IPOLAA 2001

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IPOLAA 2001: Cure or Complexity?

Professor Alan Fogg

IPA was constructed to be the framework for a world class planning and development system. Large ambitions can be expected to have teething problems, but we have now been in the dental surgery for four years.

IPOLAA 2001 deals with the planning system itself rather than roll-ins, and demonstrates three things. First, that official reviews are achingly slow. The IPA review took two years from July 1999, and IPOLAA itself will only seriously begin to be implemented later in 2002.

Secondly, the changes are numerous. The Act runs to 188 pages, and the hub Chapter 3 is replaced. Thirdly, it is difficult to produce an internally coherent world class system in a component jurisdiction in a federation. Practical effects of the centripetal force of Commonwealth power exemplified by the EPBC Act have obliged the introduction of EIS and changes to the IPA purpose.

The latest issue of Planning Matters identifies four key features of IPOLAA 2001:

• Numerous refinements of the IDAS process aimed at improving its day-to-day operation;
• Creation of an EIS process to enable accreditation under the Commonwealth’s environmental legislation;
• Creation of a streamlined “compliance assessment” process for certain works and related checking processes;
• A revamp of the infrastructure and charging provisions to increase flexibility and simplify implementation.

These are bland and dehydrated descriptions. It is proposed to cherry-pick among them, and to add a couple of areas.

1. Precautionary principle

The original definition was “crafted specifically for the purposes of the Act,” but environmentalists thought it was merely crafty. There was, they said, no environmental bottom line. In IPOLAA 2001, it is replaced by the IGAE and EPBC definition. The change appears to be part of compliance with federal requirements for the content of a bilateral agreement.

Too much should not be made of the importance of a statutory purpose. A statutory purpose does not dictate outcomes. It is essentially the modern version of a long title or preamble, and an aid to interpretation in cases of uncertainty and ambiguity. Moreover, the precautionary principle is not directly part of the purpose of ecological sustainability, but one of nine ways of advancing that purpose. There are now numerous PEC decisions on s 1.2.3 that rely on one or more the nine elements. Since the statutory list is a heterogeneous mix reflecting elements of both the environmental and the development ethics, one conclusion may be that the court treats those elements as useful elective and supportive justifications rather than crucial factors.

There is still no environmental bottom line. The main distinctions between the two are that
“careful evaluation,” “avoid where possible” and “risk-weighted consequences” are out, and “lack of full scientific certainty” is in when coupled with the injunction not to use absence of certainty to postpone protective environmental measures. The substituted propositions are unlikely to make any serious difference. Sol Theo⁶ would probably not be differently decided under the new definition. The highwater mark of the significance of the current principle disclosed by Histpark⁷ is likely to stand as an exceptionally devotional implementation. The precautionary principle remains one of many potential ingredients in the applicant’s standard of proof. Where appropriate, conditions will insulate against environmental dangers.⁸

2. EIS

The absence of EIS from the original IPA has been criticised by numerous commentators.⁹ It is not so much the force of those criticisms but the need for a bilateral agreement under the EPBC Act that has resulted in the new Chapter 5 Part 7A. The EPBC Act has been trenchantly criticised on the IPA website in an article by a splenetic but anonymous commentator.¹⁰ The article has now disappeared, no doubt because it has become politically incorrect. Retired professors have no such inhibitions, and sympathy must be extended to that silenced public servant. In particular, the EPBC Act is criticised as outdated 1970s legislation that uses the model of the repealed EPIP Act. It “is complex, highly process-driven” and “seeks to protect the environment by creating elaborate assessment processes and expanded federal bureaucracies.”¹¹ It is also highly discretionary, with floppy definitions of “national environmental significance” and “significant impact.”

The IPOLAA insertion duplicates the discretionary basis of EPBC evaluations. If a proposed development or community infrastructure is a controlled action, under the EPBC Act, then Chapter 7 Part 5A cuts in provided there is written agreement between the Chief Executive DLGP and the developer. A second category of non-controlled actions is to be fleshed out in regulations.¹²

The concession is understandable. Failure to achieve a bilateral agreement will mean a confusing duplication of processes that may discourage international investment or persuade developers of significant major projects to move interstate. But the accommodation may have been bought at a high price. Central to IPA simplicities are desired environmental outcomes and standards, coupled with effective information requests. To add an EIS level is to detract from this model. Further, the only achievable target is an assessment bilateral which leaves the ultimate decision to the federal minister. An approval bilateral is not a serious political possibility.¹³

3. Definitions of use and development

Changes are not merely an orderly consolidation of constituent elements. The replacement of the definition of “use” and its IPOLAA version that the use of premises includes any ancillary use of those premises is a significant alteration to the scope of the development trigger.¹⁴

Developers may use the absence of “necessarily associated with” to shovel a variety of uses into a development application to avoid separate evaluation. It is suggested that the interpretation of “necessarily associated with” in Boral Resources¹⁵ is not improperly restrictive, and furthermore is well established. Secondly, there may be implications for extensions of the application of the bugbear Pioneer Concrete principle.¹⁶ Thirdly, the interpretation of “ancillary” will depend on future case law. This not only detracts from the current reasonable certainty, but will have implications for development control and definitions in planning schemes.

The idea of material change of use is also changed. Only a material increase in intensity or scale counts towards the trigger definition.¹⁷ The alteration reflects the thrust of English case law stemming from a similar definition of material change. It is fascinating to see the Consultation Draft contains draft Guidelines for determining material change that includes a forest of English decisions.¹⁸ There is little doubt that Queensland courts will be faced with the piecemeal task of identifying the appropriate development unit, as the English courts have had to do for a planning unit.
4. Compliant development and compliance assessment

On a first reading, the new compliance stage in Chapter 3 Part 7 is a serious derogation from the presumption against public control in s 3.1.2(1). The presumption represents a major philosophical difference when comparing IPA with the PEDA Bill. Nonetheless, the default category of exempt development is potentially caught by the new compliance stage. Technical rebuttal is that the compliance stage is a free-floating check, and unconnected with the IDAS process. Indeed, it is intended to avoid a double IDAS process for situations where a clear technical standard is available.

An important point is, however, that s 3.7.2(2) is intended to avoid the perceived effect of the court-created finality principle with respect to conditions. Courts have standardly disapproved of approval conditions which postpone a required element of the decision. The Model Regulation in the Consultation Draft contains a number of indicative condition-related controls to be exercised with respect to compliant development. Do these operate to subvert the finality principle? Probably only if substantive decisions that could seriously alter the proposal are postponed. The condition that created several stages of an increasing number of pigs in McBain’s case should clearly not be authorised by regulation.

Two points remain. First, the courts are likely to look closely at implementation of the compliance stage to examine statutory authority. Secondly, is Chapter 3 Part 7 mandatory, or may a developer choose to make a second IDAS application? The drafting is not clear.

5. Other IDAS changes

These are as numerous as those who sheltered beneath Nebuchadnezzar’s tree. However important they may be, they can only attract bullet points:

- The acknowledgment notice disappears. Its departure is unlikely to be mourned, because at best notices were usefully indicative. At worst, they provided a platform for spoiling procedural challenge by third parties that was unconnected with the merits of the proposal.

- An incomplete application can no longer be accepted by the assessment manager. Instead, the application must be properly made otherwise it attracts a non-acceptance notice, which means it lapses unless changed within 20 business days. The PEC is given wider powers to cure by s 4.1.5A. It is doubtful whether this provides a blanket solution. For example, absence of owner’s consent is unlikely to have “substantially restricted” the owner’s rights where an owner has been given no opportunity to consent in the first place. Further, the opportunity to change an application under the new s 3.2.7(2)(b) does not include omission of requirements mandatory for an application to be properly made.

- Public notification has become a floating stage, and may start as early as two business days after the end of the application stage. For the more complex and contentious applications, it may be sensible for the developer to postpone notification until information requests have been dealt with. Further, the notification stage will not need to be repeated if the alternative “would not cause a person to make a substantial submission on reasonable grounds to the thing comprising the change.” What is “substantial”? What are “reasonable grounds”? This is a potentially hazardous provision for the developer.

- Changing or cancelling of development approvals and conditions is now sensibly consolidated in Chapter 3 Part 6. There are drafting oddities plus a puzzle. Applications to change an approval must be refused in specified circumstances. There are two problems. First, the meaning of the awkward phrase if “the development application would, if it could, and had included the change” which precedes the grounds of refusal. Secondly, the words in s 3.4.5(3)(b) are essentially repeated in s 3.6.2(5)(c). This supplies a subjective test.
6. Infrastructure planning and funding

The detailed discussion group is welcome to this mare’s nest. Two brief points. First the ICP and BDS concepts are acknowledged to have caused considerable customer confusion and misunderstandings; the system is substantially changed in IPOLAA 2001 and new concepts introduced. Notably, there is now a distinction between high and low growth local governments in s 5.1.3. Secondly, condition powers reappear like Banquo’s ghost for site-related non-trunk infrastructure. There is no longer a procrustean “one size fits all.”

7. Conclusions

One commentator has described IPA as visionary. The trouble with visions is that they are difficult to translate into an effective reality.

IPOLAA 2001 will not be the end of the story. Moreover, there is a new power in s 3.1.10 for the DLGP to identify codes that can override local planning instruments. Coupled with the notion of guidelines, this may flag progressive centralisation of the system and erosion of local government autonomy. In England, similar ministerial powers have resulted in planning by a blizzard of official circulars with the legislation condemned to a support role.

This area should be carefully watched. Queensland does not need the kind of gargantuan bureaucratised planning system reflected in Desmond Heap’s multiple volume looseleaf English commentary.

Footnotes

2 Explanatory Guide, 7
5 For example, Sol Theo as Trustee for the Solon Theo Family Trust v Caboolture Shire Council [2001] QPELR 101 (sterilisation and decontamination plant); CSR Ltd v Caboolture Shire Council [2001] QPELR 398 (extractive industry proposal bounded by a creek and Pumicestone Passage); Histpark Pty Ltd v Maroochy Shire Council [2001] QPEC059 (water discharge and sensitive seagrass beds); Energex Limited v Logan City Council [2002] QPEC 01 (modular electricity substation).
6 Sol Theo as Trustee for the Solon Theo Family Trust v Caboolture Shire Council [2001] QPELR 101. In Sol Theo the more important question was balance under s 1.2.1. A proposed sterilisation and decontamination plant properly took into account local, regional and State interests. It was not reasonable that commercial enterprise should be obliged to send their products to NSW or Victoria for irradiation by gamma rays and subsequent return to Queensland.
7 Histpark Pty Ltd v Maroochy Shire Council [2001]QPEC 059, where the likely effect of off-site discharge of nutrients onto seagrass beds was the sole reason for dismissing the applicant’s appeal.
8 His Honour Judge Quirk, “Some Thoughts from ‘The Coalface’” (2001/2002) 7(34) QEPR, 149 at 153. The point is also made (152-3) that the necessary practical evaluations of a proposal on appeal raise questions that are rarely answered by legislation alone.
10 “The Commonwealth Environmental Protection and Biodiversity Conservation Act 1999.”
The EIS daddy of the EPIP Act and its subsequent progeny the EPBC Act is the National Environmental Policy Act 1969 in the USA. Professor Daniel Mandelker criticised the NEPA Act in comments that parallel the website criticisms: Environmental and Land Control Legislation (Bobbs – Merrill Co, New York, 1976). It is worthwhile to set out an extract (166):

“[T]he argument can be made that adding the environmental impact statement to existing land development approvals only imposes additional procedural requirements without necessarily securing the added protection of the environment which the impact statement promises.”

Section 5.7A.1, inserted by IPOLAA 2001, s 72.

Because of requirements for an accredited management plan which complies with federal regulation, and which may be disallowed by either house of federal parliament (for which read the Senate).

IPOLAA, s 7 (amending and extending the definition in s 1.3.4).

Boral Resources (Qld) Pty Ltd v Cairns City Council (1996) 91 LGERA 323 (Court of Appeal).

Pioneer Concrete (Qld) Pte Ltd v Brisbane City Council (1980) 44 LGRA 346 (High Court).


IPOLAA, s 8 (replacing the definition of terms used in “development” in s 1.3.5.


Section 3.1.2(2) inserted by IPOLAA, s 27. Section 3.1.2(2) states that development may be compliant development requiring compliance assessment. This is clearly a reference to all the categories of development in s 3.1.2(1). The detail of forthcoming regulations will clarify whether exempt development is, in practice, caught.

Consultation Draft, 40.

Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council (1994) 85 LGERA 408 (Court of Appeal).

McBain v Clifton Shire Council (1995) 89 LGERA 372 (Court of Appeal). The invalid condition required a base level of 20,000 pigs to be only increased in stages of further numbers of 20,000 until a ceiling of 80,000 was reached. Each stage was to be subject to the approval of the local government acting on the advice of a monitoring committee. This constituted an unlawful postponement.

For a sixteenth century legal application of Nebuchadnezzar analogy, see Chudleigh’s Case (1595) 1 Co Rep 1136b, Perriam CB at 1346b.

For example, Powell v Bowen Shire Council [2000] QPELR 45; Jezreel Pty Ltd v Brisbane City Council [2001] QPELR 92.

Sections 3.2.1 and 3.2.3, inserted by IPOLAA, s 27.

Inserted by IPOLAA, s 28.

Section 3.4.3, inserted by IPOLAA, s 27.

Section 3.4.5(3)(b), inserted by IPOLAA, s 27.

Section 3.6.2(5), inserted by IPOLAA, s 27. The wording evokes the childish rhyme: “I would if I could, if I couldn’t how should I? Could you if you wouldn’t – I shouldn’t, should you?”

My source is Penny Fogg, from early memories.

Consultation Draft, Part 5, 3-4.

Section 5.1.1, inserted by IPOLAA, s 59.


Section 5.8, inserted by IPOLAA, s 75. Guidelines are made by the Chief Executive Officer after consultation and the results gazetted. Present powers to issue guidelines are limited to environmental assessment and material change of use. One can expect these limits to disappear once appetite grows.
Precautionary Principle – New definition to better reflect IGAE and Commonwealth EPBC Act. (s1.2.3)

“Development” – Building work, plumbing and drainage work, and operational work definitions combined into a single, inclusive “works” definition. Material change of use definition modified slightly to reflect only increases in intensity. Regulation for defining minor activities that are not material changes of use. (ss 1.3.5; 5.8.2)

“Use” – “ancillary” replaces “incidental to and necessarily associated with”. (s1.3.4)

Existing Uses and Rights – Rewritten and simplified. No intended change of effect. (Ch 1, Pt 4)

Superseded Planning Schemes – New process in Chapter 2 for applying for consideration under superseded planning scheme. Necessary as a result of discontinuation of acknowledgement notices. (s2.1.7A)

Planning Scheme Policies – Clearer description of intended function. Limitation on PSP calling up other local government documents. (ss 2.1.16; 2.1.18; 2.1.23)

Covenants – Section 2.1.25 now subject to section 3.5.33, meaning a valid covenant under a development approval is not void if it conflicts with a planning scheme. “Inconsistent” changed to “conflicts” to emphasise that there must be an “active” conflict with the planning scheme to void a covenant, not merely an inconsistency. (s2.1.25)

Designation – Section 2.6.7 substantially modified to create clearer links with the environmental duties under Chapter 1, while also establishing “best practice” benchmarks for environmental assessment and public consultation which replace the rigid processes under Schedules 6 and 7. These schedules are removed, and remaining procedural requirements included in Part 6 of Chapter 2. Several small amendments add support to entities which commonly take only an interest in land, particularly for corridor infrastructure. The hardship arrangements are clarified, and the criteria for hardship are modified slightly. (Ch 2, Pt 6)

IDAS - Complete Chapter rewrite; many corrections and clarifications.

“Conceptual" preliminary approvals – Numerous changes made to support conceptual preliminary approvals, in particular approvals which vary the effect of a planning scheme for a premises. (ss 3.1.5; 3.1.6, 3.2.1(8); 3.4.2; 3.4.5; 3.5.6; 3.5.7; 3.5.16)

Assessment managers – Additional rules for determining assessment manager aimed at simplifying Schedule 1 of the regulation (s3.1.7)

Codes – “Complete”, “partial”, “variable” and “adoptable” codes. (s3.1.10)

Native title – Stops IDAS time periods when notification under Commonwealth Native title Act required. Only applies to certain future acts with a possible development component. (s3.1.14)

Owner’s consent – Most works no longer require owners’ consent. Special arrangements for State consent when application involves a State resource. (s3.2.1)

Properly made application – More emphasis on correct completion of form, in particular nomination of referral agencies. Clarification that an application that is not properly made stays in application stage. (s3.2.1)

Acknowledgement notices – Acknowledgement notices no longer required. Replaced with non-acceptance notice if application is not properly made. Endorsed copy of application given to applicant if there are referral agencies or if requested. (s3.2.3)
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Changing applications – More explicit and comprehensive description of circumstances in which applications may be changed, and the effect of different types of change. (ss3.2.7 – 3.2.10)

Referral Coordination – Former transitional referral coordination triggers now permanent and moved into Chapter 3. Chief executive may nominate additional advice agencies when giving information request. (s3.3.7)

Referral agency assessment period – Time periods simplified through introduction of an “information period”. (s3.3.16)

Notification stage – Notification stage may now start any time after the end of the application stage. Applies for impact assessment and “conceptual” preliminary approvals under section 3.1.6. Notification stage may need to be restarted if application is changed in specified ways. (ss3.4.2; 3.4.5)

“Coordinated” and “integrated” parts of an application – Confirms that an assessment manager may not assess a part of a development application for which the entity would not be the assessment manager if the development was contained in a separate application. (eg. An environmentally relevant activity that is not assessable under the relevant planning scheme). (s3.5.4)

Impact and “other” assessments – Assessment arrangements expanded to accommodate “conceptual” preliminary approvals for which the type of assessment cannot be clearly determined. Specific assessment criteria for proposed variations of the effect of a planning scheme also included. (ss3.5.6 – 3.5.7)

Negotiated decision notices – Clearer distinction between suspension of applicant’s appeal period and request for negotiated decision notice. (ss3.5.18 – 3.5.22)

Changing or cancelling approvals – New separate and consolidated Part for changing or cancelling approvals. Request to change or cancel decided by a “deciding entity”. Multiple requests to different entities possible. Concept of “minor change removed. (Ch 3, Pt 6)

Compliance stage – New stage for technical approvals (eg building work, reconfiguration works), and approval of plans etc required under conditions of a development approval. Simple process with key parameters (triggers, assessment times etc) decided by regulation. May apply for assessable, self-assessable or exempt development. Also allows assessment of development related matters (eg plans of subdivision, completed works) as well as proposed development. (Ch 3, Pt 7)

Ministerial powers – New ministerial call-in for applications to change or cancel development approvals. (ss3.8.8 – 3.8.11)

Substantial Compliance – New, broader provisions allowing the court to act as it sees fit in cases of substantial compliance in any proceeding, replaces section 4.1.53. (s4.1.5A)

Declarations and Orders – Declaration may be sought for “matter done for this Act” (previously “under”) to clarify scope (refer definition of “under” in Acts Interpretation Act). Limitation on orders cancelling development approvals removed, but replaced by requirement for Court to consider compensation. (ss4.1.22 – 4.1.23)

Submitter’s Appeal Rights – Submitter may forego appeal rights; Greater clarity about scope of submitters’ appeal rights against concurrence agency decisions. (ss3.5.23; 4.1.28)

Appeals for Matters Arising After Approval Given – Reorganised to accommodate new procedures for changing approvals and for greater clarity. (ss4.1.30 – 4.1.31)

Notice of Appeal to Other Parties and Respondents – Modified for consistency with provisions in Chapter 3 about changing or cancelling development approvals. (ss4.1.41; 4.1.43; 4.2.11; 4.2.12; 4.2.17)

De-novo Jurisdiction of Court – Modified for consistency with provisions in Chapter 3 about changing or cancelling development approvals. (s4.1.52)

Appeals about Compliance Assessment – Tribunal jurisdiction expanded to accommodate probable appeals about technical matters arising under compliance assessment. (4.2.9A; 4.2.10)
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**Development Offences** – New offences for compliance assessment, and use of premises contrary to designation. *(ss4.3.4A – 4.3.5)*

**Infrastructure Planning and Funding** – Infrastructure provisions of Act consolidated and clarified. Greater emphasis on using conditions for infrastructure contributions in for local governments without significant business activities. *(Ch 5, Pt 1)*

**Environmental Impact Statements** – Triggered under regulation (currently proposed only for controlled actions under the EPBCA) and subject to chief executive’s agreement. Terms of reference (usually) and EIS publicly notified. Chief executive produces evaluation report for completed EIS. For IDAS, EIS replaces information request period and notification stage. For designation, EIS must be considered by designator. *(Ch 5, Pt 7A)*

**Statutory Guidance** – Chief executive may issue statutory guidelines about material change of use and environmental assessment arrangements for designation. *(s5.8.8)*

**Schedule 1** – Statement of proposals no longer mandatory for any scheme amendments. Core matters transferred to Chapter 2.

**Schedule 8** – Title of part 3 changed to “Exempt development for a planning scheme”. Part 3 moved to separate schedule (Schedule 9). Content re-ordered for greater clarity, and some assessable development (e.g., building work and works for reconfiguration) removed to reflect proposed introduction of compliance assessment.
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IPOLAA 2001: A critical look at the changes to existing use rights provisions

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Introduction

One only has to read the Judgment of the Court of Appeal in Brisbane City Council v. Boral Resources Pty Ltd1 to appreciate the complexity of existing use provisions under the repealed Local Government (Planning and Environment) Act 1990 and its predecessor the Local Government Act 1936. In Boral Resources, His Honour Justice Dowsett observed in passing:

“Section 1.4.6 of the Integrated Planning Act protects uses of premises which were lawful under the Local Government (Planning and Environment) Act immediately prior to 30 March 1998. As we have not heard argument on the matter, it would not be appropriate for us to consider the effect of this Section upon the current status of the Respondent’s use of the site. Nevertheless, the Section appears to adopt a new approach to such problems ...”2.

Section 1.4.6 did indeed adopt a new approach which, with the benefit of hindsight, was probably more complicated than it needed to be. As can be seen from the new Section 1.4.1, which replaces Section 1.4.6, much of the previous content is now considered otiose. This arises because of the fundamental changes to the planning system affected by the IPA3.

Two short points should be made at the outset. Firstly, the new provisions do away with the separation of pre and post 30 March 1998 uses under different divisions. Secondly, the Explanatory Notes indicate that the purpose of the changes is to improve the structure and clarity of the provisions, rather than substantive change.

Section 4.3.5

A discussion of existing use rights should commence with an examination of the legislative provisions which prohibit the carrying on of unlawful uses of premises. Section 4.3.5 of the Integrated Planning Act 1997 (“IPA”) deals with that subject and is one of the provisions which is to be replaced when the Integrated Planning and Other Legislation Amendment Act 2001 (“IPOLAA”) commences later this year. The new provision is as follows:

“4.3.5 Offences about the Use of Premises

Subject to Section 4.3.6, a person must not use premises –

(a) If the use is not a lawful use; or

(b) Unless the use is in accordance with –

(i) for premises that have not been designated – a planning scheme or temporary local planning instrument that regulates the use of premises; or

(ii) for premises that have been designated – any requirements about the use of land that are part of the designation.

Maximum penalty – 1,665 penalty units”
Section 4.3.6 contains some exceptions from the operation of Section 4.3.5 which are not relevant to the present discussion.

Because of Section 4.3.5, it is necessary to ensure that:

- Uses lawfully undertaken prior to the commencement of the IPA survive the commencement of both the IPA, and any new planning instruments made under it; and
- Uses lawfully commenced under the IPA remain lawful despite changes effected by subsequent planning instruments.

**Section 1.4.1**

Under the current provisions, uses falling into the first category are covered by Section 1.4.6, which, as mentioned above, is the Section briefly referred to by the Court of Appeal in Boral Resources. That Section is to be replaced by Section 1.4.1 which has been considerably simplified. It is in the following terms:

1.4.1 Lawful Use of Premises on 30 March 1998

To the extent an existing use of premises was lawful immediately before 30 March 1998, the use is taken to be a lawful use under this Act on 30 March 1998.

When the exposure draft of the IPOLA Bill 2001 was released, I took issue with the way in which clause 1.4.1 was drafted. You may recall that it was expressed as follows:

1.4.1 Lawful Use of Premises on 30 March 1998

(1) To the extent an existing use of premises was lawful under the repealed Act immediately before 30 March 1998, the use is taken to be a lawful use under this Act on 30 March 1998.

(2) Subsection (3) applies if there has been a material change of use of the premises since 30 March 1998.

(3) Any lawful use of the premises immediately before the change is still a lawful use of the premises after the change but only to the extent the lawful use of the premises immediately before the change continues.

The main problem with the draft provision was its failure to recognise that there were many lawful uses of land on 30 March 1998 that did not depend upon the repealed Act for their lawfulness. An obvious example is the multitude of Government uses which fell under the shield of the Crown to which the repealed Act never applied. Additionally, there are lawful uses under special purpose legislation which established discrete planning regimes in respect of particular projects. Lawfulness might also be founded upon protective provisions within planning schemes made under the repealed planning legislation.

If the Section had been passed in the form proposed, there would have been an implication (at least) that such uses derived no protection and this would have made it necessary to fall back on arguments based upon Section 20(2) and (3) of the Acts Interpretation Act 1954. This is always difficult because the Acts Interpretation Act can be displaced by a contrary intention appearing in the legislation to which it is applied. The current drafting avoids that complication.

The new Section 1.4.1 falls into the first of the categories referred to in the comments in the introduction on Section 4.3.5 (i.e. it deals with lawful uses which predate the commencement of the IPA). Section 1.4.1 should not be interpreted by applying the definition of “lawful use” in Section 1.3.4 of the IPA. That definition is not materially altered by the IPOLAA amendments and is in the following terms:

1.3.4A use of premises is a “lawful use” of the premises if –

(a) The use is a natural and ordinary consequence of making a material change of use of the premises; and
(b) The making of the material change of use was in accordance with this Act.

Clearly, this definition operates only prospectively in relation to material changes of use effected under the IPA. Section 1.4.1 operates independently of that definition, as a deeming provision.

The result is that uses which were lawful prior to the commencement of the IPA remain lawful and are immune from prosecution under Section 4.3.5. However, the expansion of those uses is not necessarily protected because any material change in the scale or intensity of the use will constitute development, and if it is “assessable development” it will require a development permit. Without a permit, such a material change of use would constitute an offence.

The simplified version of Section 1.4.1 which has ultimately found its way into IPOLAA has the effect that the circumstances of a use in existence before 30 March 1998 must be examined against the legal context applicable to the use at the relevant time. That context may, for example, be immunity from planning laws under State or Commonwealth legislation, Crown immunity, or lawful non-conforming use protection under prior legislation or planning schemes.

Section 1.4.2 Lawful uses of premises protected

Section 1.4.2 states as follows:

(1) Subsection (2) applies if immediately before the commencement of a planning instrument or an amendment of a planning instrument the use of premises was a lawful use of the premises.

(2) Neither the instrument nor the amendment can—

(a) stop the use from continuing; or

(b) further regulate the use; or

(c) require the use to be changed.

Post 30 March 1998, Section 1.4.2 will afford continued protection to uses deemed lawful under Section 1.4.1. Section 1.4.2 will also protect uses lawfully established under the IPA. In respect of the former, “lawful use” will take its meaning from Section 1.4.1 and in respect of the latter, it will take its meaning from Section 1.3.4.

The drafting of the new Section 1.4.2 recognises that it is unnecessary to refer to abandonment or intensification, as the current Section 1.4.1(2) does, because that is taken care of through the operation of the substantive provisions of the Act dealing with material change of use. In that sense, a pre-IPA use which is deemed a lawful use, is in exactly the same position as a lawful use commenced under the IPA.

Section 1.4.2 gives protection from the effect of new planning instruments as well as amendments of planning instruments. This includes State Planning Policies (“SPPs”) as well as planning schemes and local planning policies. Protection from the effects of new or amended SPPs is significant, because they are the only type of planning instrument capable of including prohibitions.

Section 1.4.3 Lawfully constructed buildings and works protected

Section 1.4.3 provides that:

(1) To the extent a building or other work has been lawfully constructed or effected, neither a planning instrument nor an amendment of a planning instrument can require the building or work to be altered or removed.

Section 1.4.3 is substantially the same as the current Section 1.4.4 except for the deletion of the words “on or after the commencement of this Section”. The Section as it now stands applies to buildings or other work lawfully constructed or affected at any time. This change is consistent with the approach now taken under Section 1.4.1 and 1.4.2.
Section 1.4.4 New planning instruments can not affect existing development approvals

Section 1.4.4 states:

(1) This section applies if—

(a) a development approval exists for premises; and

(b) after the approval is given, a new planning instrument or an amendment of a planning instrument commences.

(2) To the extent the approval has not lapsed, neither the planning instrument nor the amendment can stop or further regulate the development, or otherwise affect the approval.

Section 1.4.4 substantially replicates the existing Section 1.4.2. The new Section will apply to “development approvals” while the existing Section 1.4.2 applies to “development permits”. Preliminary approvals are dealt with separately under the existing Section 1.4.5. Both kinds of approval are now combined under Section 1.4.4. Sub-section 1.4.4(2) contains the additional words “or otherwise affect the approval”. The purpose of this appears to be to ensure that preliminary approvals remain completely unaffected by new planning instruments or amendments of planning instruments until they either lapse in accordance with Section 3.5.25 or cease to have effect pursuant to Section 3.1.6(6) and (7).

Section 1.4.5 Implied and uncommenced right to use premises protected

Section 1.4.5 states:

(1) Subsection (2) applies if—

(a) a development approval comes into effect for a development application or an approval is given under section 3.7.5; and

(b) when the application was properly made, or the approval was requested, a material change of use, for a use implied by the application, was self-assessable development or exempt development; and

(c) after the application was properly made, or the approval was requested, but before the use started, a new planning instrument, or an amendment of a planning instrument—

(i) declared the material change of use to be assessable development; or

(ii) changed an applicable code for the material change of use.

(2) The use is taken to be a lawful use in existence immediately before the commencement of the new planning instrument or amendment if—

(a) the development, the subject of the approval, is completed within the time stated for completion of the development in—

(i) a permit; or

(ii) this Act; and

(b) the use of the premises starts within 5 years after the completion.

Section 1.4.5 substantially repeats the existing Section 1.4.3. It is directed at a development approval which does not expressly cover the right to use premises for a particular purpose because when the permit is applied for, there is no need for it to deal with use rights, any change in use, upon completion of construction, being either exempt or self assessable development. The Section is directed at circumstances where there is a right to use premises which flows not from the development approval itself, but by implication from the planning scheme as it existed prior to its amendment. Section 1.4.5 is directed at the commencement of a new planning scheme or an
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amendment to a planning scheme which would otherwise create an obligation to apply for a development permit for a material change of use. It allows an implied use to commence provided the permitted development is completed within the time stated in the permit and the use commences within 5 years after completion of the development.

When commenting on the existing provisions in 1997, I observed that the existing use provisions would, in practical terms, only operate in respect of the limited ability of planning schemes to regulate the use of premises through the application of a code identified in a scheme. I noted that existing use protection would not be needed in the traditional sense because of the inability of planning instruments to prohibit the use of premises. This, of course, is a natural consequence of a planning system which focuses on the achievement of environmental outcomes through a statutory development control process, instead of through prescriptive land use control within planning schemes. I said then that I thought IPA would, through the mechanism of permits and approvals, create rights and obligations which could not be abrogated by planning schemes. I remain puzzled by this provision which is substantially unchanged except that its operation is extended to approvals granted as a result of the compliance assessment process under the new Section 3.7.5.

Assume that a development permit is granted to construct a commercial office building and that a development permit for a material change of use is not needed in order to use the building because that use is either self assessable or exempt. After the approval is granted, the planning scheme is changed and the use of the premises for commercial offices becomes assessable development. Will the occupation and use of the building for the natural and ordinary purpose for which it was constructed be unlawful? If the building's use for that purpose is not unlawful, then Section 1.4.5 has no work to do. Clearly, the scheme cannot prohibit that use. Further, it can only "regulate" that use by applying a code identified in the scheme.

It would be an odd result indeed if the use of a building, already constructed and ready for use, could be retrospectively regulated through a code aimed at the impacts of development of the building. The right to use the building is implied in the development approval relating to its construction in combination with the exempt or self assessable nature of the use. Those rights would not ordinarily be capable of being made unlawful retrospectively. Section 1.4.5 appears to reinforce the legal presumption against statutes or statutory instruments retrospectively invalidating rights. Because the Section operates by deeming the use to be a lawful use in existence immediately before the commencement of the new planning instrument or amendment, the legislative policy appears to be to confirm what would otherwise be the effect of applying ordinary legal principles. However, that result is then qualified by Section 1.4.5(2). The qualifications in that sub-section override the otherwise unlimited protection afforded to those legal rights by Section 20(2) and (3) of the Acts Interpretation Act.

The policy reason behind Section 1.4.5(2) is not given in the explanatory notes. It is not clear what purpose would be served in requiring an application for a development permit for material change of use to be made in respect of the previously approved and constructed development. It is difficult to conceive of any rational basis for refusing to allow the use to commence, and if the development has been completed in accordance with the conditions of the development permit relating to it, there does not seem to be much scope for new conditions. We will have to wait until the Section is enforced to find answers to these questions.

Section 1.4.6 Strategic port land

Section 1.4.6 provides that:

Sections 1.4.1 and 1.4.3 apply to lawful uses of, and buildings and other works lawfully constructed on, strategic port land as if a reference to 30 March 1998 were a reference to 1 December 2000.

Section 1.4.6 will substantially replicate the existing Section 1.4.8 by replacing the references to 30 March 1998 with a reference to 1 December 2000 being the date on which strategic port land was brought within the ambit of the IPA.
Section 1.4.7 State forests

For this Act, each of the following are lawful uses of a State forest—

(a) conservation;
(b) conducting a forest practice;
(c) grazing;
(d) recreation.

Section 1.4.7 is a new provision. It arises from concern on the part of the State that it may have difficulty in establishing the lawfulness of existing uses of State forests. The provision may have its genesis in the findings of fact made in Maroochy Shire Council v. Barnes. The provision overcomes the need for an analysis similar to that undertaken in Barnes in order to determine whether prior forestry operations constituted an existing lawful use.

Section 1.4.8 Schedule 8 may still apply to certain development

Section 1.4.8 provides that:

Nothing in this part stops development in relation to a lawful use being assessable or self-assessable development under schedule 8 if the development starts after schedule 8 starts to apply to it.

Section 1.4.8 re-emphasises the paramountcy of Schedule 8 of the IPA over planning schemes. The protection of existing uses from changes to planning instruments is not extended to development that is regulated under Schedule 8. Regulation under Schedule 8 will apply immediately the Schedule starts to operate in relation to particular development. The example used in the Explanatory Notes is the clearing of endangered native vegetation associated with an existing agricultural use. If that clearing is regulated under Schedule 8 Part 1 Item 3A, it will require a development permit even though it is ancillary to an existing lawful use of land.

Conclusion

The provisions of the IPA relating to existing use rights have been considerably simplified. This simplification is the result of a recognition by the legislature of the fundamental changes to the planning system effected by the IPA. However, don't be too quick to dispose of your copies of the IPA's antecedent legislation, as there will be many instances where it will be necessary to have recourse to that legislation to determine the lawfulness of a use immediately before 30 March 1998. To that extent, decisions on the antecedent legislation, such as Boral Resources and Professor Fogg’s text book, will be particularly helpful.

Footnotes

1 1998 99 LGERA 84
2 Ibid p. 100
3 IPA section 2.1.23; see discussion in Fogg et al Planning and Development Queensland para.1450
4 See for example Sanctuary Cove Resort Act 1985 Section 9 and Southbank Corporation Act 1989 Section 34
5 See Brisbane City Council v. Boral Resources op.cit at p.91
6 Acts Interpretation Act 1954 Section 4
8 See for example Telecommunications Act 1997 (Cth) Schedule 3, Clause 37(2)(c)
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9 See also Nicholls DL Commonwealth Immunity from State Environmental Laws – A Level Playing Field? 1997 3(12) QPER 59; see also Fogg et al op.cit para. 1695-1720
10 Refer to the Explanatory Notes
11 Statutory Instruments Act 1992 Section 27; Fogg et al para.1450
13 IPA Section 2.1.23(3)
14 IPA Section 2.1.23(2)
15 IPA Section 2.1.23(2)
16 Section 2.1.23(3)
17 See Acts Interpretation Act Sections 6, 7 and 20(2)(c) and (3)
18 Acts Interpretation Act Section 4; This is also consistent with the opening statement in the explanatory notes to the IPOLA Bill that no substantive change is intended by any of the Sections.
20 Op.cit. particularly the Judgment of Dowsett J
21 Fogg Land Development Law in Queensland p.667-70
1. Introduction

The Integrated Planning and Other Legislation Amendment Act 2001 (IPOLAA) replaces the existing Chapter 3 in the Integrated Planning Act 1997 (IPA) with a new chapter that changes the IDAS process in numerous, and not always readily identifiable, ways. The paper will consider the more important changes to the IDAS process and related matters.

2. Definitions

2.1 “Use”

The definitions of “use” and “development” are fundamental to the operation of IDAS. “Use” is defined in IPA in relation to premises as including any use incidental to and necessarily associated with the use of the premises.1 This definition dates back to the Local Government Act 1936.2 IPOLAA will replace this definition with a definition that the use of premises includes any ancillary use of the premises.

The justification for this change is contained in the following paragraph in the Explanatory Notes:

The term “ancillary” is a common planning term in many jurisdictions, and is supported by considerable judicial authority. The term replaces the term “incidental to and necessarily associated with” currently used in the definition of use. There is little judicial authority about the current term, although it is possible that it may be interpreted too narrowly, and exclude activities that desirably should be considered ancillary. In particular, the term “necessarily associated with” may imply absolute dependency between the activity and the primary use, rather than “functional” dependency.

The above statement is not entirely accurate.

The term “ancillary” is not a common planning term in Queensland3, although it may be common in other jurisdictions.4

The current definition is well understood and has a respectable body of precedent regarding its meaning.5

It is acknowledged that the current definition requires a narrow interpretation of “use” and requires an element of inevitability or compulsion between the primary use and uses which are “incidental to and necessarily associated with” the primary use.

The leading case about ancillary use is Foodbarn Pty Ltd v Solicitor-General.6 In this case it was alleged that the premises were being used for the purpose of a shop in contravention of the planning scheme. The business conducted on the premises was similar to that of an ordinary supermarket. However, wholesale trade was encouraged through the offering of bulk buying discounts available to clubs, motels, caterers and shopkeepers etc. The use of the premises for the purpose of a warehouse was not prohibited under the planning scheme.
The New South Wales Court of Appeal held that the premises were used for two purposes (warehouse and shop), neither of which subsumed the other. The classic statement is found in the judgment of Glass JA:

... where a part of the premises is used for a purpose which is subordinate to the purpose which inspires the use of another part, it is legitimate to disregard the former and to treat the dominant purpose as that for which the whole is being used. Doubtless that same principle would apply where the dominant and servient purposes both relate to the whole and not to separate parts. ... Where the whole of the premises is used for two or more purposes none of which suberves the others, it is, in my opinion, irrelevant to enquire which of the multiple purposes is dominant. If any one purpose operating in a way which is independent and not merely incidental to other purposes is prohibited, it is immaterial that it may be overshadowed by the others whether in terms of income generated, space occupied or ratio of staff engaged.7

The case draws a distinction between a dominant (and independent) purpose and purposes that are subsumed by this dominant purpose (also called incidental purposes). It is only the dominant purpose that is relevant to the characterisation of the development.

It is useful to look at some illustrations of the concept of ancillary use.

In *Warringah Shire Council v Raffles*8 Dr Raffles used part of the site of his dwelling house (a permitted purpose) for the landing and taking off of a private helicopter, which he used to travel for business and pleasure. The Council alleged that the use of the land for helicopter related purposes was an independent use and required the consent of the Council. Waddell J said:

Where land is used for the purpose of a dwelling house the use of some part of that land for some means of private transport seems to me necessarily to be use of the land for the purpose of a dwelling house. The very idea of a dwelling house presupposes that the occupants may have some means of private transport kept at hand to travel from the dwelling house to their place of work, shops, social occasions, and other places. In the present case, I do not see any reason to treat the use by Dr Raffles of a helicopter as being, for the purpose of the application of the planning scheme ordinance, different in principle to the use by him of a motor car to travel to his various places of practice and to social occasions. It should be regarded as a use of the land for the purpose of the dwelling house on the land. Accordingly, the consent of the Council to the use is not required.9

In *Lizzio v Ryde Municipal Council*10, the sale of 55–60 bunches of flowers from a dwelling house was not merely incidental to its use for the purposes of a dwelling house. The Court referred to the regularity and extent of the activities involved in selling flowers and the fact that some flowers were grown on other land. Gibbs CJ said:

Obviously a person who is entitled to use land for the purpose of a dwelling house may use it for incidental purposes, such as garaging his car or housing his boat. No doubt in some circumstances a householder who on an isolated occasion used his land for the purpose of making sales from a stall might be held to be doing no more than using his land for the purposes of a dwelling house. For instance, if a householder allowed his land to be used annually as the site for a fete to raise money for some charitable purpose, the use of the land in that way might be regarded as simply incidental to its use for the purposes of a dwelling house. The question is one of fact and degree. Having regard to the regularity and extent of the activities involved in selling flowers, and the fact that some of the flowers were grown on other land, there is no reason to disagree with the decision reached in the courts below that the use of the land in the present case could not be regarded as merely incidental to its use for the purposes of a dwelling house.11

In *Drouyn v Mattingley Pty Ltd; Ex parte Drouyn*12 the premises were used to repair second hand clothing and sell such clothing. General industry was permitted, but a shop was prohibited. The Full Court of the Supreme Court of Queensland held:

The clothing in question was bought for the purpose of resale. As a means to its resale it was stored on the premises and something of the order of 75 per cent of it was altered. Ultimately some 60 per cent of it was resold by retail on the premises. The alterations were incidental and subordinate to the purpose of resale and thus ancillary thereto. The sales were in no sense incidental or subordinate to the purpose of alteration or repair.13
In Ashfield Municipal Council v Australian College of Physical Education Ltd, the respondent operated an educational establishment. Across the road from the educational establishment were premises providing residential accommodation for staff and students. The Council sought a declaration that these premises were being used as a boarding house and therefore prohibited. Pearlman J considered whether the boarding house use was ancillary to the educational establishment. The physical separation of the premises was a factor to be considered but did not necessarily preclude a finding that the use was ancillary. Pearlman J said:

... in this case the boarding-house use, though it may be an ancillary or incidental use, is nevertheless an independent use. The houses are used only for residential accommodation (with some private study facilities in the bedrooms) and not for teaching, and they are on the opposite side of the street. Though the boarding-house use is ancillary, it is independent, and it is prohibited.

In Wym Pty Ltd v Sutherland Shire Council, Bignold J had to determine whether a dwelling house was incidental or ancillary to the agricultural use of the land. The dwelling house comprised four bedrooms, lounge room, dining room, family room and study, two bathrooms and double garage and workshop having a total floor space of 290 square metres excluding verandahs. The estimated cost of the house was $180,000, being nearly 50% of the capital establishment costs for the whole agricultural enterprise. Bignold J said that these factors supported a conclusion that the dwelling house was not merely incidental to the agricultural use. His Honour said:

In my opinion the proposed use of the proposed dwelling-house cannot properly be categorised as merely incidental or ancillary to the proposed agricultural use of the appeal site. Even if it be accepted that the residence by accommodating the manager/caretaker will assist the proposed agricultural use that is not the sole purpose or function of it for it is equally clear that it is intended that the residence operate as the family dwelling of the manager/caretaker. It is a separate use or at least a dual use.

In his excellent article about ancillary uses Chris Grainger draws the following useful conclusions from the case law:

- “Evidence of a purpose that is inconsistent with the dominant purpose is likely to undermine a claim that the allegedly ancillary purpose is ancillary.”

- “If the use for the allegedly ancillary purpose is a regular use, it is more likely to be found to be a separate and independent purpose (whether or not it is also ancillary). But an infrequent use for the allegedly ancillary purpose is unlikely to have this effect, and indeed may suggest that the purpose is ancillary.”

- “If the allegedly ancillary purpose goes beyond what is reasonably required in the circumstances for implementing the dominant purpose, it is likely to be regarded as an independent purpose.”

- “The physical proximity of the land on which the use for the ancillary purpose is carried on, to the land for which the dominant purpose is carried on, is a material consideration although not necessarily conclusive.”

- “The percentage or proportion of the allegedly ancillary use to the dominant use is extremely relevant. If the ancillary use represents a relatively small proportion of the overall use of the land when compared to the proportion occupied by the dominant purpose, the courts are much more likely to find the use is for a genuinely ancillary purpose.”

Grainger concludes with the following warning for developers:

... well-advised developers are increasingly seeking to rely on the doctrine of ancillary use with a view to achieving what would otherwise not be possible under applicable planning instruments. No doubt this is because they are aware that the courts are increasing the scope of the doctrine. However, it does not follow that the developers are necessarily succeeding in those attempts. In other words, while there obviously has been a judicial explanation of the doctrine, it does not follow that such expansion has tended to operate in favour of developers so that the purpose of the planning system is undermined by it. To the
contrary, it is submitted that while the doctrine can operate in favour of developers in appropriate circumstances ..., its judicial expansion has actually served to reinforce the fundamental objective of the applicable planning instruments in their application to individual circumstances.24

It is relevant to consider the limited Queensland case law on the concept of ancillary use.  

Fox v Milfull25 concerned an appeal against a Stipendiary Magistrate’s dismissal of a complaint that the respondents used land in the Residential A zone for the purpose of a retail plant nursery contrary to the planning scheme. The Stipendiary Magistrate found that the use was an existing lawful non-conforming use. At the time the use commenced, agriculture was an as of right use. Byth DCJ found that on the facts, the retailing from the nursery was incidental to the dominant use of the land for agriculture. However, His Honour warned that the position might be different if the degree of retailing activity was such that it could not be regarded as incidental to the dominant purpose.

In Drouyn v Holman; Ex parte Holman26 the appellant engaged in breeding birds and fish on his land and sold the produce of this activity in a building erected on the land. He also sold cages, bird feed, toys, veterinary products and other goods in addition to the produce of his activity on the land. The Full Court of the Supreme Court held that the land was being used for a dual purpose of agriculture and shop, the latter being a prohibited purpose. The shop purpose was found to be a separate and distinct purpose.

In Boral Resources (Qld) Pty Ltd v Cairns City Council27 a permit was issued for an extractive industry, namely the stockpiling, treatment and cartage of sand, gravel and loam. Gravel aggregate was dredged as part of the extractive industry operations. Of the total material dredged the aggregates formed 20%. The larger aggregates (comprising 17% of the material dredged) required further processing by screening and crushing. While extractive industry was a consent use in the zone in which the land was situated, noxious industry (including screening and crushing) was a prohibited use. Based on the authority of Logan v Woongarra Shire Council28, Daly DCJ found that the permit could not be said to authorise the crushing and screening.29 The Court of Appeal held that the disputed use was not “incidental to and necessarily associated with” the extractive industry use. In making this finding the Court of Appeal referred to incidental uses as follows:

...there could be a case of a different kind where there exists only one significant use and a further use only arguably and insignificantly present so that it might be regarded as no more than merely technically in existence. The process of screening and crushing which the appellant voluntarily proposes to conduct as an additional process here, has a character quite different from those just described.30

An interesting discussion of the term “ancillary use” is to be found in Kempstan Pty Ltd v Hervey Bay City Council.31 The case concerned the establishment of a crematorium and caretaker’s residence. An issue arose as to whether the proposed use was a non-residential ancillary land use which served or complemented housing areas. Skoien SJDC referred to the Shorter Oxford English Dictionary definition of “ancillary” as being “subservient, subordinate” suggesting “something inferior which is of use or service”. The planning scheme defined “ancillary” as “incidental and subordinate”. His Honour said that the word “incidental” added to the dictionary definition, as many things could be incidental to something other than things which are of use or service to it. His Honour said that incidental could mean “something which happens fortuitously”. Skoien SJDC did not think that the drafter of the planning scheme meant that. His Honour said: “I think it was rather intended to mean an “incident” of, that is, an event of accessory or subordinate nature. Again the meaning suggests the aspect of service to the primary use.”32

In Mitchell v Cairns City Council33 the Court had to determine whether premises used for the wholesale supply of fruit and vegetables amounted to a “warehouse” or a “freight depot”. In concluding that the premises were being used for a “warehouse”, Daly DCJ said that the transportation carried on in relation to the use was ancillary to the lawful use of a warehouse.

The consequences of the change to the definition will no doubt become apparent over the years. However, a couple of consequences come to mind immediately.

First, the impact on the Pioneer principle must be considered. In Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council, the High Court held that the use of land must be stated in appropriate detail in one application and all the land involved must be the subject of the application. It is also
useful to recall some of the statements made by Stephen J:

…the two critical integers, land and use, each involves a question of definition, what land and what use?…it will be one of them, the integer of use, that will dictate the precise identity and extent of the other integer, the land the subject of the application.

…The land is merely the passive object which is being used; the active integer, use, will determine its extent.35

and

…I do not regard this definition as in any way requiring that an applicant for consent should include in his application a description of all incidental and associated uses involved in devoting the land to the proposed use. What it does do, however, is to make it clear that, just as permission granted for a particular use will extend to permit all incidental and associated uses, so too land devoted only to the latter will be as much land to which the application relates or applies as will be the land devoted to the principal use.36

A more expansive definition of use may require a more expansive identification of the land the subject of the application.

To date, the Courts have not shown any enthusiasm for extending the application of the Pioneer principle.37 One of the factors used to avoid the application of the Pioneer principle has been the definition of use. It may be more difficult to take a narrow view of Pioneer in light of the more expansive definition of use.

Second, a local government’s ability to regulate land use and development may suffer as a result of the expansive definition of use. A local government will need to be aware of uses which may be ancillary to the primary use when approving development and defining development in its planning scheme.

It must be remembered that the definition of “use” is an inclusive definition and the term must be interpreted according to its ordinary and natural meaning but within the planning context. A useful definition of use is found in Heavy Lex No. 64 Pty Ltd v Mulgrave Shire Council38 where Wylie QC DCJ defined use as “the enjoyment of land by virtue of its employment or occupation for an activity or purpose beneficial to its occupier or owner. The land may be considered as having been put to work”.39

2.2 “Development”

A number of changes will be made to the concept of development.

The definition of development will become more concise with the amalgamation of building work, plumbing and drainage work and operational work into a single inclusive definition of “work”.40 An exclusive definition may, however, provide more certainty and less opportunity for disagreement.

The definition of material change of use will be amended. The component relating to a material change in intensity or scale will be amended to refer to a “material increase” in intensity or scale. This change provides certainty, but fails to recognise that, in practice, a decrease in intensity or scale may have material impacts in town planning terms.

A new category of development will be created. Development that is exempt, self-assessable or assessable may also be compliant development.41 Compliant development will be prescribed by regulation or identified in conditions of a development approval. Compliant development may require a compliance permit42 or a compliance certificate.43 A compliance permit will authorise compliant development to be carried out. A compliance permit may contain conditions for achieving compliance with prescribed standards. The conditions may be noted on or attached to the documents or plans the subject of the compliance assessment.

A compliance certificate will approve documents, plans or works subject to conditions for achieving compliance with prescribed standards. The conditions may be noted on or attached to the documents or plans. A compliance assessor may give written instructions for achieving compliance with respect to works.

Compliant development will be assessed and approved during a new IDAS stage called the compliance stage.44 The purpose of the compliance stage, according to the Explanatory Notes, is
“to enable certain development to be dealt with under IDAS more simply and effectively without compromising the benefits of integrated development assessment”.  

Complaint development and assessment are overlays on the existing categories of development and assessment and as such add to the complexity of the process. However, it is difficult to comment upon the utility or effectiveness of this stage in the absence of the regulations, which are at the core of compliant development and assessment.

The development listed in Schedule 8, Part 3 of IPA will be relocated to Schedule 9 of IPOLAA, with some amendment. Schedule 8 will continue to list development that the State wishes to be assessable or self-assessable. Schedule 9 will identify development that is exempt development for a planning scheme or temporary local planning instrument. As stated in the Explanatory Notes, the development listed in Schedule 9 will be exempt only for the purposes of a planning scheme or temporary local planning instrument and may be regulated under Schedule 8.

### 3. IDAS – Application Stage

#### 3.1 Preliminary Approval for Development

The IDAS system currently operates tolerably well because of certain principles.

An important principle of IDAS is the clear distinction between assessable development, which requires a development approval and other development, which does not require a development approval and for which a development approval cannot be obtained. The erosion of this principle will create confusion and the potential for legal challenge. This distinction has been used successfully in some cases to limit the application of the **Pioneer** principle.

Another principle is that the assessability of development should be a matter of certainty. That is, it should be possible for an applicant to identify those developments that are assessable and those that are not assessable by reference to Schedule 8 and the planning scheme.

This clear distinction will be muddied by IPOLAA, which will permit an applicant to apply for a preliminary approval for development, whether or not the development is assessable development.

An explanation of this amendment is found in the following paragraph in the Explanatory Notes:

Subsection (1) is amended to provide that a preliminary approval approves “development”, rather than “assessable development”. This reflects the fact that one of the uses of the preliminary approval process is to allow applicants to seek approval, not of development specifically defined under a planning scheme, but of a concept, such as a “shopping centre” or an “industrial estate”. The assessment type for such a concept may not actually be clear under the planning scheme, and the current wording implies that the preliminary approval process may only be used for development that is clearly assessable under the scheme. (Further reforms have been made elsewhere in chapter 3 to provide support for the assessment of conceptual development applications).

The ability to submit an application without first determining the assessability of development simply encourages intellectual laziness on the part of applicants and their consultants and creates difficulties for members of the public, the assessment manager and other entities (eg referral agencies).

The amendment proposed by IPOLAA will encourage poorly considered and prepared applications to be submitted to an assessment manager.

The assessment manager, in turn, will find it difficult to assess such applications and may find it necessary to devote a considerable period of time to preparing a request for further information about the application and perhaps having to refuse the application if this information is not forthcoming.

Members of the public will have inadequate information upon which to make properly made submissions and may in fact make submissions merely to protect their position in the absence of sufficient information.

If an applicant does not take the time to determine whether or not an application for preliminary approval includes development that is assessable or not assessable, the applicant may also experience difficulty in determining whether or not the application requires public notification.
The “benefits” of such a conceptual approval will be little better than those obtained from an application for consideration in principle under the repealed legislation.48

Section 3.2.1(8) to be inserted by IPOLAA provides that, subject to the requirements of the approved form, the application may describe the development to any degree of specificity. This provision merely encourages applicants, at best, to make poorly made applications and, at worst, to be deliberately vague or misleading in the description of the proposed development.

In making these comments, it is accepted that a preliminary approval must be followed by a development permit for development to occur.49 However, it must also be recognised that a preliminary approval may amend a planning scheme for a particular development50 and that the conditions in a preliminary approval will become the conditions of the development permit.51

### 3.2 Preliminary Approvals under s 3.1.6

An application under s 3.1.6 as amended by IPOLAA may be made with respect to development that is a material change of use or development other than a material change of use (eg carrying out work or reconfiguring a lot).52

The public notification stage will apply to an application under s 3.1.653, except where:

1. a preliminary approval to which s 3.1.6 applies has been given for land; and
2. the application:
   1. does not seek to change the type of assessment for the development; or
   2. seeks only to change development requiring code assessment to self-assessable development or development requiring assessment for compliance with codes; and
3. a code proposed as part of the application is substantially consistent with a code in the preliminary approval.54

An approval under s 3.1.6 for a material change of use may change the category of assessment required for development relating to the material change of use or identify codes for development relating to the material change of use.55 The Explanatory Notes give the following examples:

- For example, a preliminary approval for a material change of use for a “master planned community” may vary assessment requirements or codes for building work associated with the material change of use (eg for building height, bulk or density), or associated reconfiguration (eg through lot size or other lot characteristics).

An approval under s 3.1.6 for other development may only change the category of assessment required or identify codes for development the subject of the application.56

The problems identified above regarding an application for development (rather than assessable development) are compounded by the expansion of s 3.1.6. The ramifications of an approval under s 3.1.6 demand that an application be more than a conceptual application where the applicant is unable (or unwilling) to determine whether or not development is assessable.

### 3.3 Assessment Manager

The changes to the assessment manager provisions will streamline the process.

Section 3.1.7(4) and (5) will make a concurrence agency the assessment manager where the development is not assessable under a planning scheme, there is no alternative assessment manager prescribed and there is only one concurrence agency. The reason for this change, according to the Explanatory Notes is to simplify Schedule 1A of the Integrated Planning Regulation 1998.

Section 3.1.7(6) and (7) will apply where a concurrence agency directs a preliminary approval. When the applicant later applies for the development permit, the concurrence agency who directed the preliminary approval becomes the assessment manager, unless the assessment manager for the original application indicates otherwise in the preliminary approval. The Explanatory Notes state that the Integrated Planning Regulation 1998 will be amended to require the development to be code assessable.
The operation of this section should be limited to circumstances where there is only one concurrence agency that requires a preliminary approval. If there are a number of concurrence agencies in this situation, the section may allow an applicant to obtain development permits in a fragmented, rather than integrated, fashion.

A question also arises with respect to the paper trail in these circumstances. Does the concurrence agency who becomes the assessment manager issue a development permit for the entirety of the development or only for the aspect of development for which the preliminary approval was given? The concurrence agency who becomes the assessment manager should be required to provide the original assessment manager with a copy of the development permit.

3.4 Codes

The code regime under IPA will become more complicated, with the expansion of State codes. A State code may be identified by a regulation under IPA or another Act or in a State planning policy. A State code may be a complete code, a partial code or a variable code. Any of these may be identified by regulation as an adoptable code. These codes are in addition to codes included in planning schemes and codes identified in preliminary approvals issued under s 3.1.6.

It is hoped that State codes do not proliferate and that the benefits to be obtained from codes will not come at the cost of local government autonomy and the relegation of local planning instruments to a supporting role.

3.5 Owner’s Consent

The requirements for owner’s consent will change. The approved form must “contain” or “be supported by” the written consent of the owner of the land. This change avoids the need to further explore the interesting discussion by Robin QC DCJ in *Stradbroke Island Management Organisation Inc v Redland Shire Council* as to whether the consent must be contained on the approved form.

Most works applications will not need to contain the owner’s consent. An application may need to be supported by a resource allocation where the development involves taking, or interfering with, a State resource prescribed by a regulation.

3.6 Acknowledgment Notices, Non-acceptance Notices and Applications Endorsed as Accepted

Acknowledgment notices will be removed from IPA. An assessment manager will be required to give the applicant a copy of the application endorsed as being accepted within 10 business days after an application is properly made in the following circumstances:

(a) there are 1 or more referral agencies; or
(b) the application requires referral coordination; or
(c) at the time the application is made, the applicant asks the assessment manager for a copy of the application endorsed as being accepted.

If the application is not properly made the assessment manager will be required to issue a non-acceptance notice stating the reasons why the application is not properly made.

The non-acceptance notice must be given within 10 business days after the assessment manager receives the application.

An applicant has 20 business days after receiving the non-acceptance notice to change the application in response to the notice, or the application lapses. A non-acceptance notice should not be given for a development involving the taking or interference with a State resource where the application does not contain evidence relating to an allocation of or entitlement to the State resource if the assessment manager is the same entity that administers the resource. Although not clearly stated in IPOLAA, the Explanatory Notes state:
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Where the entity administering the resource is also the assessment manager, this will enable an applicant to apply for both the resource allocation and the development approval at the same time. In that circumstance, the development application will remain in the application stage, without the need for a non-acceptance notice to be issued, until the resource allocation issues have been dealt with and the necessary evidence to support the development application is available. At that stage the application will become “properly made”.

3.7 End of Application Stage

The application stage ends when an application is properly made. If an application is not properly made it will remain in the application stage or lapse if a non-acceptance notice is issued and not responded to within the prescribed time.

4. IDAS - Information and Referral Stage

4.1 Referral Coordination

The transitional referral coordination trigger will be incorporated into mainstream IDAS and amended. If a concurrence agency’s functions have been lawfully devolved or delegated to the entity that is the assessment manager, the entity is not counted as a concurrence agency for the purpose of triggering referral coordination.

The long suffering “minor or of an ancillary nature” test will be replaced by a test which requires the assessment manager to give the applicant written notice if the development is minor and would in the assessment manager’s opinion, be unlikely to have significant effects on the environment. While this test will no doubt create its own case law, it is a more appropriate test than that currently found in IPA.

The informal referral coordination practice of seeking views from entities that are not referral agencies for the purpose of IPA will be legitimised. The chief executive will be able to nominate advice agencies for the purpose of referral coordination.

4.2 Referral

An advice agency will be able to make an information request under IPOLAA. The information request period for an assessment manager will be extended to 20 business days after the start of the information and referral stage for an application requiring impact assessment.

4.3 Applicant’s Response

The response period for an information request will be reduced from 12 months to 6 months, with ability for the requesting authority to extend. In most circumstances the 6 month period will be adequate, however, there is a concern that the period will be inadequate if further environmental monitoring and assessment are required. It is hoped that the requesting authorities will act reasonably in these situations.

4.4 Referral Response

The referral response period has been altered.

If an environmental impact statement is required, the period is 20 business days from the day the chief executive gives the referral agency the EIS, copies of all properly made submissions, copies of submissions the chief executive has accepted and the EIS assessment report.

In all other cases, the period is 20 business days from the end of the referral agency’s information period. “Information period” is a defined term. It means the period between the day the information and referral stage starts and the day:

(a) if referral coordination is required, but the chief executive does not make an information request – the referral agency receives the chief executive’s advice;
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(b) if the referral agency does not make an information request – the end of the referral agency’s information request period;

c) if an information request is made – the day the applicant gives a response to the information request.

The response powers of concurrence and advice agencies will be clarified and expanded. In addition, IPOLAA entrenches the application of the precautionary principle in the deliberations of a concurrence agency. A concurrence agency is required to have regard to the precautionary principle if the concurrence agency considers the applicant has not given the concurrence agency sufficient information to properly respond to an application.

5. IDAS - Notification Stage

The proposed changes to the notification stage are perhaps the most interesting.

The notification stage may start at any time after 2 business days after the application stage ends. The delay is to enable the assessment manager to complete its administrative requirements. The notification stage may therefore run concurrently with the information and referral stage.

The Explanatory Notes state:

The notification stage has been changed to a “floating” stage to be more flexible and responsive to individual circumstances, in particular changes made to development applications in the course of the IDAS process.

The applicant will be required to repeat the notification stage if:

(a) the applicant has started the stage (whether or not the applicant has completed the stage); and
(b) the applicant changes the application; and
(c) the change is a change mentioned in s 3.2.8(1)(a) or (b) or s 3.2.10.

Section 3.2.8(1)(a) refers to a change to an application given before the end of the application stage. This is a curious provision, as the notification stage cannot start until after the application stage ends.

Section 3.2.8(1)(b) refers to a change for giving more or better particulars about the application. Presumably this would apply where an applicant responds to an information request by giving “more or better particulars” about the application.

Section 3.2.10 refers to a change to an application that stops and restarts the IDAS process. The notification stage does not restart if “the change only reduces the scale or intensity of an aspect of development” or “the change only removes development”.

The former exclusion is related to the new definition of “material change of use”. The use of the word “only” suggests that the sole effect of the change is to reduce the scale or intensity of an aspect of development and that the change should not, for example, result in the start of a new use. However, this is not made clear by the section.

In both cases, members of the public may be disadvantaged if an applicant makes and advertises an application that includes “sweeteners”, and subsequently changes the application by removing these components. A member of the public who decides not to make a submission objecting to a development because of these components of the development, will be left without recourse.

The notification stage will not need to be repeated if:

(a) the notification stage for the original application had been completed when notice of the change is received; and
(b) the assessment manager states in writing it is satisfied the change to the application, if the notification stage were to apply to the change, would not cause a person to make a substantial submission on reasonable grounds to the thing comprising the change.

The words “a substantial submission on reasonable grounds” introduce a high degree of subjectivity to the determination. The Explanatory Notes suggest that this section will encourage an applicant to change an application in response to submissions received provided the changes do not create
“fresh grounds for submissions”. The section sets a higher threshold than envisaged by the Explanatory Notes. An applicant would be well advised not to rely on this section except in the clearest of cases.

It is difficult to know whether an applicant is better served advertising up front, and running the risk of having to readvertise or simply deferring public notification until after responding to information requests. The latter would seem to be a more prudent approach and one less likely to lead to legal challenge.

For submitters, the proposed change to the public notification stage is likely to be of little benefit. An applicant may seek to take advantage of the early notification option (when limited information is available to the public) and a member of the public not familiar with the process may fail to appreciate the reason for the readvertising and thereby miss out on making a submission to a changed application. One way in which to address this concern may be for any second and subsequent public notices to clearly state the purpose of re-advertisement ie that a change has been made to the application.

Other minor changes are proposed to the notification stage.

The application will lapse if the notification stage is not started within 3 months after the preceding stage ends.92 This is an improvement on the 20 business day lapsing period under IPA.

Public notification will be required for all applications under s 3.1.6 (except for some subsequent stage applications).93 The notification period for applications under s 3.1.6 will be 30 business days.94

Changes will occur to the definition of the owner for land adjoining the land the subject of the application.95 Of note are the following changes:

• if the adjoining land is land granted in trust or reserved under the Land Act 1994 – the trustees and the chief executive of the Department of Natural Resources and Mines (DNRM) will be the owner;96
• if the adjoining land is the bed or bank of a watercourse as defined in the Water Act 2000 – the chief executive of DNRM will be the owner;97
• if the adjoining land is freehold land held in the name of a department – the chief executive of the department will be the owner;98
• if the adjoining land is freehold land held in the name of the State of Queensland – the chief executive of DNRM will be the owner.99

A concurrence agency will only be precluded from making a submission if the submission is about a matter that is within the limits of its concurrence jurisdiction.100

6. IDAS - Decision Stage

There are few major changes to this stage.

The start of the decision stage may be deferred if an assessment manager takes action under s 24HA or s 24KA of the Native Title Act 1993.

If an applicant starts a notification stage after the decision stage has started, the decision stage must restart the day after the notification stage ends.101

The assessment manager will be precluded from assessing that part of a development application, which is the subject of referral.102 However, it would be useful for the assessment manager to be able to have regard to the common material relating to the referred component so as to have a holistic appreciation of the application.

IPOLAA also entrenches the application of the precautionary principle in the deliberations of an assessment manager.103 An assessment manager must apply the precautionary principle if the assessment manager considers that the applicant has not given the assessment manager sufficient information to properly decide the application.104

Separate assessment criteria will be included for the assessment of applications for preliminary approval under s 3.1.6.105 The criteria include:
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- the effect the proposed variations would have on any right of a submitter for following applications, with particular regard to the amount and detail of supporting material for the current application made available to submitters;

- the consistency of the proposed variations with aspects of the planning scheme, other than those sought to be varied.

The above criteria are necessary considerations, particularly in light of the move towards more conceptual and less detailed applications for preliminary approval.

The decision notice must state whether or not there were any properly made submissions about the application and for each properly made submission, the name and address of the principal submitter.\(^{106}\)

If an applicant applies to change a matter in a decision notice during the applicant's appeal period (ie takes advantage of the negotiated decision notice procedure), the applicant's appeal period is automatically suspended.\(^{107}\)

A submitter may give the assessment manager written notice that the submitter will not be appealing the decision.\(^{108}\) Assuming submitters are co-operative, this should streamline the process.

7. Changing an Application

An applicant may change a development application before it is decided.\(^{109}\)

A change is defined to include giving a response to an information request.\(^{110}\)

A change to a properly made application does not include a change that, if the application were remade including the change, would cause the application to be not properly made.\(^{111}\) The example in the Explanatory Notes suggests that a change, which involves adding a piece of land for which the consent of the owner is not obtained, would not be covered by s 3.2.7.

There are three types of changes:

- changes that do not stop IDAS;\(^{112}\)
- changes that restart IDAS for part of the application;\(^{113}\)
- changes that restart IDAS completely.\(^{114}\)

The table below summarises the relevant sections:

| IDAS does not stop if - | notice of the change is given before the end of the application stage (public notification may be restarted) |
| IDAS partly restarts if - | the change is for giving more or better particulars about the application (public notification may be restarted) |
| IDAS completely restarts - | the change only reduces the scale or intensity of an aspect of development |
| | the change only removes an aspect of development |
| | the assessment manager and concurrence agency give the applicant a written notice stating that the entity is satisfied the change is insignificant |
| | the change corrects a mistake in, or omission from, the application about the name or address of the applicant or owner |
| | the change corrects a mistake or omission about the property details of land and the assessment manager and any concurrence agency gives the applicant a written notice stating the entity is satisfied that change would not adversely affect the ability of a person to assess the changed application unless the change has the effect of adding referral agencies or the original application involved only code assessment but the changed application involves impact assessment |

IDAS partly restarts if -

- the change only corrects an omission from an application about a referral to a referral agency and the application, but for the omission, would have been a properly made application

IDAS completely restarts -

- any other circumstance
Some of these sections require comment.

A change that “only reduces the scale or intensity of an aspect of development” or “only removes an aspect of development” may impact upon the public’s appreciation of the application and should trigger the restart of the public notification stage (if at the time the change is made, public notification has started or been completed). As can be seen from the decision in Carillon Development Limited v Maroochy Shire Council, the removal of an aspect of development may well remove a perceived benefit of an application, without which members of the public may wish to make a submission objecting to the application.

The ability of an assessment manager and any concurrence agency to give an applicant a written notice that a change is insignificant introduces a degree of subjectivity into the process, which may be the subject of legal challenge. The Explanatory Notes assume that such a notice will only be given in similar situations to those listed in the section. No such limitation is imposed by IPOLAA.

The provisions dealing with a missed referral are necessary given the complexity of the referral process as more development is brought within the ambit of IDAS and the inconvenience and inefficiency in requiring an applicant to reapply in the event of a missed referral.

8. Changing or Cancelling Development Approvals

8.1 Applicant Initiated Application

IPOLAA introduces new provisions dealing with applications to change or cancel a development approval (including the currency period).

The consolidation of the previously dispersed sections is supported, however, the new provisions need to state with more clarity the circumstances in which a change application may be made, assessed and decided by an entity.

A change application must relate to an approval that has effect. While this is implicit in the current sections, it helps to have this requirement made explicit. For a change application relating to an extension of a currency period, this effectively means that the change application must be made before the approval lapses.

A change application must not change a preliminary approval into a development permit. The Explanatory Notes do not correlate with the section in that they speak of the inappropriateness of changes to conditions of a preliminary approval. This is not the effect of the section.

The application is made to the deciding entity. “Deciding entity” is a defined term and refers to the entity that decided the aspect of development to which the change application relates. It may therefore be necessary to make a number of change applications to different entities with respect to a single change. The alternative is to require a change application to follow a fully integrated process. Given the complexity of the section, further complexity is not supported. However, this does mean that changes are being assessed in a vacuum (except for s 3.6.2, which requires an assessment manager to consult with the concurrence agency for the development application).

The change application procedure does however remove the distinction between changing conditions and changing a development approval and this is an improvement to the process. However, this distinction may still resurface as the “conditions” and the “development approval” may be viewed as separate “aspects of a development approval” for which it may be necessary to make a change application to different deciding entities.

A change application may be made for the purpose of cancelling a development approval. Under the existing s 3.5.26 a request to cancel a development approval may only be made before the development under the development approval starts. IPOLAA does not contain such a limitation and in fact contemplates that a development approval may be cancelled after the development or use starts. Section 3.6.2(8)(a) states that a deciding entity must refuse the change application if the entity is satisfied the cancellation of the development approval would compromise the fulfilment of a condition to mitigate the adverse environmental effects of development or use of the premises.

Section 3.6.1(5) states that if the person making the change application is the owner of the land and there is a written agreement between the owner and another person in which the other
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person proposes to buy the land, the change application must also be accompanied by the written consent of the other person. Currently a similar limitation is only imposed with respect to a request to cancel a development approval. The imposition of this requirement in relation to all change applications is supported.

A change application cannot be approved if the development application would, if it could, and had, included the change:

• require referral to additional concurrence agencies; or
• cause development previously requiring only code assessment to require impact assessment; or
• cause a person to make a substantial submission on reasonable grounds about the change (unless the change is the complete removal of, or a reduction in the scale or intensity of, an aspect of the development).121

This is a curious provision.

The first two components should more appropriately be prerequisites to the making of the application, rather than being grounds of refusal.

The deciding entity must refuse the change application if the deciding entity is satisfied the “development application would, if it could, and had, included the change” have certain outcomes. The Explanatory Notes refer to s 3.6.2(5) as requiring the change application to be refused if “the proposal, including the change, if reapplied for, would require a different application to that originally made”. The Explanatory Notes state:

The subsection uses the term “if it could, and had, included the change”. This reflects the fact that the limitations in this subsection only apply if it is possible to conceptualise the original application as including the change. It would not apply if the change sought was, for example, to alter the hours of operation for a facility, the subject of a development application. This type of change is not a change to an aspect of development, so it could not have been a substantive part of the original application, and would not result in a different application for the purposes of this subsection.

Further clarification is found in the Explanatory Notes:

... the use of this part is limited generally by the definition of “development approval” for the Act. The definition states the relationship between a development application and any approval of that application. The scope of an approval cannot exceed (but may vary or be less than) the scope of the application. Therefore an application to change a development approval is also limited to dealing with the development originally applied for. That is, no new aspects of development can be dealt with and added by a change, but aspects may be varied or removed.

It is not intended that an application for change under the division be used where a new development application is necessary. Because of these constraints, it is envisaged that only relatively minor changes, limited to the jurisdiction and interest of the deciding entity, will be dealt with through this Part.

In comparison to the complexity of this explanation, the existing requirement for there to be no assessable development arising from the change122 appears to be simple.

The section needs to clearly state that a change application may only be made in circumstances when a new development application is not required to be made to the deciding entity in order to effect the change.

Section 3.6.2(5)(c) states that the deciding entity must refuse the change application if the deciding entity is satisfied it would “cause a person to make a substantial submission on reasonable grounds”. This test is difficult to understand and too subjective and will lead to challenge.

Of more concern, however, is the fact that this test does not apply “for a change if the change is the complete removal of, or a reduction in the scale or intensity of, an aspect of the development”. It is acknowledged that the reason for this exclusion is related to the new definition of development, however, the rights of members of the public need to be considered. For example, members of the public expecting to have a regional shopping centre developed may be disappointed if all that eventuates is a neighbourhood centre. If such an application is in fact made, it is hoped that the

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deciding entity when assessing such an application under s 3.6.2(2) and s 3.6.2(3), will see fit to refuse the application and require the applicant to re-apply using the IDAS process.

The application is to be assessed and decided using a simple IDAS process. This process is satisfactory where the deciding entity is the assessment manager, a concurrence agency or a private certifier. This process is not appropriate where the deciding entity is the Court. Where the deciding entity is the Court, the person seeking to make a change application should be required to make an application to the Court and comply with the Planning and Environment Court Rules 1999.

Section 3.6.2(10) makes it clear that a development approval may be changed by removing an aspect of development from the approval. The comments made above with respect to changing an application are equally applicable.

For all of the reasons stated above, the provisions dealing with a change application under IPOLAA are unsatisfactory. These provisions need to be redrafted, with the following principles in mind:

(a) the provisions must clearly identify the prerequisites for making a change application;
(b) the provisions must clearly identify the procedure for making a change application;
(c) the provisions must clearly identify the procedure for assessing a change application;
(d) the provisions must clearly identify the procedure for deciding a change application;
(e) in (b), (c) and (d) above, some thought needs to be given to the identity of the deciding entity;
(f) the provisions must clearly identify the effect of a change application.

A change application may be called in by the Minister. The Minister may call in a change application only if the change or cancellation involves a State interest. The period during which a change application may be called in is of concern. For example, a change application may be called in at any time after the change application is made until 10 business days after an appeal against the deciding entity’s decision starts. Calling in a change application after an appeal starts is likely to lead to a waste of resources and time for all parties, including the Court.

8.2 Assessment Manager or Concurrence Agency Initiated Application

Section 3.6.5 is intended to replace s 6.1.44.

Section 3.6.5 will allow an entity that imposed or has jurisdiction over a development condition or an operational condition to change or cancel the condition without the consent of the owner or occupier of the land to which the approval attaches.

The section does not apply if another Act deals with this matter in a different way.

A development condition as defined in the Environmental Protection Act 1994 (EP Act) may be changed or cancelled only on a ground mentioned in s 130(2) of the EP Act, which deals with amendments to an environmental authority.

An operational condition of a development approval is defined in s 3.6.5 as “a condition that states a standard of environmental performance for an activity or use that is the natural and ordinary consequence of the development”.

An operational condition may be changed or cancelled only if the entity is satisfied that change or cancellation reflects a standard for environmental performance stated in a statutory instrument with which the condition does not comply.

The Explanatory Notes state:

“Standard of environmental performance” is intended to be applied broadly. It may for example apply to emission standards, traffic management standards, site circulation standards or standards of visual or aural amenity.

An operational condition must also apply to the activity or use that is the consequence of development, and not to the development itself. This is intended to reflect the “performance” approach adopted by the Act generally.

A condition aimed at achieving a standard of environmental performance may be expressed
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in different ways. For example, a condition designed to ensure adequate on-site parking might be expressed as a requirement to construct a specified number of car parking spaces as part of carrying out the development. Such a condition would not be able to be changed under this section, as it is a condition about carrying out the development.

If however the condition required the use resulting from the development to be conducted in such a way that there was at all times provision for adequate on site parking, such a condition could subsequently be changed under this section. This approach is also consistent with the use of compliance assessment for conditioning under Part 7 of this Chapter. A condition about environmental performance could be accompanied by another condition requiring submission for compliance assessment of a plan showing how the standard of environmental performance is to be achieved and maintained. It is then up to the applicant to propose the best strategy for meeting the desired standard of performance. If the performance standard is subsequently changed in a planning scheme for example, the condition could be changed under this section to require the submission of a new plan demonstrating performance against the new standard.

This provides an incentive for assessment managers and concurrence agencies to express conditions as performance standards, as it allows the entity to subsequently upgrade the standards consistent with those in a new planning scheme for example.

The interaction of s 3.6.5 and the existing use protections in Chapter 1, Part 4 of IPA or IPOLAA is of some interest. Query whether s 3.6.5 has the potential to erode the protection afforded by the existing use provisions.

9. Conclusion

The substantive and operational changes in IPOLAA will require re-education for those operating within the regime. It is hoped that the benefits of a more streamlined process will outweigh the cost in time and resources of coming to terms with the new chapter.

Footnotes

1 Schedule 10, Dictionary, IPA.
2 The definition of use was inserted by the Local Government Acts Amendment Act 1966, No. 30, s 8.
3 Although it is sometimes found in planning scheme definitions and in some early decisions which seem to use “ancillary” and “incidental to and necessarily associated with” interchangeably: Badgery v Brisbane City Council [1983] QPLR 397, Too World Holiday Pty Ltd v Cairns City Council [1985] QPLR 86, Barcoo Pty Ltd v Crows Nest Shire Council [1986] QPLR 105, Southside Action Group v Brisbane City Council (1992) 76 LGERA 402.
4 The case law in New South Wales suggests that it is a common planning term in that State.
6 (1975) 32 LGRA 157
7 (1975) 32 LGRA 157 at 161
8 (1978) 38 LGRA 306
9 (1978) 38 LGRA 306 at 310
10 (1983) LGRA 114
11 (1983) LGRA 114 at 116–117
12 (1981) 47 LGRA 30
13 (1981) 47 LGRA 30 at 33
14 (1992) 76 LGRA 151
15 (1992) 76 LGRA 151 at 156

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Grainger, C., “The Doctrine of Ancillary Use” (1993) 10 EPLJ 267 at 274, Warringah Shire Council v May (1979) 38 LGRA 424 (light plane landing strips not ancillary to dwelling house), Chesser v Morris (1958) 4 LGRA 175 (a cartage contractor parked his trucks alongside and on the same allotment as his residence in a zone in which the use of land for business was prohibited), Franconi v Shire of Perth (1965) 11 LGRA 380 (the parking and transit of motor vehicles used in connection with a stonemason’s business was not incidental to the residential use).


Grainger, C., “The Doctrine of Ancillary Use” (1993) 10 EPLJ 267 at 275, S Wallace Pty Ltd v Sydney City Council (1952) 18 LGRA 130 and Wym Pty Ltd v Sutherland Shire Council (1990) 69 LGRA 322.

Grainger, C., “The Doctrine of Ancillary Use” (1993) 10 EPLJ 267 at 275, Ashfield Municipal Council v Australian College of Physical Education Ltd (1992) 76 LGRA 151 cf. Davenport v Waverley Municipal Council (1981) LGRA 97 where Cripps J held a car park to be ancillary to a residential flat building although the car park was not on the same land. His Honour said that it was not a case of one purpose being independent of another, but of the car park subserving the purpose of the residential flat building.


[1984] QPLR 341
[1982] 47 LGRA 230
[1996] 91 LGERA 323
[1983] 2 Qd R 689
[1996] QPLR 35
[1996] 91 LGERA 323 at 327
[1997] QPELR 256
[1997] QPELR 256 at 259
[1999] QPELR 105

Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council (1980) 44 LGRA 346

(1980) 44 LGRA 346 at 357-358
(1980) 44 LGRA 346 at 358


[1989] QPLR 42
[1989] QPLR 42 at 48

Section 1.3.5 as inserted by IPOLAA.
Section 3.1.2(2) as inserted by IPOLAA.
Section 3.1.5(4) as inserted by IPOLAA.
Section 3.1.5(5) as inserted by IPOLAA.
Chapter 3, Part 7 as inserted by IPOLAA.

The Explanatory Notes further state:
The compliance stage will simplify aspects of the IDAS process by allowing for development
that simply requires assessment for compliance with certain standards proceed straight through a simple compliance check. The stage will also apply for checking documents related to development (as opposed to checking the development itself) for compliance.


This is accepted in the Explanatory Notes to s 3.2.1(8) which state:

New Section (8) is particularly relevant with respect to the applications for preliminary approvals. The provision makes it clear that an applicant may apply for approval for development in most general terms. An application does not necessarily have to align with how aspects of assessable development are specified in the planning scheme, but may be quite conceptual. For example, an application for the conceptual approval of a shopping centre would not be required to include details of the types of shops ultimately to be included in the centre. However, the more general the application, the more general any approval would be. (Emphasis added.)

Section 3.1.5(2) as inserted by IPOLAA.

Section 3.1.6. IPA and as inserted by IPOLAA.

Section 3.1.5(3)(b) as inserted by IPOLAA.

Sections 3.1.6(2)(a) and 3.1.6(4)(a) as inserted by IPOLAA.

Section 3.4.2(1)(b) as inserted by IPOLAA.

Section 3.4.2(3) as inserted by IPOLAA.

Section 3.1.6(3) as inserted by IPOLAA.

Section 3.1.6(5) as inserted by IPOLAA.

Section 3.1.10(1) as inserted by IPOLAA.

Section 3.1.10(1)(a) – A complete code cannot be added to or changed by a local planning instrument. To the extent a local planning instrument is inconsistent with a complete code, the local planning instrument is of no effect: s 3.1.10(3) as inserted by IPOLAA.

Section 3.1.10(1)(b) – A partial code can be added to but not otherwise changed by a local planning instrument. To the extent a local planning instrument is inconsistent with a partial code, the local planning instrument is of no effect: s 3.1.10(4) as inserted by IPOLAA.

Section 3.1.10(1)(c) – A variable code can be changed by a local planning instrument. A code not otherwise identified is a variable code: s 3.1.10(2) as inserted by IPOLAA.

Section 3.1.10(5) – An adoptable code is one that has no effect until a planning scheme is amended to apply the code.

Warning signs were raised in Vynotas Pty Ltd and Permanent Trustee Australia Ltd v Brisbane City Council (2000) 112 LGERA 206 and Grosser v Gold Coast City Council [2001] QCA 423. Section 3.2.1(3)(b) and (5) as inserted by IPOLAA.

Section 3.2.1(3)(b) as inserted by IPOLAA.

[2001] QPEC 057. IPA requires the written consent of the owner of the land to the making of the application to be contained in the approved form. Robin QC DCJ says that it is tempting, therefore, to conclude that a written consent accompanying the application will suffice. However, His Honour points to s 3.2.1(2) which requires that each application be made in the approved form and the approved form makes provision for the written consent of the owner to be contained therein. His Honour finds s 49 of the Acts Interpretation Act 1954 of little assistance in this regard, but then concludes that it is not necessary to decide the point in this case.

Section 3.2.1(3)(b) as inserted by IPOLAA. The owner’s consent will still be required for works on land below high water mark and outside a canal as defined under the Coastal Protection and Management Act 1995 and for works on rail corridor land as defined under the Transport Infrastructure Act 1994.

Section 3.2.1(5) as inserted by IPOLAA.

Section 3.2.4 as inserted by IPOLAA.
Section 3.2.3(1) as inserted by IPOLAA.

Section 3.2.3(2) as inserted by IPOLAA.

Section 3.2.3(3) as inserted by IPOLAA. This period may be extended under s 3.2.7(5). It would be preferable for the extension provision to be contained within s 3.2.3.

Section 3.2.3(3) as inserted by IPOLAA.

Section 3.2.13(1) as inserted by IPOLAA.

Section 3.2.13(2) as inserted by IPOLAA.

Section 3.7(1) as inserted by IPOLAA.

Section 3.7(5) as inserted by IPOLAA.


Section 3.7(2) as inserted by IPOLAA. Reference may be had to the interpretation of the term “significant impact” in the Environment Protection and Biodiversity Conservation Act 1999 in Booth v Bosworth [2001] FCA 1453. Branson J said:

The parties were in broad agreement that in the context of s12 of the Act a “significant impact” is, as expressed in the applicant’s written submissions, an “impact that is important, notable or of consequence having regard to its context or intensity.” Reliance was placed on a number of Australian authorities including Oshlack v Richmond River Shire Council and Iron Gates Developments Pty Ltd (1993) 82 LGERA 222 per Stein J at 233; Concord, North Sydney, Woolahra and Manly Councils v Optus Networks Pty Ltd (1996) 90 LGERA 232 per Dunford J at 264: McVeigh v Willarra Pty Ltd (1984) 6 FCR 587 per Tooke, Wilcox and Spender JJ at 596; Tasmanian Conservation Trust Inc v Minister for Resources (1995) 55 FCR 516 per Sackville J at 541; Drummoyne Municipal Council v Roads and Traffic Authority of New South Wales (1989) 67 LGRA 155 per Stein J at 163.

Section 3.9(2) as inserted by IPOLAA.

Section 3.8(2) as inserted by IPOLAA.

Section 3.8(4) as inserted by IPOLAA.

Section 3.10(4) and (5) as inserted by IPOLAA.

Section 3.16(1)(a) as inserted by IPOLAA.

Section 3.16(1)(b) as inserted by IPOLAA.

Schedule 10, Dictionary to be inserted by IPOLAA.

Sections 3.20 and 3.21 as inserted by IPOLAA.

See s 3.20(8) as inserted by IPOLAA.

This corresponds to the duty imposed by s 1.2.2(1)(c), IPA.

Section 3.4.3 as inserted by IPOLAA.

Section 3.4.5(1) as inserted by IPOLAA.

Section 3.4.5(3) as inserted by IPOLAA.

Section 3.4.4 as inserted by IPOLAA.

Section 3.4.2 as inserted by IPOLAA.

Section 3.4.7(1)(b) as inserted by IPOLAA.

Section 3.4.6(5) as inserted by IPOLAA.

Section 3.4.6(5)(g) as inserted by IPOLAA.

Section 3.4.6(5)(h) as inserted by IPOLAA.

Section 3.4.6(5)(i)(i) as inserted by IPOLAA.

Section 3.4.6(5)(i)(ii) as inserted by IPOLAA.

Section 3.4.11(2) as inserted by IPOLAA.

Section 3.5.1(2) as inserted by IPOLAA.

Section 3.5.4 as inserted by IPOLAA.

See s 3.5.15(5) as inserted by IPOLAA.

This corresponds to the duty imposed by s 1.2.2(1)(a), IPA but appears to override the lesser duty in s 1.2.2(1)(b), IPA.
For example, take the case of a submitter appeal in which the applicant is successful. If the Court simply orders that the appeal be dismissed and the application be allowed, without altering the conditions, it may still be possible to argue that the conditions were decided by the assessment manager and the development approval was granted by the Court.

This process may also be unsatisfactory if the deciding entity is the Tribunal. The author of this paper is not sufficiently familiar with the operations of the Tribunal to reach a conclusion in this regard.

The grounds in s 130(2) are:
(a) a contravention of this Act by the holder [of an environmental authority];
(b) the environmental authority was issued because of a materially false or misleading representation or declaration, made either orally or in writing;
(c) the environmental authority was issued on the basis of a miscalculation of-
   (i) the quantity or quality of contaminant authorised to be released into the environment; or
   (ii) the effects of the release of a quantity or quality of contaminant authorised to be released into the environment;
(d) a change in the way in which, or the place where, contaminants are, or are likely to be, released into the environment;
(e) the approval of an environmental protection policy or the approval of the amendment

Schedule 3, Dictionary of the EP Act defines a development condition as:

1. “Development condition” of a development approval, means a condition of the approval imposed by, or imposed because of a requirement of, the administering authority as assessment manager or concurrence agency for the application for the approval.

2. The term includes a reference to a condition referred to in the State Development and Public Works Organisation Act 1971, section 29O(5).
of an environmental protection policy;

(f) an environmental report;

(g) if the environmental authority is for a level 1 approval – the administering authority forms the opinion that the risk of environmental harm from an activity carried out under the approval is no longer insignificant;

(h) another circumstance prescribed under a regulation.

As is obvious from the above, s 130 deals with amendments to an environmental authority under the EP Act. The Explanatory Notes state that “when applied to development conditions, the grounds be read, as far as practicable, as applying in the context of a development condition”. This should be made clear in IPOLAA.

131 A statutory instrument may be a regulation, an order in council, a rule, a local law, a by-law, an ordinance, a subordinate local law, a statute, a proclamation, a notification of a public nature, a standard of a public nature, a guideline of a public nature or another instrument of a public nature by which the entity making the instrument unilaterally affects a right or liability of another entity. A statutory instrument must be made under an Act or another statutory instrument: s 7, Statutory Instruments Act 1992. All local planning instruments (planning scheme, planning scheme policy and temporary local planning instrument) are statutory instruments under the Statutory Instruments Act 1992: s 2.1.23, IPA. A State planning policy is also a statutory instrument under the Statutory Instruments Act 1992: s 2.4.1, IPA.
The New Compliance Stage

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My job today is to look at the new Compliance Stage in Chapter 3, Part 7.

My initial reaction was ‘what the ….?’ I thought, ‘great, another stage to wrestle with, and what does it add?’ At first blush, it occurred to me that the purpose was to statutorily remove the concept of finality with respect to conditions of approval. It also occurred to me that by taking certain things outside the regular development approvals and IDAS process it might have unintended consequences.

The introduction of the Compliance Stage represents a dis-integration from IDAS.

Perhaps I was being a little harsh in my initial judgement, but on reflection it appears there are potentially a number of problems associated with it that may have been unintended, and also I have a general state of uneasiness with the level of reliance upon as yet unwritten regulations to give certainty to its operation.

What is it?

The Compliance Stage is a new stage that was added for compliant development, or to allow for other works or documents relating to works to be assessed against specified technical standards for compliance with those standards.

It is an offence to carry out compliant development without first obtaining a compliance permit or other than in accordance with it. It is also an offence not to request compliance assessment for work mentioned in section 3.7.3 within the time prescribed by regulation.

Section 3.7.1 specifies compliance assessment is assessment of compliant development, a document or work relating to development to be assessed against:

(a) a matter or thing prescribed under a regulation; and
(b) conditions of a development approval.

This is where it first gets interesting, must compliance assessment be both prescribed under the regulation and conditions of the development approval, or is it intended that it be the disjunctive? It would seem odd for a requirement that the regulation must prescribe every possible instance when compliance assessment might arise. Although section 3.7.1 suggests that is the case, the Explanatory Notes at the third dot point on page 70 suggest otherwise.

The ‘quest’ for the Compliance Stage is to obtain a compliance permit, which authorises compliant development to be carried out to the extent stated in the permit; and subject to any conditions for achieving compliance that are noted on, or attached to the documents or plans the subject of the compliance assessment.

Alternatively, one can obtain a compliance certificate which approves documents, plans or works to the extent stated in the certificate subject to any conditions attaching to plans or documents or written instructions given by the compliance assessor for achieving compliance.

A compliance permit is in addition to a development permit, and given the terms of section 3.1.2
may be in substitution for a development permit for exempt development.

**When does it apply?**

Section 3.7.2 specifies 3 instances where the Compliance Stage applies:

1. Compliant development, which by virtue of sections 3.1.2(2) and 3.1.12 appears to incorporate exempt development;
2. Where a condition of a development approval requires assessment of documents or works under the approval for compliance with a condition of the approval; or
3. Where a preliminary approval states that development requires assessment for compliance with a code identified in the approval.

**What can be assessed for compliance?**

Section 3.7.3(1) makes provision for a regulation to prescribe compliant development or to prescribe a document or work that may be assessed for compliance with a matter or thing mentioned in section 3.7.1, being a matter or thing prescribed under a regulation and conditions of a development approval.

It is clear the forthcoming regulation will have a significant impact on both the operation and extent of the compliance stage, particularly given a regulation may prescribe stated codes or standards or a range of conditions with which development or works must be assessed for compliance.

**When does it start?**

Section 3.7.4 deals with when the Compliance Stage starts. Again, if a time is prescribed under a regulation for the start, the Compliance Stage starts at that time, however if no such time is prescribed, then section 3.7.4(b) starts the Compliance Stage on the day a request for compliance assessment is made under section 3.7.5.

It is important to note that the Compliance Stage as it relates to an aspect of an application proceeding through the IDAS process need not be completed before the decision stage starts.

**Compliance assessment process**

Again, the as yet unwritten regulation is central to the process for compliance assessment. It sets the prescribed form and the entity to whom the request for compliance assessment must be made. Section 3.7.5(1)(c) requires the appropriate fee and for any relevant document mentioned in section 3.7.3(1) to accompany the prescribed form.

It does not appear to be a requirement that compliance assessment requests be made or consented to by the owner of the land. If consent is to be required, and I think it should, then it should be included in the Act rather than the Regulations, particularly given the effect of section 3.7.7(3).

The appropriate fee is the fee fixed by resolution of the local authority if that is the entity to whom the compliance request is made. If the entity is not a local authority, then the fee is that fee prescribed by regulation.

The assessment is carried out by an entity prescribed by the Regulation and not by an assessment manager.

Section 3.7.5(3) restricts the things to which a compliance assessor can have regard in assessing compliant development, a document or work for compliance. Section 3.7.5(3) states:

> *the compliance assessor must assess the compliant development, document or work only against either or both of the following:*

(a) the matters prescribed under a Regulation;

(b) the relevant conditions of a development approval.*
Queensland Environmental Law Association

Compliance assessment requests can only be approved or approved subject to conditions or written instructions required to achieve compliance with the stated code, however the assessor may give written notice to the person making the request for compliance assessment notice of the action required for the compliant development, document or work to apply. If the assessor gives a written notice under section 3.7.5(4)(c), it must be given within the time prescribed by Regulation.

If the assessor fails to decide a request within the time prescribed by Regulation, the person making a request may take the action prescribed under the Regulation for the type of request that has been made.

The explanatory note says a compliance request cannot be refused. That appears in direct conflict with the provisions of section 3.7.5(4)(c), and the initial words of section 3.7.5(5) ‘if the assessor approves the request’. It seems to me that a notice under subsection 4(c) acts as a non-approval of the request, at least until such time as the compliant development, document or work are amended to achieve compliance.

Depending on the type of development for which the request is made, either a compliance permit or a compliance certificate will be issued. A compliance permit is issued in respect of compliant development, whereas a compliance certificate is issued in respect of a document or work carried out. The distinction is less than obvious.

The Regulations may prescribe additional requirements relating to documents for which compliance assessment is requested, e.g. scale, size of plan etc, and may also prescribe additional actions that may or must be taken by the compliance assessor in assessing compliance requests.

Effects/ Duration of Approval

If a period is prescribed under the Regulation, then the approval has effect for that period.

If no period is prescribed by Regulation, then a compliance permit or a compliance certificate has effect for 2 years from the date notice is given under section 3.7.5(4).

Subsection 2 of section 3.7.7 confirms that if the compliant development starts within the period the approval has effect, it continues to have effect, and subsection 3 attaches a compliance permit to the land and binds the owner, the owner’s successors in title and any occupier of the land. This may have onerous consequences if owners consent is not required for the making of a request.

Section 3.7.8 specifies that a compliance certificate approving a plan for the reconfiguration of a lot is taken to be an approval for the purposes of the Land Title Act, and subsection 2 overcomes the problem associated with a plan of amalgamation which is excluded from the definition of reconfiguration of a lot, but would otherwise have to be sealed by the local government under the Land Title Act before it could be registered.

Codes

Section 3.7.9 makes it clear that codes against which compliance is being assessed are not applicable codes as defined by Schedule 10. Applicable codes only apply to assessable and self-assessable development and therefore the assessment manager for assessable development under IDAS is not required to assess the development application against codes identified in the Regulation as code for compliance assessment. This section is the flip side of the restriction on compliance assessors in section 3.7.5(3).

Examples

The Explanatory Notes provide a series of examples as illustrations of the way in which the Compliance Stage will work. The first and most obvious is that relating to building work only requiring assessment under the Building Act ‘it will be specified as exempt under Schedule 8 and therefore all that will be required under IDAS will be the checking of building plans for compliance with the Standard Building Regulation (and possibly completed work for compliance with the plan)’. That example has the flaw that Schedule 8 does not specifically exempt building work.

Another example given for when the Compliance Stage will apply for assessable development is
when as a condition of a development approval a landscaping plan or an environmental management plan is required to be prepared and checked for compliance with a condition, or if subdivision plans need to be sealed by the local government prior to registration under the *Land Title Act*. The plan would be assessed against some objective criteria or standards to establish compliance.

**Finality**

At the beginning of this paper I raised concerns relating to the issues of finality. Upon reflection, provided the conditions of a development approval against which some further condition requiring something to be done is assessed established definitively what is required, then the ‘how’ component should not lack finality. The key is providing sufficient certainty and detail in the development condition or the codes and regulations to ensure an objective assessment can be undertaken to demonstrate compliance or non-compliance.

It is possible the Compliance Stage could be used to overcome the lack of finality encountered in the staged piggery case of *McBain* where the permit given purported to allow incremental increases from an originally approved stock level to a maximum level provided the local government ‘signed off’ on those increases having regard to the level to which impact from the previous stages had been contained. If there were identified standards for each threshold, then this process might just be able to respond.

**Possible problems**

A few questions for thought:

1. Does the designation of building works as compliance development have the effect of removing private certifiers from the constraints of the mainstream IDAS process? If so, what are the effects in light of the fact private certifiers may receive, assess and decide development applications (not compliance requests) as if the private certifier were the assessment manager?

2. Is it intended to reproduce appeal or at least review provisions in the regulation against notices issued under section 3.7.5(4)(c) or (5)?

**Footnotes**

1. Page 70, Explanatory Notes
2. Defined in the uncommenced provisions of Schedule 10. Schedule 10 refers to section 3.1.2.
3. Section 4.3.4A(1)
4. Section 4.3.4A(2)
5. Section 3.1.5(4)
6. Section 3.1.6(5)
7. I have said must given the offence created by section 4.2.4A(2) notwithstanding the terms of section 3.7.3(1).
8. Section 3.7.5(4)
9. Section 3.7.5(4)(c)
10. Page 74, first paragraph
11. Section 3.7.7(1)(b), however that appears to be a typographical error and should in fact refer to section 3.7.5(5).
12. Page 70, last paragraph
14. Section 5.3.5(1)
Queensland Environmental Law Association

Infrastructure Overview

Graeme Ballard
Department of Local Government & Planning

Infrastructure Overview

• Completely reviewed and recast
• Clear distinction between infrastructure planning objectives and mechanisms for charging for infrastructure
• Clearer distinctions between “impact” conditioning and the powers to impose routine charges/payments to fund development infrastructure
• Choice of charging mechanisms – charge or payment (condition)

New Infrastructure Mechanisms

• Planning - Priority Infrastructure Plan
• Charging/contributions
  – Infrastructure Charges Schedules
  – Infrastructure Payments Schedules
  – Conditions for “non-trunk” infrastructure
  – Conditions for “additional costs”

How is it Proposed to Work?

Priority Infrastructure Plan
  – Identifies priority infrastructure area
  – Identifies planning assumptions for priority area
  – Identifies “desired standards of service” for networks in the area
  – Identifies existing and future “trunk” level infrastructure to address planning assumptions in ways that seek to achieve the desired standards of service
  – Includes any charges schedules or payments schedules

Funding and works
  – Trunk infrastructure – charges or payments
  – Non-trunk infrastructure - conditions
  – Trunk infrastructure outside priority area or inside priority area but inconsistent with identified planning assumptions – conditions to deal with “additional infrastructure costs”
  – Ability to enter into infrastructure agreements

Outstanding Matters

• Resolution of outstanding policy issues
  – State’s involvement in the framework
  – Rules governing how spare capacity in existing networks may be funded
• Regulations and associated guidelines for charges and payments schedules

42 Integrated Planning & Other Legislation Amendment Act 2001
The Integrated Planning & Other Legislation Act 2001 (IPOLAA) introduces a new regime for the funding of infrastructure through infrastructure charges and infrastructure payments. While it retains some of the philosophies from the current Act, it also introduces some new mechanisms for funding of infrastructure.

In his presentation, Graham Ballard has examined the criticisms levelled at the current provisions and explained the responses to those criticisms as they are embodied in the new provisions.

This paper will provide a brief commentary on the new provisions and make some comments on the mechanisms which have been used.

**Division 1 - Non-trunk Infrastructure**

**Section 5.1.1 conditions local governments may impose for non-trunk infrastructure**

This section picks up a major deficiency in the current Act. It enables a local government to impose conditions upon a development application for:

- internal reticulation of infrastructure;
- external connections between the development and existing trunk infrastructure networks;
- reduction of the immediate impact of a particular development on an existing trunk infrastructure network.

Any condition must still comply with Section 3.5.29 (conditions must be relevant or reasonable).

The new section to a large extent restores the position that existed prior to commencement of the Integrated Planning Act 1994 (IPA) but with the important proviso that the condition can only require the provision of or payment for items which are non-trunk infrastructure (that is, any items which are not identified in the priority infrastructure plan as being trunk infrastructure). The current provisions do not differentiate between these two levels of infrastructure which has caused difficulty in both the conditioning process and the preparation of infrastructure charges plans. This section will overcome those difficulties.

**Division 2 - Trunk Infrastructure**

**Section 5.1.2 Priority infrastructure plans for trunk infrastructure**

Section 2.1.3 (as amended by IPOLAA) requires that each planning scheme include a priority infrastructure plan.

Section 5.1.2 requires that the priority infrastructure plan be prepared in accordance with guidelines prescribed under a regulation (although they may go by a different name).
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It is a consistent theme throughout Chapter 5, Part 1 that much of the detail about the way in which these charging mechanisms for infrastructure will work is to be contained in regulations/guidelines. As these documents are not yet available it is sometimes difficult to know exactly what is intended.

Obviously, the regulations/guidelines will not be able to conflict with the requirements and intentions of the Act. The definition contained in the dictionary (Schedule 10) of a priority infrastructure plan is very wide and very general. The guidelines will play a critical role in determining the workability of the scheme provided by the Act.

One of the criticisms which has frequently been levelled at the current infrastructure charges plan regime is the lack of specificity and detail provided by the Act (and the Department) about what an infrastructure charges plan should look like and how it is to be implemented.

Without having seen the guidelines/regulations for priority infrastructure plans, it is not possible to comment on whether that criticism will remain valid. However, it is not unreasonable to suggest that the Act should provide a better framework within which the guidelines are to operate. At the moment, the power to legislate by regulation is very open-ended.

It is understood that generally the priority infrastructure plan will contain the planning elements for the provision of infrastructure (for example, identification of the priority infrastructure area, assumptions for population growth and development direction, specification of the desired standards of service) while the infrastructure charges schedule will contain the detail of timing, design, cost and calculation of charges.

Section 5.1.3 Funding trunk infrastructure for certain local governments

This section applies to those local governments which operate significant business activities as defined by Chapter 8 of the Local Government Act 1993 (the so called “Big 18”).

In funding the up-front costs of supplying infrastructure in those activities, the local government can not use the infrastructure payments schedule option and must use charges under an infrastructure charges schedule. Of course, funding mechanisms outside IPA (for example, special rates under the Local Government Act or City of Brisbane Act) are not affected.

Subsection 3 gives to the Minister a discretion to waive the application of the section in relation to any part of the local government’s area which the Minister is satisfied is low growth. The explanatory notes make it clear that the Minister will not lightly exercise the waiver power.

Division 3 - Trunk Infrastructure Funding Under an Infrastructure Charges Schedule

Section 5.1.4 Making or amending infrastructure charges schedules

This section has two purposes.

Firstly, it allows the abbreviated process used for preparation and amendment of a planning scheme policy to be used for preparation and amendment of an infrastructure charges schedule even though it forms part of the planning scheme and would otherwise need to follow the lengthy process set out in Schedule 1 to IPA.

This concession appears to be justified. Indeed, a strong argument can be mounted to say that once the rest of a priority infrastructure plan has been initially prepared and adopted under the Schedule 1 process, any part of that priority infrastructure plan (not just the infrastructure charges schedule) should be able to be amended by the abbreviated process. A priority infrastructure plan needs to be flexible and able to react as market forces change and the assumptions on which the plan has been predicated prove either true or false over a period of time. If it is difficult, time consuming and costly to change the planning elements then it encourages a situation where the priority infrastructure plan does not reflect actual intentions, trends and
direction of development. This defeats the purpose of the legislation and the latest round of
changes introduced by IPOLAA.

The second purpose of the section is set out in Section 5.1.4(1)(a) which requires that an
infrastructure charges schedule must be prepared in accordance with the ubiquitous guidelines/
regulations. The comments which have already been made in relation to Section 5.1.2 about
guidelines/regulations apply equally here and are not repeated.

However, it must be said that there seems to be little need for Section 5.1.4(1)(a) at all. Section
5.1.2 already provides that priority infrastructure plans must be prepared in accordance with the
guidelines/regulations. An infrastructure charges schedule is part of the priority infrastructure
plan and the subsection is therefore an unnecessary duplication.

Section 5.1.5 Key elements of an infrastructure charges schedule

This section prescribes what must be included in an infrastructure charges schedule. It provides
the skeleton which presumably will be fleshed out by the guidelines/regulations.

The list is similar to Section 5.1.4(2) of the current legislation and contains no real surprises. The
devil will, as always, be in the detail which will be provided by guidelines/regulations.

The inclusion of subsection 2, and in particular subsection 2(c) is very welcome and removes
some anomalies identified under the current provisions.

It is understood that the general structure being proposed is that a local government will make
one priority infrastructure plan for its priority infrastructure area. The priority infrastructure
area may be divided into a number of charge areas. Charges can be specified for the different
types of infrastructure and can apply at different rates between charge areas to reflect the different
infrastructure networks (both existing and required) to service the particular charge area.

It is not particularly clear from the language used in Division 3 whether there is to be a separate
infrastructure charges schedule for each area or if there is to be only one charges schedule
which will specify separate charges for each charge area and each infrastructure type within the
charge area.

This may become clearer from the guidelines/regulations but it is preferable that it be clear from
the Act. Regulations can be successfully attacked if they add a new or different means of carrying
out the purposes of the legislation or depart from or vary the system which the legislation adopts
to attain its ends.

The explanatory notes also credit this section with creating the head of power for levying
infrastructure charges. The current IPA provisions rely on the general charging provisions of the
Local Government Act 1993 although it was never clear why that was thought to be necessary. It
would be preferable to see a clearer statement in the new provisions that a local government may
impose infrastructure charges in the manner provided in an infrastructure charges schedule
simply to remove any doubt about from where the charging power now emanates.

Section 5.1.6 Infrastructure charges

This section sets certain parameters for the way in which a charge can be levied by the infrastructure
charges schedule. While it is the equivalent of the current Section 5.1.6 in that regard, there are
very significant differences.

The reasonable apportionment requirement in Section 5.1.6(1)(b) now refers to the “establishment
cost” of the infrastructure - a term which is unfortunately not defined but presumably is different
from merely the “cost” of the infrastructure. This needs clarification.

Further, the always difficult direction to take into account the “likely share of usage of the item for
the premises” no longer applies. This is thought to be a substantial step forward.
Section 5.1.6(1)(c) is a new provision which is designed to protect existing users from imposition of charges based on future possible development even if that user is not itself intending the carry out the development. This seems only reasonable.

**Section 5.1.7 Infrastructure charges notices**

**Section 5.1.8 When infrastructure charges are payable**

For convenience, these two section will be dealt with together.

The sections are an improvement on the previous provisions and clarify to whom the charge notice must be given and when a charge is payable.

Section 5.1.7(7) provides that the charge is not payable if the development does not proceed or if an approval stops having effect for any reason. There could be some unintended consequences if a development approval is cancelled under Section 3.6.2 and that may need some further attention by the drafters.

While the sections clearly state the person to whom the notice must be given, they are silent about who must pay the charge. However, as Section 5.1.11 provides a charge is a rate within the meaning of the *Local Government Act*, and payment must be made before the use commences or reconfiguration plans are sealed, the question may be academic. For completeness, the reference in Section 5.1.11 could probably also include a reference to the *City of Brisbane Act*.

**Section 5.1.9 Agreements, and alternatives to, paying infrastructure charges**

This provision authorises the entry of infrastructure agreements about matters relating to infrastructure charges and gives a degree of flexibility. However, agreement must be reached between the local government and the developer before that flexibility can be used.

The explanatory notes provide an example of a typical arrangement which might be entered where trunk infrastructure is necessary for a development but will not be provided by the local government in time for the development. This scenario which occurs quite frequently raises some interesting questions which are not, unfortunately, fully dealt with by the new provisions or the current ones.

In reality, the infrastructure agreement under which an applicant agrees to build trunk infrastructure must be:-

- entered before the local government decides the relevant development application;
- made conditional on the development application being approved.

As the local government has no power to impose a condition requiring construction of the trunk infrastructure if no agreement is reached, the local government’s only option is to refuse the development application if no prior agreement is entered into.

This causes a deal of uncertainty and inconvenience. It is reminiscent of the situation which prevailed for many years before the introduction of the *Local Government (Planning and Environment) Act* and needs to be addressed. The only real answer may be further amendment to Section 3.5.31(1)(b) but the situation has a number of complexities which cannot be addressed in this paper.

**Division 4 - Trunk Infrastructure Funding under an Infrastructure Payments Schedule**

This division introduces a new mechanism for funding of trunk infrastructure. The local government...
can now impose a condition on a development approval requiring an infrastructure payment under an infrastructure payments schedule forming part of the priority infrastructure plan.

In many respects, the provisions in Division 4 are equivalent to the provisions in Division 3 dealing with infrastructure charges under an infrastructure charges schedule. As such, it is not proposed to go through them in the same way. The comments above generally are applicable to the equivalent provisions in Division 4.

However, some general comments about the new mechanism and its usefulness are appropriate.

We are told (although it is nowhere stated in either IPOLAA or the explanatory notes) that an infrastructure payments schedule is designed to be used by local governments in low growth areas and will require a considerably lower level of detail, information, complexity and rigor than an infrastructure charges schedule.

If this is to be the case, it will be because of the guidelines/regulations. The only difference between the two mechanisms identified by the Act is the requirement that an infrastructure charges schedule must specify the estimated timing for the provision of trunk infrastructure but an infrastructure payment schedule need not.

Given the specific requirements of the Act, there must be some serious reservations about the ability of guidelines/regulations to reduce the level of information and detail required in an infrastructure payments schedule and not be found to be outside the delegation power.

The explanatory notes liken an infrastructure payments schedule to a headworks policy under the former *Local Government (Planning and Environment) Act* (P & E Act). It is difficult to see the likeness.

A condition imposing a contribution pursuant to a headworks policy under the P & E Act was not subject to challenge on the grounds of reasonableness or relevance. Section 6.2 of the P & E Act created a code for calculation of the contribution which took it beyond the test in Section 6.1 of the P & E Act. So long as the policy and manner of calculation of the contribution was in accordance with the requirements of Section 6.2, a court would not go beyond the policy (see for example, Maroochy Shire Council v Wise (1998) 100LGERA311 and Bargara Park Pty Ltd v Burnett Shire Council (1996) QPELR133)

A condition imposing an infrastructure payment under an infrastructure payment schedule apparently must comply with Section 3.5.29. Presumably, Section 5.1.15(5) is intended to give some assistance although it is unclear how far that will help.

There are substantial arguments in favour of exempting a condition requiring an infrastructure payment under an infrastructure payments schedule from compliance with Section 3.5.29. The Act requires certain information to be in the priority infrastructure plan and the infrastructure payments schedule. If because of the circumstances (for example, a low growth trend) there is no need for quite the same level of detail, complexity or rigor as in an infrastructure charges schedule, that of itself should not mean it is open to challenge through the appeal process.

A better result may have been to set out criteria specifying the circumstances in which an infrastructure payments schedule can be used. Once these are met, an infrastructure payment would still be imposed through the conditions process but would be excused from compliance with Section 3.5.29.

Finally, it is not entirely clear from the Act whether a priority infrastructure plan can contain both infrastructure charges schedules and infrastructure payments schedules. If this is intended (as is understood to be the case) then perhaps a clarification could be included.

**Division 5 - Conditions Local Governments May Impose for Additional Infrastructure Costs**
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Because of restrictions of time, these provisions will not be examined at length.

The division replaces the attempt at cost impact recovery for out of sequence development contained in the current Sections 3.5.35 and 3.5.36. The new provisions are a great improvement in that they are much more logically and clearly put.

It is also suggested that the driving philosophies and mechanisms are essentially correct. The division allows the local government to impose a condition on a development application to recover the cost impact on trunk infrastructure where a development is inconsistent with the assumptions in a priority infrastructure plan or includes an area outside the priority infrastructure area.

The provisions establish with some precision:

• the circumstances in which recovery is permitted;
• the extent of the cost impacts which may be recovered.

Importantly, it seems to be the intention that any condition to recover the costs impacts must comply with Section 3.5.29. This again seems incongruous as the division spells out at length and in detail the circumstances in which costs impacts are recoverable and the extent to which they are recoverable. Having done that, there is no valid reason why a condition imposed in accordance with those provisions should be subject to further scrutiny under Section 3.5.29.

Chapter 6 Part 2 Transitional Provisions for IPOLAA

The new Section 6.2.1 contains the transitional provisions regarding infrastructure charges plans which are already adopted at the date IPOLAA commences or which are in the course of preparation at that date.

The scheme is simply to:

• allow infrastructure charges plans in the course of preparation to be adopted as if IPOLAA had not commenced;
• treat infrastructure charges plans (whenever adopted) as infrastructure charges schedules;
• treat the infrastructure identified in the infrastructure charges plans as trunk infrastructure.

The provisions work well for most purposes subject to some minor refinement of the language. However, it will be necessary to expand the provisions to create an equivalency between the areas covered by an infrastructure charges plan and the priority infrastructure area under a priority infrastructure plan to allow a local government with infrastructure charges plans to impose conditions for recovery of costs impacts under Division 5 for development which is outside the area covered by an infrastructure charges plan.
A new EIS process has been included in Part 7A of the *Integrated Planning and Other Legislation Amendment Act 2001* (IPOLAA). This paper first outlines the context before describing the new process itself and highlighting some anomalies.

1. **Context**

1.1 **Existing environmental study processes under IPA**

Queensland previously had an EIS process, which was required to take place before lodging a planning application, if the project was a “designated development” or was in a “prescribed area”, under the repealed *Local Government (Planning and Environment) Act 1990*.1 This philosophy changed with the *Integrated Planning Act 1997*. Essentially, IPA replaced the traditional case-by-case EIS approach by providing opportunities for environmental studies and assessment, as a component of overall information requirements, at three points in the planning process:

- At the stage of preparing a planning scheme (on the basis that, once satisfied that all relevant environmental issues for a local area have been studied, assessed and addressed in the planning scheme, then any developments which fulfil these requirements may be categorised as self-assessable or code-assessable);
- In the supporting information for a development application; and
- In information requests from government agencies following lodgement of the application. (The system recognises that developments located in environmentally sensitive areas and also certain types of high-impact developments tend to involve more complex information requirements, and addresses this through a referral coordination process facilitated by the Department of Local Government and Planning.)

1.2 **“Significant Projects”**

The Queensland system also includes recognition of the special needs of the top-end of industrial and infrastructure projects, which are not usually capable of being planned for (or, in many cases, even contemplated) at the planning scheme stage. These projects are declared as “significant projects” and there is an EIS process led by the Coordinator-General under the *State Development and Public Works Organisation Act 1971*.2

1.3 **Compatibility Difficulties with the Commonwealth System**

This system is not readily compatible with the less sophisticated, case-by-case traditional approach of the Commonwealth’s *Environment Protection and Biodiversity Conservation Act 1999*. The Commonwealth legislation essentially creates a list of “matters of national environmental significance” and projects can be determined to be “controlled actions” requiring a form of environmental assessment and approval if they would or are likely to have a “significant impact” on these matters. The Commonwealth legislation does not contemplate a system in which planning schemes, codes or State Planning Policies (and the studies carried out for the purposes of those planning documents) would address up-front the relevant issues for a sensitive area, but instead requires referral of each individual “controlled action” for separate assessment. The terminology and timing for the Commonwealth process also does not fit readily into the current Queensland IDAS approach, which takes a more holistic approach to “information” than merely focussing on
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the environmental component of this information. Queensland’s repealed *Local Government (Planning and Environment) Act 1990* would have been a better “fit”.

This is why the Queensland Government understandably has perceived that it has little option but to create a special add-on to IDAS for those developers of “controlled actions” who may prefer not to engage in a separate environmental assessment process with the Commonwealth, to the extent permitted by the Commonwealth legislation.

1.4 **Bilateral Agreement**

The Commonwealth and the State of Queensland are currently negotiating a bilateral agreement which is proposed to adopt the EIS processes administered by three State agencies in Queensland:

- “Significant projects”, led by the Coordinator-General (State Development) under the State Development and Public Works Organisation Act 1971;
- The EIS process for mining projects, administered by the EPA under the *Environmental Protection Act 1994*;
- The new Part 7A process in IPA.

The Agreement must state which type of Commonwealth process the State process corresponds to, and all three of the above processes are proposed to correspond to the EIS assessment process in the EPBC Act.

1.5 **Anomalies in the Commonwealth System**

Most of the practical difficulties with trying to retro-fit an EIS process to the IDAS system are ultimately attributable to anomalies in the EPBC Act itself, rather than to State legislation. It is beyond the scope of this paper to address all of those issues. However, a typical example is the provision about notices in 130(1B). Essentially, although the Commonwealth Environment Minister can start his decision-making period as soon as he has received the relevant assessment report, this is varied when the relevant action is for a purpose of interstate or under an international agreement or for international trade or commerce (which is relevant to the vast majority of controlled actions which are triggered for their impacts on matters covered by international agreements). In those circumstances, the decision-making period cannot begin until the State has given a notice to the Commonwealth which says, in effect, that everything else other than the controlling provisions has been addressed “to the greatest extent practicable”. These are some interesting issues to consider:

- How can the State give this notice for IPA assessments when it is normally local governments in Queensland which are the assessment managers?
- What does “the greatest extent practicable” mean? After an approval? After an appeal? What about declaration proceedings? If different aspects of a project require different approvals, and the proponent has only applied for some of those approvals so far, how does the State know what all the matters are?
- And why should it be any of the Commonwealth’s business whether or not impacts on matters other than those protected by controlling provisions have been assessed, anyway (for example, economic impacts)? (Note that s48A which relates to bilateral agreements suggests that the notice relates to ‘environmental impacts’, but this is not specified in section 130(1B)).
- If a proponent relies on an incorrect notice having been given to the Commonwealth, and an invalid approval subsequently obtained, what might be the implications for professional negligence?

Nothing in Queensland legislation can overcome such intractable problems with the Commonwealth legislation itself.

2. **When new EIS process applies**

There are two situations in which the new EIS process under IPA will apply:

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• under a regulation; or
• if the development constitutes a controlled action under the EPBC Act and also DLGP has agreed in writing with the applicant to apply the process.\(^5\)

As the relevant proposed regulations are not yet publicly available, it would be impractical to comment on the first of these situations. This appears to be a provision which is merely intended to keep the Government’s options open for the future expansion of the process. It is to be hoped that the situations in which the EIS process are applied would not be incrementally expanded by regulation, without prior consultation with all stakeholders.

The second situation for applying the EIS process is the one which is actually relevant for a bilateral agreement under the EPBC Act. Most stakeholders involved in the IPA Operational Review forum process supported the concept of making it optional for a developer to refer a proposal to the Commonwealth Government directly for separate assessment under the EPBC Act, or to use the EIS process under IPA. This objective is almost achieved by IPOLAA, but not quite. Instead of leaving it solely to the applicant to make an election which process to use, IPOLAA requires that both the applicant and DLGP agree to use the process. It is not apparent why DLGP should be given the discretion to refuse to apply the process under its own legislation to a controlled action.

Possible reasons may be to allow the State flexibility to refuse to apply an EIS process for developments which may not warrant the full details of an EIS process, for example, where it may be more cost effective for the Commonwealth to use its ‘preliminary documentation’ process and for the State then to follow a normal IDAS process, or where the State would prefer, for whatever reason, not to conduct the assessment on behalf of the Commonwealth. In any of those circumstances, it is suggested that the State would still be able to advise a proponent not to elect to use the State process, in an informal way, without the need to enter a written agreement as a prerequisite.

Note that the proposed development must already have been determined by the Commonwealth Government to constitute a “controlled action” under the EPBC Act, before the applicant and DLGP can validly agree to apply the EIS process under IPA. The new Part (correctly) does not avoid the referral step. (In practice, applicants wishing to minimise their process risks often provide substantial supporting information to the Commonwealth at the referral stage, so as to demonstrate the lack of impact by their projects on matters of national environmental significance. The supporting information for a referral can be as much as would be required on a full EIS.)

3. Outline of Process

Essentially, the process is as follows:

• The proponent applies for terms of reference;
• Terms of reference are issued, and in some cases, this may be by a process of first publishing draft terms of reference, considering comments on them and then issuing the final terms of reference;
• The proponent submits a draft EIS and once DLGP is satisfied that the draft EIS addresses the terms of reference in accordance with the guidelines, the chief executive issues a notice to that effect;
• The draft EIS is publicly advertised and any person may make a submission;
• The draft EIS is then either accepted as the final EIS, or the chief executive may request changes first;
• The chief executive must then prepare an EIS assessment report within 30 business days (ie, within about 6 weeks) of issuing the notice accepting the EIS and this report may recommend conditions of development;
• To the extent that the development is the subject of the EIS, both the EIS and the EIS assessment report are taken to be part of the supporting information, and the information and notification stages do not apply to the development applications (although the referral
part of the information and referral stage still applies), a properly made submission about the EIS is taken to be a properly made submission on any impact assessable development application (meaning that the submitter has appeal rights).

It is important to be aware that this is not the whole of the process, which will continue to be “topped and tailed” by steps at the Commonwealth level. The referral to the Commonwealth to determine whether a project constitutes a “controlled action” must still be the first step. The Commonwealth’s environmental approval process (including the ability to request further information) must remain the final step under the EPBC Act.

4. Some anomalies

There are some anomalies in the new EIS process:

(a) Timing of EIS

In the section on applying for terms of reference, there is a mandatory requirement that, if an applicant proposes to make 1 or more applications for preliminary approval for the development, the EIS must be prepared for the first of the applications, unless the chief executive requires the EIS to be prepared for a later stage.

The apparent intention of this provision is laudable, that is, to trigger the EIS at an early stage, rather than having to retro-design a project late in the approvals process because of a delayed EIS. However, in the absence of qualifying provisions such as those set out in Section 5.7A.14(3) for other purposes, the drafting may have some unintended consequences, for example:

• Many applications for preliminary approval are vague, and essentially in the nature of “ambit claims”. At this point, it may be difficult for some developers to identify with sufficient clarity what the proposal is about, for the Commonwealth to be capable of making a determination whether or not it constitutes a “controlled action”. This may only become apparent at later stages. The opportunity to use the process would then have been lost.

• In some cases, it may be that only part of an overall development could constitute a “controlled action”. For example, a mixed use development may be proposed for a large area of land, the size of a suburb or town. As it expands, it may encroach upon an area of national environmental significance, and only the relevant development permits for that limited area might trigger “controlled actions”. Does this mean that the preliminary approval for the whole development should have gone through an EIS process? What would constitute “the development” in this context?

(b) EIS assessment report

When the chief executive of DLGP prepares an EIS assessment report, this may recommend conditions not only for development approvals under IPA, but for “any approval required for the development”. This would appear to be beyond the scope of DLGP's functions. It is understandable that the report should be able to recommend conditions for a Commonwealth environmental approval, in addition to IPA approvals, given that the Commonwealth would have had an opportunity to participate in the EIS process. However, there are also still various State approval processes which have not yet been “rolled in” to IDAS, and it is difficult to see why the power should extend this far.

A project which requires a report recommending conditions for other types of approvals would probably be more conveniently undertaken by the Coordinator-General upon a declared “significant project”.

The report may also address other matters prescribed by regulation. The details of this regulation are not yet available. If the scope of the report is substantially extended by regulation, it is to be hoped that stakeholders will first be consulted about the regulation.

(c) Overriding part of Information and Referral Stage only

There is an awkward provision that the information stage of a subsequent development application does not apply, but that, if there is a referral agency, the referral agency’s assessment period starts upon receiving the material from the chief executive.
Obviously, starting the referral agency's assessment period without the development applications having been lodged would leave the referral agencies in an absurd situation.

Apart from this, it is not clear why IPA needs to be inconsistent with the position under the State Development and Public Works Organisation Act 1971, that the whole Information and Referral Stage is overridden, given that referral agencies would have had opportunities for input throughout the EIS process.

(d) Decision Stage for Application May Start Before Application Lodged
Similarly, the decision stage for a development application starts upon receiving the chief executive's material on the EIS, without regard to whether the development applications have actually been lodged. Most local governments would find this a little difficult.

5. Inconsistencies in the 3 State EIS Systems
There are numerous inconsistencies between the three State EIS systems (for significant projects, mining and IDAS). Most of these inconsistencies would not appear to bear any relationship to the different nature of the projects, but are merely matters of drafting practice, minor process differences, the extent to which it was considered necessary to duplicate Commonwealth requirements rather than simply adopting them by reference, and terminology. The effect is likely to be confusing to the layperson, and to government officers at each of the levels of government.

One inconsistency of particular interest is that an EIS assessment report under IPA can only make recommendations about conditions of development, whereas the Coordinator-General's report for a “significant project” may state the conditions which must attach to a development approval. In my experience, this would be likely to be a factor continuing to make the “significant projects” process more attractive to developers, as it would tend to focus the minds of all government agencies at the earlier stage of the EIS rather than waiting until the development applications are lodged, and would also be likely to facilitate a “whole of government” approach to conditions.

6. Development Applications Accidentally Lodged
From experience with the “significant projects” system, an issue that occasionally arises is that developers mistakenly lodge development applications before completing the EIS process, which means that the applications start progressing through the IDAS system, creating problems for referral agencies, when they ought to have waited until the end of the EIS process and then omitted the Information and Referral and Notification stages of IDAS. The simple commercial solution to this is that developers should withdraw applications mistakenly lodged and seek a refund of fees. However, those developers who are unsophisticated enough to have made the error in the first place, or who are poorly advised, may not do this. A suggested solution would be a deeming provision that the application is withdrawn or stayed until the EIS process has finished.

7. Timeliness
One of the available objectives for a bilateral agreement would be to ensure an efficient and timely process. There are few timeframes for government actions in the IPA EIS process, and, in the absence of regulations or guidelines at this stage, there is a question how timeliness is proposed to be achieved. The EPBC Act, while it suggests timeframes for Government actions where the Commonwealth conducts the assessment, does not actually impose any penalties for breaches. There are also no requirements of bilateral agreements for timeframes on State Government actions. Timeframes only apply to minimum public comment periods.

The QELA submission on IPOLAA raised the question of timeframes.

However, there are also reasonable arguments available against over-rating the significance of this issue, and my understanding is that the omission was deliberate (consistently with the process for “significant projects”).
For example, while there are statutory timeframes for the environmental approvals process under the EPBC Act itself, this has not prevented delays in the assessment of certain projects, essentially because of the ability to request further information at different stages of the assessment. In particular, the power to request further information at the end of the process, just before approval, could lead to lengthy delays for issues such as migratory birds, which potentially only visit a site once per year.

As another example of an exercise in futility in imposing statutory timeframes, the experience of lawyers practising regularly in the field of commercial due diligence is that the existence of statutory timeframes for matters such as planning and development certificates bears almost no relationship to the timeframes for local governments to provide full certificates, in practice.

For any development which is not entirely straightforward (and, indeed, any project requiring an EIS for a “controlled action” should fall into this category), the commercial reality is that timeframes for assessment of any significant environmental issues will tend to correlate to qualitative factors such as the political and economic significance of the project, the technical thoroughness of the documentation, the relative status and functions of the lead agency for the project, and the level and sensitivity of consultation undertaken. These timeframes are unlikely to have any relationship to arbitrary statutory timeframes.

Footnotes

1 Section 8.2 and Schedules 1 and 2 of the Local Government (Planning and Environment) Regulations 1991 (repealed).
2 It is recognised that this description bears little relationship to the list of criteria for considering whether to declare a significant project in Section 27. As a matter of experience, there is a “rule of thumb” that a project should be worth over $50 million, it would generally not be residential, and it is most likely to be an industrial or infrastructure project.
4 Section 3.02 EPBC Regulation.
5 Section 5.7A.1 IPA (not yet commenced).
6 Section 5.7A.3(3).
7 Section 5.7A.12.
8 This difficulty appears to have arisen from Sch1 Section 6.03(f) of the EPBC Regulation, which requires a statement of State or Territory approval requirements and conditions that apply, or are proposed to apply, to the action when the report is prepared...Perhaps this could still be addressed if the DLGP report lists likely necessary approvals (including under other legislation) together with relevant conditions for IPA approvals (but not for approvals beyond its jurisdiction), and still comply with Sch 1 Section 6.03(f). Perhaps proposed conditions for other approvals could also be included by way of advice or background information, without attempting to interfere with other agencies’ future discretion.
9 Section 5.7A.14(2)(e).
10 Section 5.7A.12 (d)
12 Section 45(2)(a)(iii) EPBC Act. Bilaterals are intended to provide for one or more of the following... ensuring an efficient, timely and effective process...” It could be argued that merely by combining the two assessment processes into one is a major efficiency, timeliness (given the1301B provisions) and effectiveness gain in itself.
The 2002 QELA Conference will be held from May 1 - 4, 2002 at Twin Waters Resort on Queensland’s Sunshine Coast.

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