REFORMING QUEENSLAND'S PLANNING LAWS: BRIEFING NOTE ON THE PROPOSED LEGISLATION

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The planning reform bills were tabled in the Queensland Parliament on 12 November 2015. There are three bills that together are proposed to repeal and replace the current Sustainable Planning Act 2009 (SPA) being the:

- Planning Bill 2015;
- Planning and Environment Court Bill 2015 (P&E Court Bill); and
- Planning (Consequential) and Other Legislation Amendment Bill 2015 (Consequential Amendments Bill).

The Bills have been referred to the Infrastructure, Planning and Natural Resources Committee to report to the House by 21 March 2016. Submissions on the Bills can be made to the Committee until Monday, 18 January 2016.

In addition to the Bills, the State has released a number of draft statutory instruments under the proposed legislation for public consultation until 5 February 2016. The draft instruments that have been released are the:

- draft Planning Regulation;
- draft Development Assessment Rules;
- draft Plan Making Rules; and
- draft Infrastructure Designation Guidelines.

Fact sheets and other supporting information are also available.

The Bills represent the most drastic overhaul of Queensland's planning laws since the introduction of the Integrated Planning Act 1997 and are the culmination of the planning reform process that has now been ongoing for a number of years.

The Bills introduce changed terminology for many of the planning concepts that would be retained, and de-regulates and streamlines a number of processes that exist under SPA. There are a number of matters under SPA that are not proposed to be continued under the Bills, including:

- State planning regulatory provisions and standard planning scheme provisions (although elements will be continued through other instruments, including the Regulations);
- the EIS process; and
- compliance assessment.

In this paper we examine some of the essential aspects of the Bills.

PURPOSE OF THE PLANNING BILL

The purpose of the Planning Bill is expressed to be "to establish an efficient, effective, transparent, integrated, coordinated, and accountable system of land use planning, development assessment and related matters that facilitates the achievement of ecological sustainability."

As for SPA, the Act is expressed to bind all persons, including the State, but does not bind the Coordinator General when performing functions under the State Development and Public Works Organisation Act 1971.

Planning instruments

Similarly to SPA, the Planning Bill provides for two types of planning instruments:

- **a State planning instrument**, which is a State planning policy or a regional plan; and
- **a local planning instrument** which is a planning scheme, temporary local planning instrument or planning scheme policy.

State planning regulatory provisions and the standard planning scheme provisions would be discontinued, however some aspects of these instruments (eg. the South East Queensland Koala Conservation State Planning Regulatory Provisions) are intended to be continued through regulations.

The hierarchy in the case of inconsistency is that:

- a State planning policy applies instead of a regional plan or local planning instrument;
- a regional plan applies instead of a local planning instrument;
- a planning scheme applies instead of a planning scheme policy; and
- a temporary local planning instrument applies instead of a planning scheme policy.

The contents of local planning instruments are to be prescribed by regulation, and the Minister is to make guidelines and rules for making local planning instruments. The process for making a planning scheme will be contained in a notice given to the local government by the chief executive, prepared having regard to the Minister's guidelines.

That notice will set out the requirements for public consultation and how the local government must publish a notice after the planning scheme is made.

The duration of a temporary local planning instrument is extended to up to two years.

DESIGNATING LAND

Designations of land may be made by the Planning Minister, or by a local government. The current ability for any Minister to designate land is not continued. To designate land, the designator of land must be satisfied that:

- the infrastructure will satisfy statutory requirements, or budgetary commitments, for the supply of infrastructure; or
- there is or will be a planning need for the efficient and timely supply of infrastructure.

As for SPA, the designation can only be made if the Minister is satisfied there has been adequate environmental assessment and consultation in carrying out the environmental assessments, however the identified environmental assessment processes are not prescribed as the only way in which the Minister can be so satisfied. The Planning Bill provides that the Minister is taken to be satisfied if the guidelines process adopted by regulation has been followed, or may be satisfied of those matters in another way.

The Planning Bills provide for increased consultation between the Planning Minister and local governments in making designations, which reflects that the effect of the designation is to exempt development from both local and State planning instruments.

Development in relation to infrastructure identified in a designation is accepted development, except to the extent the development is building work that is building assessment work under the Building Act. Unlike the position under SPA, development under the designation is exempt from both State and local planning instruments, with the exception of building work.

For designations made under the current SPA, development carried out under these designations after the new Act commences will be exempt against the planning scheme or for reconfiguration of a lot. Otherwise the category of development under SPA will apply.

DEVELOPMENT ASSESSMENT: INSTRUMENTS

There are two key documents that define the development assessment process.

The **categorising instrument** which is a regulation, or a "local categorising instrument" (planning scheme, a temporary local planning instrument or a variation approval to the extent that approval does any of the following) identifies:

- the category of development (prohibited, assessable or accepted); and
- category of assessment (code or impact assessable); and
- the matters that an assessment manager must assess assessable development against (**assessment benchmarks**).

The **development assessment rules** must be made by the Minister and prescribed by regulation. The development assessment rules **must** provide for:

- how notification is required to be carried out for development applications for which public notification is required; and
- the consideration of properly made submissions,

and **may** provide for:

- the period within which a development application may be taken to be properly made; or
- the effect on a development application of the expiry of a time limit under, or of a contravention of, the rules (like the lapsing of the application); or
- the revival of lapsed applications; or
- how and when a referral agency may change its response before a development application or change application is decided; or
- the standard conditions for a deemed approval; or
- steps for dealing with development approvals, including changing, cancelling and extending development approvals; or
- lapsing of development approvals; or
- the effect on a process of taking certain action under the *Native Title Act 1993* (Cth).

DEVELOPMENT ASSESSMENT: CATEGORIES

A categorising instrument may assign a category of development to particular development. The Planning Bill provides for three categories of development:

- **prohibited development** is development for which a development application may not be made. Similar to SPA, a local categorising instrument may only state that development is prohibited development if permitted by regulation;
- **assessable development** is development that can only be carried out with a development approval. A local categorising instrument may not state that development is assessable development if a regulation prohibits the local categorising instrument from doing so;
- **accepted development** does not require a development approval, and is:
  - development, or an aspect of development, that a categorising instrument states is accepted development; or
  - any other development, or aspect of development, that is not categorised by a categorising instrument as prohibited development or assessable development. This is a combination of SPA's exempt and self-assessable categories.

To the extent a local categorising instrument does not comply with the relevant requirements as set out above, or seeks to change the effect of a specified assessment benchmark (or part thereof) to the extent prohibited by a regulation, the instrument has no effect. There are two categories of assessable development.

- **code assessment** which is an assessment that must be carried out only:
  - against assessment benchmarks stated in the categorising instrument for the development,
  - and having regard to any matters prescribed by regulation.

Code assessable applications must be approved

to the extent the development complies with all the assessment benchmarks for the development. Code assessable applications may only be refused if compliance cannot be achieved by imposing development conditions.

- **impact assessment** is an assessment that:
  - must be carried out against the assessment benchmarks in a categorising instrument for the development; and
  - must be carried out having regard to, any matters prescribed by regulation; and
  - may be carried out against, or having regard to, any other relevant matter other than a person's personal circumstances financial or otherwise (for example planning need; the current relevance of the assessment benchmarks in the light of changed circumstances; whether assessment benchmarks or other prescribed matters were based on material errors).

Similar to impact assessment under SPA, this assessment category will require public notification and may be subject to third party appeals.

After carrying out the assessment, the assessment manager must decide to:

- approve all or part of the application; or
- approve all or part of the application, but impose development conditions on the approval; or
- refuse the application

For variation requests – akin to the current preliminary approval that varies a local planning instrument – the assessment manager must have regard to:

- the result of the assessment of that part of the development application that is not the variation request; and
- the consistency of the variations sought with the rest of the local planning instrument that is sought to be varied; and
- the effect the variations would have on any submission rights for later development applications; and
- any other matter prescribed by regulation.

A development application which includes a variation request will require public notification and may be subject to third party appeals.

A variation approval may only categorise development, specify the categories of assessment and/or set out the assessment benchmarks in relation to:

- development that is the subject of the variation approval; or
- development that is the natural and ordinary consequence of the development that is the subject of the variation approval.

The Planning Bill provides for exemption certificates to be given that exempt an owner of land from having to obtain a development approval for assessable development by local government (if the assessment manager) or otherwise the chief executive if:

- each referral agency has agreed in writing to the exemption certificate being given; and

- any of the following apply:
  - the effects of the development would be minor or inconsequential;
  - the development was categorised as assessable development only because of particular circumstances that no longer apply; or
  - the development was categorised as assessable development because of an error.

An exemption certificate has effect for two years, and attaches to premises and benefits each of the owners, the owners' successors in title and any occupiers.

DEVELOPMENT ASSESSMENT: AGENCIES

The Planning Bill removes the distinction between advice and concurrence agencies. An applicant is required to give a copy of the development application to a referral agency where a referral agency is prescribed by regulation, the agency to which the referral agencies' functions have been devolved or delegated, or an agency decided by the Minister to be a referral agency.

The referral agency can direct the assessment manager to:

- give any development approval subject to stated conditions;
- give development approval for only a stated part of the application;
- give only a preliminary approval;
- impose a stated currency period for a development approval given;
- refuse the application for stated reasons.

Decisions of the assessment manager must comply with all referral agency responses (other than to the extent a referral agency's response provides advice), including that conditions must be imposed exactly as stated in the response.

DEVELOPMENT CONDITIONS

The conditions tests remain the same as SPA, in that conditions must:

- be relevant to, but not an unreasonable imposition on, the development or use of premises as a consequence of the development; or
- be reasonably required in relation to the development or use of premises as a consequence of the development.

A development condition may limit how long a lawful use may continue or works may remain in place, state that development must not start until a certain event has occurred (ie. other development permits for the development on the same premises have been given, or other development on the same premises has been substantially started or completed), require compliance with an infrastructure agreement for the land (although cannot require an infrastructure agreement), require development, or a part of development, be completed within a stated period or require the payment of security under an agreement.

A development condition must not:

- require a person other than the applicant to carry out works for the development;
- require a person to enter into an infrastructure agreement;
- other than in accordance with the infrastructure charging provisions, require a monetary payment for infrastructure;
- require an access restriction strip;
- limit the period a development approval has effect for a use or work forming part of a network of infrastructure, other than State owned or State controlled transport infrastructure;
- be imposed for water infrastructure about a matter for which the SEQ Water Act requires a water approval; or
- be inconsistent with a condition of an earlier development approval unless the earlier condition was imposed by the same person and the applicant and owner otherwise agree in writing.

The Planning Bill provides a similar process for negotiated decision notices to be issued as under the current legislation.

CHANGING APPROVALS

A change application for a development approval must be made to the responsible entity, being:

- a referral agency for a minor change to a development condition imposed by a referral agency;
- the P&E Court where the development approval was given because of a court order and there were properly made submissions for the application; or
- otherwise the assessment manager.

The process for assessing and deciding the change to the approval depends on whether or not the change is a minor change. The definition of minor change is substantially similar to the SPA definition.

For changes other than minor changes, the responsible entity must assess the application under the original assessment provisions, however, public notification does not apply if the change is not a minor change only because the change may cause referral to a referral

agency (if there were no referral agencies for the original development application),referral to extra referral agencies or a referral agency to assess the change application against extra matters.

An extension application may also be made to the assessment manager at any time before a development approval lapses to extend the currency period for that development approval. In determining an extension application, the assessment manager may consider any matter the assessment manager considers relevant, even if the matter was relevant to the assessment of the development application.

LAPSING APPROVALS

The standard lapsing periods are longer than the existing SPA provisions, and are:

- for a material change of use – if the first change does not happen within six years;
- reconfiguration of a lot – four years;
- any other aspect of the approval – two years; and
- for a variation application – five years.

MINISTERIAL POWERS AND CALL-INS

The Ministerial powers are expressed to apply to more than just a development application, and can also apply to change representations, a change application, an extension application or a cancellation application.

Unlike the lapsed Planning and Development Bill 2014, the current notification and consultation process before the call in power is exercised is continued by the Planning Bill, although consultation obligations are not expressed to apply to other Ministerial powers. Timeframes for the consultation process are deferred to the regulations, although if an application is called in, the notice must be given within 20 business days after the end of the representation period.

The call in notice must state the reasons for the call in, the State interest giving rise to the call in, and (except for a cancellation application) whether the Minister intends to assess and decide the application or direct the decision maker to assess all or part of the application, and the point in the development assessment process from which the process must restart.

In deciding the application, the Minister may consider anything the Minister considers relevant. The Minister is not bound by any referral agency response.

INFRASTRUCTURE

The infrastructure charging provisions in the Planning Bill largely replicate the infrastructure charging provisions from SPA that commenced on 4 July 2014, with requisite changes to terminology, and in recognition of the discontinuance of SPRPs.

The current Adopted Infrastructure Charges SPRP is to be replaced by regulation which will prescribe charges.

On commencement, the SPA will continue to apply to:

- charges notice given before 4 July 2014, unless the notice relates to a development approval that is changed or extended; and
- charges payable before 4 July 2014.

Infrastructure agreements entered into before commencement will also continue to have effect, even if the terms and conditions could not be imposed under the Planning Act.

OFFENCES, ENFORCEMENT AND APPEALS

The offences include:

- carrying out prohibited development, unless under a development approval for a superseded scheme development application;
- carrying out assessable development without all necessary development permits;
- contravening a development approval; and
- using premises unless the use is a lawful use, or , for designated premises, complies with requirements about the use of premises in the designation.

The maximum penalties for offences have been increased significantly, increasing from an upper limit of 1,665 penalty units under SPA to 4,500 penalty units under the Planning Bill.

Show cause and enforcement notices are continued under the Planning Bill.

The Planning Bill allows the chief executive to appoint “inspectors” who may be officers of the department, or other persons prescribed by regulation. Inspectors have powers under the draft Planning Bill, including to enter into a place with consent or with a warrant for certain purposes.

Chapter 6 of the Planning Bill deals with dispute resolution, setting out the Court or Tribunal where appeals may be made, what matters can be appealed and who the appellant is.

Except where provided for, other decisions under the Planning Bill (e.g. a decision of the Minister) is: "non-appealable", meaning that the decision:

- is final and conclusive;
- "may not be challenged, appealed against, reviewed, quashed, set aside or called in question in any other way under the Judicial Review Act 1991 or otherwise, whether by the Supreme Court, another court, a tribunal or another entity"; and
- is not subject to any declaratory, injunctive or other order of the Supreme Court, another court, a tribunal or another entity on any ground.

A person who is aggrieved by a decision, may, however, apply to the Supreme Court for a review of the decision on the ground of jurisdictional error.

The P&E Court Bill continues the Planning and Environment Court through its own legislation.

Relevantly, once enacted:

- existing judges of the Court will become P&E Court Judges;
- the alternative dispute resolution process, facilitated by an ADR Registrar, is retained.
- the current rules of the Court will continue for six months from commencement and are taken to be the rules of the P&E Court, unless new rules are made earlier, and are adapted as required to enable the operation of the rules to all enabling Acts;
- existing orders and directions made prior to commencement will continue in effect as orders or directions of the P&E Court;
- existing proceedings started prior to commencement continue to be decided by the P&E Court under SPA as if the P&E Court Bill and the Planning Bill had not been enacted.
- each party to a proceeding will bear its own costs for the proceeding, apart from in certain limited circumstances, including, for example, where the P&E Court considers:
  - the proceeding was started or continued primarily for an improper purpose, including, for example, to delay or obstruct;
  - the proceeding to have been frivolous or vexatious;
  - an assessment manager, referral agency or local government should have taken an active part in a proceeding and did not do so.

EXISTING USES AND APPROVALS

To the extent an existing use of premises was lawful immediately before the Act commences, the use is taken to be a lawful use on commencement.

A planning instrument (which is a State planning instrument or a local planning instrument) cannot stop a use from continuing, further regulate a use or require a use to be changed. A planning instrument also cannot affect a development after a development approval is given.

TRANSITIONAL PROVISIONS

Generally, documents under SPA continue through to the Planning Bill, as if the document had been made under the Planning Bill. "Documents" is defined to include things such as infrastructure agreements, appointments, development approvals, planning and development certificates, delegations, directions, a call in notice, infrastructure charges notices, planning instruments and resolutions. State planning regulatory provisions and the standard planning scheme provisions cease to have effect on commencement of relevant parts of the Planning Bill.

In summary, the transitional provisions provide that:

- proceedings commenced under SPA continue under SPA, but any appeal is under the Planning Bill;
- the extended lapsing provisions in the Planning Bill do not apply to a development approval given under SPA;
- a person entitled to commence proceedings under SPA who had not commenced proceedings, may only do so under the Planning Bill.
- compensation claims lodged under SPA but not decided continue under SPA.

CONSEQUENTIAL AMENDMENTS

For the most part, the separate Consequential Amendments Bill proposes amendments to a wide range of legislation that will be necessary to reflect the repeal and replacement of SPA, and replaced terminology.

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