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The new lapsing of approvals regime in the IPOLA Bill 2006

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1. Introduction

The *Integrated Planning Act 1997* ("IPA") commenced on 30 March 1998. At last count there had been 49 pieces of amending legislation.

When passed, the *Integrated Planning and Other Legislation Amendment Bill 2006* ("**IPOLA Bill 2006**"), which was introduced into Parliament on 7 March 2006, will bring up the half century of amendments for IPA.

The focus of this paper is the new lapsing of approvals regime contained in the Bill. The relevant provision is clause 39 of the IPOLA Bill which replaces the existing sections 3.5.21 to 3.5.23 of IPA.

This reform appears to address the practical difficulty in carrying out development, particularly for large scale development, within the current time frames under IPA so as to avoid the lapsing of the relevant approval. This has arisen as a result of the Court of Appeal decision in *McDonald v Douglas Shire Council (2003) 126 LGERA 96*¹, the current wording of the IPA lapsing provisions², and the tight conditions in the building market which have prevailed in recent times.

The key change to the approval lapsing regime is the "roll forward" provisions which provide a more generous and logical timeframe for the lapsing periods of material change of use of premises ("MCU") and reconfiguring a lot ("ROL") approvals.

2. What has stayed the same?

Many of the concepts remain unchanged. Broadly speaking, the same "default" timeframes for lapsing apply³, an approval can still provide for a different timeframe for lapsing⁴ and an extension can be granted before the approval lapses.⁵ However, the new provisions do made detailed changes to the implementation of these concepts.

3. The "roll forward" provisions

The most significant change is that the relevant periods for the lapsing of MCU approvals and ROL approvals are "rolled forward" and are taken to have started again when subsequent approvals for the same development take effect.⁶ These amendments are quite detailed and not susceptible to general rules which will apply in all cases. However, the features of the "roll forward" mechanism are as follows:-

¹ Which, in very general terms, applied a more stringent test as to when a development could be said to have "commenced" than had previously been applied by the Planning and Environment Court.

² For example, section 3.5.21(1)(a) of IPA provides that an MCU must "happen" within the currency period as opposed to the "substantially start" requirement for an approval other than for an MCU or ROL in section 3.5.21(1)(c) of IPA.

³ These are provided in section 3.5.21(1) to (3) of Clause 39 of the IPOLA Bill 2006. For an MCU approval this is 4 years. For an ROL approval this is 2 years if no operational works are required and 4 years if they are required. For approval of other development this is 2 years.

⁴ Section 3.5.21(1) to (3) of Clause 39 of the IPOLA Bill 2006.

⁵ Sections 3.5.22 and 3.5.23 of Clause 39 of the IPOLA Bill 2006.

⁶ Section 3.5.21 (4) of Clause 39 of the IPOLA Bill 2006.

- It only applies to MCU approvals and ROL approvals.⁷
- The relevant period for the lapsing of the approval is taken to have started on (or "rolled forward" to) the day on which the latest "related approval" takes effect.⁸ The timeframe for lapsing can therefore roll forward more than once through a chain of related approvals.
- A "related approval" is separately defined for an MCU approval and an ROL approval. The MCU definition makes a further distinction between a preliminary approval on the one hand and a development permit or a preliminary approval which states related development is self-assessable or exempt development on the other. There is a further distinction between the first related approval and subsequent related approvals. These are summarised in the table below:-

Types of approval for which a relevant period for lapsing can be "rolled forward"	First development permit which will amount to a "related approval" for this approval	Further development permits which will amount to a "related approval" for this approval
Preliminary approval for an MCU	Development permit for the MCU	Development permit for building work or operational work necessary for the MCU
Development permit for an MCU or a preliminary approval for an MCU which states related development is self-assessable or exempt development	Development permit for building work or operational work necessary for the MCU	Development permit for building work or operational work necessary for the MCU
Preliminary approval for an ROL	Development permit for the ROL	Development permit for operational work related to the ROL
Development permit for an ROL	Development permit for operational work related to the ROL	Development permit for operational work related to the ROL

- In each case, the related approval must be applied for within 2 years of either the day the original approval, or the latest related approval, took effect⁹. It is therefore not necessary to obtain the related approval within this 2 year period. It must be

⁷ Section 3.5.21 (4) of Clause 39 of the IPOLA Bill 2006.

⁸ Section 3.5.21 (4) of Clause 39 of the IPOLA Bill 2006.

⁹ Section 3.5.21 (7) of Clause 39 of the IPOLA Bill 2006. Refer to section 3.5.19 of IPA for when a development approval takes effect.

applied for within the 2 year period but it may be approved and take effect outside this period.

- Only approvals given by a local government or a private certifier in the case of an MCU approval or a local government in the case of an ROL approval can be related approvals.¹⁰ Approvals given by other assessment managers are not related approvals.¹¹
- With the exception of a development permit following a preliminary approval, the related approval for an MCU approval must be "necessary" for the MCU. This is to be contrasted with related approvals for an ROL approval which need only be "related" to the ROL. Interpretation of the words "necessarily associated with" in the context of other IPA provisions¹² give an indication of the significance of this distinction and the likely factors which will be relevant in determining what is a "necessary" approval.

4. Other changes to the lapsing provisions

Other issues arising from the new lapsing provisions, apart from the roll forward provisions, are discussed below.

The "currency period" terminology has been removed. However, the term "relevant period" is now used.¹³

For an MCU approval, the "first change" of use must "happen"¹⁴ within the relevant period.¹⁵ For an ROL approval, "a plan" for the ROL must be lodged with the local government under section 3.7.2(2)¹⁶ within the relevant period.¹⁷ The EN indicates this is to ensure that staged approvals do not lapse provided the first stage meets the relevant requirements to avoid lapsing rather than all stages.¹⁸ Despite the stated intention of this section in the EN, it is possible it will have broader application. For example, if an MCU approval is not stated to be for staged development but is for more than one use, it may not lapse if one of those uses "happens" within the relevant period. However, complications may arise if the approval is not capable of being construed as allowing only one use to occur in advance of the others. This is not always an easy matter to resolve in a given case.

¹⁰ Section 3.5.21(7) of Clause 39 of the IPOLA Bill 2006.

¹¹ Page 16 of the EN.

¹² *Boral Resources (Qld) Pty Ltd v Cairns City Council* (1996) 91 LGERA 323; *Barro Group Pty Ltd v Girgenti* [2001] QPELR 175.

¹³ See, for example, section 3.5.21(1) of Clause 39 of the IPOLA Bill 2006.

¹⁴ The use of the word "happen" is consistent with the current lapsing provisions of IPA.

¹⁵ Section 3.5.21(1) of Clause 39 of the IPOLA Bill 2006.

¹⁶ In the "old" terminology this was the lodgement of survey plans for sealing.

¹⁷ Section 3.5.21(2) of Clause 39 of the IPOLA Bill 2006.

¹⁸ Page 15 of the EN.

The separate regime for lapsing of a development approval resulting from a development application (superseded planning scheme)¹⁹ has been removed. These approvals are now subject to the general lapsing provisions applying to all approvals.

As with the current provisions of IPA, there is the ability under the amended section 3.5.21 of the IPOLA Bill 2006 to provide an alternative timeframe for the lapsing of an approval. However, an approval must "state" this timeframe. This is a significant change from the current IPA provisions which provide for an alternate timeframe if an approval "states or implies" this. The amendments will ensure that there is no longer scope to argue the existence of "implied" alternative timeframes for lapsing in an approval.

Assessment managers will still be able to require completion of development within a certain timeframe under the new section 3.5.21A of the IPOLA Bill 2006. It is very similar to the current sections 3.5.31(1)(c) and 3.5.31 (2) of IPA. These provisions have been moved and consolidated into the new section 3.5.21A to provide a "one stop shop" for lapsing under IPA.²⁰

The new section 3.5.21A allows a condition to be imposed to limit the time for completion of development, or an aspect of development, provided it meets the tests for the lawfulness of a condition under Division 6 of Part 5 of IPA, including the reasonable and relevance test. It provides for the lapsing of the approval, or part of the approval, only if the development, or relevant aspect of development, is started but not completed within the timeframe set out in the condition.²¹ The requirement to have started and not completed is curious. It raises some uncertainty as to whether the approval lapses if the development is not started and not completed within the timeframe provided in a condition.

Section 3.5.21A(4) of the IPOLA Bill 2006 ensures that security paid in relation to a development approval that lapses due to a failure to complete development within a time limit set out in a condition can still be applied to complete the development. Section 4.3.1 of the IPOLA Bill 2006 has also been amended to ensure that a development offence is not caused when completing development in this way. This is in contrast to section 3.5.21(7) of IPA which provides that security for a development approval which lapses due to a failure to commence must be refunded.

Sections 3.5.22 and 3.5.23 of the IPOLA Bill 2006 maintain the ability to request an extension of the relevant period for an approval. The key changes are:-

- If section 3.2.1(5) of IPA²² would have applied to require evidence to accompany an application for the approval at the time the request is made, the request must be accompanied by the agreement of the chief executive from whom that evidence would have been required.²³ This provides some consistency with section 3.2.1(5) of IPA. However section 3.2.1(5)(a) of IPA provides that only evidence of the allocation or entitlement to the resource is required to make an application, not the

¹⁹ Currently contained in 3.5.21(4) of IPA.

²⁰ Page 16 of the EN.

²¹ Section 3.5.21A(2)(b) of Clause 39 of the IPOLA Bill 2006.

²²Section 3.2.1 (5) of IPA provides that if an application involves the taking or interfering with a prescribed State resource, if required by a regulation, the application must be accompanied by certain evidence relating to an allocation or entitlement to the resource.

²³ Section 3.5.22(4) and (5).

evidence of the chief executive relating to this. It is unclear whether section 3.5.22(5) of the IPOLA Bill 2006 applies in these circumstances to require the chief executive's agreement to accompany the request. If so, it is not clear why the legislation has required this when evidence of an allocation or resource was all that would have been required to accompany the original application for the approval.

- Section 3.5.23 now provides for the matters which the assessment manager must have regard to in deciding a request to extend a relevant period for an approval. It is not intended that the assessment process involve a "*re-litigation of the full range of matters considered in originally approving the application. If the assessment manager considers it necessary to reconsider such matters, the scheme of the Act is that the request for extension should be refused, and a new IDAS application should be made...*".²⁴
- The relevant matters are as follows:-
 - The consistency of the approval, including its conditions, with the current laws and policies applying to the development, for example, infrastructure charges or contributions.²⁵
 - The community's awareness of the development approval.²⁶
 - If the request were refused, the availability of rights to make a submission for a further development application and the likelihood they may be exercised.²⁷
 - The views of any concurrence agency for the approval.²⁸

There is a specific provision addressing transitional arrangements for the new lapsing provisions.²⁹ The new lapsing provisions apply to approvals whether granted before or after the commencement of these provisions subject to the following:-

- The currency period shall be taken to be a reference to the "relevant period".
- It will only apply to approvals which have not lapsed.
- Applications for an extension of a currency period under section 3.5.22 of IPA must be decided as if the new provisions had not commenced.
- The new provisions will not apply to approvals which have not lapsed due to the operation of s.6.5.1 of IPA.³⁰

²⁴ Page 18 of the EN.

²⁵ Section 3.5.23(1)(a) of Clause 39 of the IPOLA Bill 2006.

²⁶ Section 3.5.23(1)(b) of Clause 39 of the IPOLA Bill 2006.

²⁷ Section 3.5.23(1)(c) of Clause 39 of the IPOLA Bill 2006.

²⁸ Section 3.5.23(1)(d) of Clause 39 of the IPOLA Bill 2006.

²⁹ Section 6.7.2 of Clause 39 of the IPOLA Bill 2006.

³⁰ This provision extended the currency period for MCU approvals given after 30 March 1998 to 30 March 2006 or the end of the currency period for that approval, whichever happened later, if, during the currency period, a development permit for works associated with the MCU took effect and the works were substantially started.

5. Concluding comments

The reform of the lapsing provisions of approvals is a significant and perhaps overdue amendment to IPA. The key change to allow the roll forward of MCU and ROL approvals is a logical and sensible approach to the practical difficulties which have been experienced in recent times in carrying out development within the relevant timeframes so as to avoid the lapsing of approvals. However, some uncertainty still remains with some aspects of the new lapsing regime and caution should be exercised when applying these provisions in a particular fact scenario.

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