays' component

Source: Better Cities Program 1993 – 27-28

Infrastructure funding

- Traditional funding mechanisms.
- Problems of funding mechanisms:
  - subsidies;
  - double dipping;
  - forward planning constrained;
  - increased cost of housing and windfall gains;
  - poor infrastructure delivery;
  - poor maintenance and replacement;
  - backlogs;
  - legal uncertainty.

Infrastructure funding under Local Government Act

- General rate.
- Special rate or special charge.
  - Bases:
    - infrastructure benefits land or occupier – eg surveillance cameras in mall, dredging of canals or lakes;
    - land or occupier contributes to need for infrastructure – eg on street parking.
  - Common law test of reasonableness.
  - Overall plan.
- Differential general rate:
  - different rates to different categories of land;
  - categories based on criteria;
  - rational process required.

Infrastructure funding under Local Government (Planning and Environment) Act

- Limited relevance as repealed on 31 March 1998.
- Infrastructure planning was specified in local planning policies:
  - specific provisions for sewerage, water supply and parkland;
  - general power for other items of infrastructure.
- Infrastructure funding:
  - conditions on development approvals – reasonable or relevant test;
  - conditions for sewerage, water supply and parkland generally lawful if in accordance with local planning policy;
  - conditions for other infrastructure – reasonable or relevant test.
- Example – roadworks conditions unlawful if:
  - development only consuming capacity and not requiring an upgrade; or
  - upgrade caused by growth in the network not development.

Transitional infrastructure planning and funding framework under IPA

- Transitional infrastructure planning framework under IPA:
  - planning scheme policies about infrastructure.

- Transitional infrastructure funding framework under IPA:
  - condition for cost of establishment, operation and maintenance of infrastructure;
  - condition must be relevant but not an unreasonable imposition or be reasonably required.
- Challenges to conditions imposed under planning scheme policies for transport infrastructure and parkland – *Hickey Lawyers v Gold Coast City Council*.
- Planning scheme policies adopted following methodology:
  - define catchment;
  - define ultimate population;
  - define infrastructure to service the ultimate population;
  - define cost to provide infrastructure;
  - divide the cost by population (parks) or trip ends (traffic) to get $ contribution per person/trip end.
- Applicant challenged conditions not the planning scheme policies.
- Applicant had two arguments:
  - contributions did not have a nexus with the development – infrastructure was remote from the development and needed for uncertain population;
  - contributions imprecise.
- Court held that a condition imposed in respect of lawful planning scheme policy will ordinarily be lawful.
- Essentially the same test as the PEA for sewerage and water supply headworks and parkland.
- Two questions:
  - Is the planning scheme policy lawful?
  - Is the contribution lawful? If 1 is yes then 2 is a likely yes.
- Planning scheme policy likely to be lawful if:
  - contribution is directly proportional to the developments contribution to the need for the additional infrastructure;
  - contribution is calculated on the same basis for all comparable development;
  - contribution bears the same proportion to the cost of the ultimate infrastructure network as the impact generated by the development bears to the impact generated by all other development.

Infrastructure planning and funding framework under IPA

- Infrastructure – two types:
  - State infrastructure.
  - Development infrastructure – sewerage, water, transport, parks and community facilities.
- Development infrastructure – two types:
  - Trunk – in priority infrastructure plan.
  - Non-trunk – not in priority infrastructure plan.
- Infrastructure planning under IPA:
  - IPA Planning Schemes.
  - Priority infrastructure plans.
- Infrastructure planning framework:
  - Priority infrastructure plan – integrates land use and infrastructure planning.
  - Basis for infrastructure funding framework.
- Infrastructure funding framework:
  - Infrastructure charges.
  - Condition requiring supply of:
    - non-trunk infrastructure;

        - necessary trunk infrastructure;
        - infrastructure by State infrastructure providers.
    - Condition for the cost of:
        - additional trunk infrastructure supplied by local government;
        - additional infrastructure supplied by State infrastructure provider.
- Infrastructure funding framework commences when a priority infrastructure plan included in IPA Planning Scheme.

Infrastructure planning framework under IPA

- Priority infrastructure plan (PIP):
    - infrastructure planning benchmark;
    - basis for infrastructure funding.
- PIP:
    - priority infrastructure area;
    - planning assumptions;
    - desired standards of service;
    - plans of trunk infrastructure;
    - infrastructure charges schedule;
    - State-controlled roads.
- PIP used to assess development application.

Infrastructure charge under IPA infrastructure charges schedule

- Infrastructure charge on trunk infrastructure under an ICS in a PIP.
- Infrastructure charges notice:
    - applicants; or
    - owners of land.
- Notice requiring land to be given to local government:
    - fee simple;
    - trust for local public parks infrastructure or local community facilities.
- Infrastructure charge recovered as a debt or rate.
- Local government must use infrastructure charge on trunk infrastructure.

Infrastructure charges under regulated infrastructure charges schedule

- Low growth local governments may use regulated ICS.
- Regulated infrastructure charge on trunk infrastructure charge under a regulated ICS made by Council resolution.
- Regulated infrastructure charges notice to applicant only.
- Regulated infrastructure charge recovered as a debt or rate.
- Local government must use regulated infrastructure charge to provide infrastructure.

Condition requiring supply of infrastructure

- Conditions requiring:
    - supply of non-trunk infrastructure;
    - supply of necessary trunk infrastructure;

  - supply of infrastructure or works to protect infrastructure;
  - works to protect or maintain State-controlled roads.
- Condition must be relevant but not an unreasonable imposition and reasonably required.

Condition requiring supply of infrastructure – non-trunk infrastructure

- Supply of non-trunk infrastructure:
  - internal infrastructure network;
  - connection to external infrastructure network;
  - protect safety or efficiency of infrastructure network.
- Imposed by local government.

Condition requiring supply of infrastructure – trunk infrastructure

- Supply of trunk infrastructure:
  - trunk infrastructure is inadequate;
  - trunk infrastructure is necessary but not available;
  - trunk infrastructure crosses premises.
- Condition is lawful even if trunk infrastructure is required to service other premises.
- Imposed by local government.

Condition requiring supply of infrastructure – State infrastructure

- Supply of infrastructure or works to protect State infrastructure.
- Imposed by State infrastructure provider.

Condition requiring money for additional infrastructure

- Condition requiring money for cost of:
  - additional trunk infrastructure;
  - additional State infrastructure;
  - protecting State owned or State-controlled transport infrastructure.
- Condition must be relevant but not an unreasonable imposition and reasonably required.
- No condition on establishment, operation or maintenance costs of State infrastructure or development infrastructure.

Cost of additional trunk infrastructure of local government

- Condition can require money if:
  - development is inconsistent with PIP;
  - development imposes additional trunk infrastructure costs on local government;
  - an acknowledgment notice was issued identifying that a condition would be imposed.

Cost of additional infrastructure of State infrastructure provider

- Condition can require money if:
  - development is inconsistent with PIP;
  - development will impose additional infrastructure costs on State infrastructure provider.
- Condition can require money to protector or maintain State-owned or State-controlled transport infrastructure.

Infrastructure agreements

- Infrastructure agreements – an alternative to infrastructure funding mechanisms.
- Infrastructure agreements attach to land and bind successors in title.
- Infrastructure agreement cannot fetter discretion.

Conclusions

Table 1 Summary of infrastructure funding mechanisms

Type of infrastructure	Category of infrastructure as defined by IPA	Infrastructure charging mechanisms						
		Special rate or special charge (LGA)	Differential general rate (LGA)	Conditions of a development approval (PEA)	Conditions of a development approval (Transitional provision of IPA)	Conditions of a development approval (IPA)	Infrastructure charges and regulated infrastructure charge (IPA)	Infrastructure agreement (IPA)
Community infrastructure	State infrastructure being State-controlled roads infrastructure	×	×	✓	✓	✓	×	✓
	State infrastructure being: – State schools infrastructure – public transport infrastructure – emergency services infrastructure	×	×	×	×	✓	×	✓
	Other State infrastructure	×	×	×	×	×	×	✓
Private benefit infrastructure	Development infrastructure	✓	✓	✓	✓	✓	✓	✓
	Other private benefit infrastructure	×	×	✓	✓	✓	×	✓

- Infrastructure funding framework of IPA will dramatically increase infrastructure contributions.
- Infrastructure funding mechanisms will be used.
- Conflicts are inevitable.

This paper was presented to the Queensland Law Society 2nd Annual Property Law Masterclass, 7 September 2005.

Colin Biggers & Paisley

Advising clients about the legality of conditions and infrastructure charges

Ian Wright

This article discusses the legality of conditions and infrastructure charges under the *Integrated Planning Act 1997* (Qld)

November 2005

Introduction

- IPA test for lawful conditions.
- Common law tests for lawful conditions.
- Infrastructure conditions.
- Infrastructure charges.

IPA tests for lawfulness of conditions – legislative provisions

- Specific power to impose conditions.
- Prohibitions on certain conditions.
- Tests for lawfulness of conditions.

IPA tests for lawfulness of conditions – specific power to impose conditions

- How long a use can continue.
- When development may start.
- When development must be completed.
- Payment of security under infrastructure agreement.

IPA tests for lawfulness of conditions – specific prohibitions on conditions

- Inconsistent with earlier development approval.
- Infrastructure outside IPA infrastructure charges regime.
- No works by an entity other than the applicant.
- No access restriction strip.
- No time limit for approval for a network of community infrastructure.

IPA tests for lawfulness of conditions – lawfulness of conditions

- Section 3.5.30 of IPA:
  - relevant to, but not an unreasonable imposition on the development;
  - reasonably required in respect of the development;
  - examples of application of these tests.

Common law tests for the lawfulness of conditions – common law principles

- The condition must be for a planning purpose.
- The condition must fairly and reasonable relate to the application.
- Not so unreasonable that no reasonable planning authority could have imposed it.
- The condition must be certain.

Common law tests for the lawfulness of conditions – uncertain conditions

- Conditions which alter the development.
- Conditions which lack finality.
- Conditions which are unenforceable.

Infrastructure Conditions – legislative provisions

- Conditions must be imposed under a planning scheme policy.
- Two legal requirements:
  - the planning scheme policy must be lawful;
  - the condition must meet the IPA and common law tests for validity of conditions.

Application of statutory test to infrastructure contributions

- *Hickey Lawyers v Gold Coast City Council* [2005] QPEC 22:
  - the basis of the planning scheme policy;
  - the test in section 3.5.30 of IPA.

Lawfulness of a planning scheme policy

- Methodology must produce a contribution directly proportional to the additional need.
- Methodology must produce a contribution calculated on the same basis for all comparable development.
- Methodology must produce a contribution in proportion.

Infrastructure funding framework under IPA – The differences

- Deadline of 31 March 2006.
- How the new framework will be different:
  - expansion of categories of infrastructure;
  - introduction of priority infrastructure plans;
  - limits on conditioning a development approval;
  - introduction of infrastructure charges notices.

Infrastructure – a broader concept

- IPA concept of infrastructure:
  - State infrastructure;
  - development infrastructure.
- Sub categories of "development infrastructure":
  - trunk infrastructure;
  - non-trunk infrastructure.

How is the new framework broader?

- Includes State infrastructure.
- Extends beyond traditional categories.
- Road infrastructure extended to a broader range of transport infrastructure.
- Extension in category for parks.
- Inclusion of local community facilities.

Priority infrastructure plans

- Requirements for contents of PIP.
- Inclusion in planning scheme.
- Infrastructure charges notices.
- Charges not subject to IPA and common law tests.

Infrastructure conditions

- Three categories of power to impose conditions:
  - relating to infrastructure other than State infrastructure and development infrastructure;
  - requiring actual supply of infrastructure;
  - requiring monetary payment for supply of infrastructure.

Conditions for infrastructure other than development infrastructure or State infrastructure

- Example: gas, electricity, telecommunications.

Conditions requiring the supply of infrastructure

- Applies to four types of infrastructure:
  - non-trunk infrastructure;
  - necessary trunk infrastructure;
  - infrastructure or works to protect local government development infrastructure;
  - works to protect or maintain the safety and efficiency of State owned or State controlled transport infrastructure.

Conditions requiring monetary payments for infrastructure

- Can be imposed in two circumstances:
  - where required to protect or maintain the safety or efficiency of State owned or State controlled transport infrastructure;
  - where development is inconsistent with a PIP.

Implications of inconsistency with a PIP

- Development in conflict with the planning scheme.
- Public sector entity cannot be required to provide infrastructure.
- Powerful position of a public sector entity.

Conclusions

- Matters to note about the new framework.
- Methodology for examining infrastructure contribution conditions.
- Issues for the future.

This paper was presented at the Property Law conference, 18 November 2005.

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