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# The Montara oil spill report

*Igor Bogdanich and Robert Merriam ALLENS ARTHUR ROBINSON*

On 21 August 2009, a blowout occurred on the H1 well of the Montara Wellhead Platform.<sup>1</sup> On the same day, all 69 personnel of the platform were safely evacuated.<sup>2</sup> The most likely cause of the blowout was the failure of the primary well control barrier (a cement shoe casing).<sup>3</sup> Further, only one of two planned secondary well control barriers (pressure containing anti-corrosion caps) had been installed.<sup>4</sup> Following the blowout, oil began to leak into the sea. The rate of discharge was initially estimated at 400 barrels a day, though it may have reached 1500 barrels.<sup>5</sup> Estimates of the resulting surface sheen ranged from 6000–25,000 square kilometres.<sup>6</sup> The discharge was finally stopped in November 2009, when the well's operator, PTTEP Australasia (Ashmore Cartier) Pty Ltd (PTTEPAA), successfully drilled a relief well (after several failed attempts).<sup>7</sup> While impacts on islands in the area and the Western Australian coastline were "largely avoided", because of remoteness and a lack of evidence, the exact nature of the environmental impact will never be known.<sup>8</sup>

PTTEPAA notified the authorities of the blowout within approximately two-and-a-half hours.<sup>9</sup> The company was found to have responded to the spill "with vigour and a sense of urgency"<sup>10</sup> by, among other things, securing a rig to drill the relief well within one week. The Australian Maritime Safety Authority (AMSA) led cleanup operations and the effort to mitigate pollution, including through use of dispersants.<sup>11</sup> These operations recovered approximately 493,000 litres of oil.<sup>12</sup> PTTEPAA undertook to pay for AMSA's costs in responding to the spill.<sup>13</sup>

The spill became known as the "Montara" oil spill and led to the creation of the Montara Commission of Inquiry (the inquiry).<sup>14</sup> *The Report of the Montara Commission of Inquiry* and the Federal Government's *Draft Response to the Montara Commission of Inquiry* (the draft response) were released on 24 November 2010. By this time, PTTEPAA had incurred costs of \$319 million in responding to the spill.<sup>15</sup>

The Montara Wellhead Platform is located in the Timor Sea, approximately 250 kilometres from the Western Australian coast, in the territory of the Ashmore and Cartier Islands.<sup>16</sup> This area falls within Common-

wealth offshore waters regulated by the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth) (the OPGGS Act). Under the Act, Commonwealth offshore waters are jointly managed by a joint authority (the federal minister) and a designated authority (a state minister). In practice, the Northern Territory Department of Resources (NT Department) administers the area (acting as the designated authority under delegated power pursuant to the OPGGS Act).

The National Offshore Petroleum Safety Authority (NOPSA) regulates certain safety practices relating to offshore petroleum operations. Until recently, NOPSA's regulatory function had been confined to the area of occupational health and safety. Structural issues, as well as approvals for operations (including environment plans and well operation management plans), have been regulated by the designated authority. Shortly before the release of the inquiry's report, the Federal Parliament passed legislation to expand NOPSA's functions in relation to structural integrity. Despite this, the designated authority still deals with operational approvals.

## Environment

Approval for development of the Montara oil field under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the EPBC Act) was granted to PTTEPAA on 3 September 2003. The Commonwealth Department of the Environment, Water, Heritage and the Arts (DEWHA) did not examine well integrity measures in approving the development. The inquiry commented that well integrity was not the responsibility of DEWHA, but of the NT Department.<sup>17</sup>

The approval was subject to six conditions, including a requirement that an oil spill contingency plan (setting out a strategy to mitigate the environmental effects of any oil spill) be approved by the minister prior to the commencement of operations. There was no requirement to undertake scientific monitoring, nor to remedy environmental damage, in the event of a spill.

DEWHA submitted to the inquiry that, despite the spill, PTTEPAA had not breached any of its approval conditions.<sup>18</sup> As a result of the drafting of the EPBC Act,

because there was no such breach, the range of coercive powers (and criminal, civil and administrative sanctions), which exist under the Act, was not triggered.

In light of these perceived inadequacies, the inquiry recommended that various changes be made to the regulation of offshore petroleum operations in relation to environmental matters. Key recommendations included:

- (a) ensuring that the conditions of the environmental approval for each project clearly set out the proponent's obligations for monitoring and remedying oil spills;<sup>19</sup>
- (b) amending the EPBC Act to allow government bodies to determine the monitoring and remediation that the relevant company must undertake once an oil spill occurs (rather than the company so determining);<sup>20</sup>
- (c) incorporating an obligation in each environmental approval (including both existing and future approvals) to pay for the monitoring and remediation of any oil spill (whether it is the company that undertakes this work or some other body);<sup>21</sup>
- (d) implementing suitable arrangements to ensure that this obligation to pay can and will be satisfied (eg, through insurance);<sup>22</sup> and
- (e) amending the EPBC Act so that, if an oil spill occurs, despite no breach of any condition of approval having occurred:
  - (i) government bodies may take "compliance action"; and
  - (ii) penalties for causing pollution are payable on a no fault basis.<sup>23</sup>

The environmental assessment process for offshore operations had been tightened even before the inquiry's report and the draft response were released. The Federal Environment Department had commented:

... every assessment of an offshore oil and gas project now considers a spill scenario of at least 11 weeks' duration. The plans, technologies and processes a company has in place to respond to this type of spill are also the subject of greater scrutiny.<sup>24</sup>

For example, Shell's proposed Prelude Floating LNG Facility was approved<sup>25</sup> under the EPBC Act in November 2010 and is subjected to various conditions including:

- (a) The development of an oil spill contingency plan, which demonstrates the capacity to respond to a spill and mitigate any environmental impacts. This plan is to include:
  - (i) oil spill trajectory modelling for potential spills in the Prelude gas field, including modelling based on a worst case scenario spill of 11 weeks;

- (ii) a description of the resources available for use in responding to a spill;
- (iii) a demonstrated capacity to respond to a spill within 12 hours; and
- (iv) details of insurance arrangements for the cost of responding to an oil spill;
  - and must be submitted at least three months prior to the commencement of drilling activities.
- (b) The development of an operational and scientific monitoring program to be implemented in the event of a spill.
- (c) A requirement that, in the event of an oil spill, the company must pay all monitoring and remediation costs

The independent review<sup>26</sup> of the EPBC Act undertaken by Dr Allan Hawke, which was delivered to the Federal Government in October 2009, recommended sweeping reforms to the scope and effect of the Act. The government is yet to release its response to the review. The Montara inquiry's recommendations on the reform of the Act will need to be considered alongside that response.

## Review of petroleum titles

The inquiry found that PTTEPAA "succumbed to a large number of serious deficiencies in its approach to well control" in the well that caused the spill.<sup>27</sup> These deficiencies were found to be emblematic of larger systemic problems,<sup>28</sup> and led the inquiry to question the company's ability to undertake satisfactorily other petroleum operations in Australian waters. In this regard, the inquiry recommended that the federal minister:

- (a) review PTTEPAA's permit and licence to operate at the Montara oil field;<sup>29</sup>
- (b) issue a "show cause" notice to PTTEPAA pursuant to s 276 of the OPGGS Act (which can lead to the cancellation of the company's petroleum titles);<sup>30</sup> and
- (c) commission a detailed audit of all other offshore wells operated by PTTEPAA to determine whether they too suffer from well integrity problems.<sup>31</sup>

PTTEPAA submitted to the inquiry an "action plan" for the improvement of the company's practices, which would bring PTTEPAA into line with "industry best practice standards". The minister had said that the findings of this review would influence his consideration as to whether to issue a "show cause" notice. The independent review concluded that an updated action plan effectively responds to the issues identified by the inquiry, and sets PTTEPAA on the path to satisfying industry standards for both good oil field practice and

good governance.<sup>32</sup> On 4 February 2011, the minister announced that he had decided not to issue a “show cause” notice to PTTEPAA. The minister’s decision is conditional upon PTTEPAA (and its parent company PTTEP) implementing the action plan in respect of all of PTTEPAA’s operations in Australia, pursuant to a binding Deed of Agreement<sup>33</sup> entered into with the Australian Government. PTTEPAA has proposed to drill two further exploration wells in the Timor Sea to the north of the Montara platform, and in April of 2011 public comment was invited regarding approval under the EPBC Act. PTTEPAA states in its proposal<sup>34</sup> that the company has a satisfactory record of responsible environmental management. The proposal also considers a worst-case scenario spill, resulting from a blowout, running for 80 days, though PTTEPAA states that the likelihood of such a spill is low.

### Amendments to the offshore petroleum regulatory regime

The inquiry recommended that, while an objective approach to offshore petroleum regulation in Australia was generally appropriate, the issue of well integrity requires a more prescriptive regime.<sup>35</sup> The inquiry found that the current regime relies on operators “doing the right thing” and requires the introduction of minimum standards. The inquiry recommended that the definition of “good oilfield practice” contained in the OPGGS Act<sup>36</sup> be amended to include a requirement that certain minimum compliance standards are met (eg, that at least two well control barriers be in place).<sup>37</sup> A titleholder’s failure to observe good oilfield practice can lead to the cancellation of titles under the OPGGS Act.<sup>38</sup>

Other amendments to legislation that the inquiry recommended include:

- (a) providing a power to suspend petroleum production licences;<sup>39</sup>
- (b) extending NOPSA’s prohibition powers;<sup>40</sup> and
- (c) amending reg 25 of the Petroleum (Submerged Lands) (Management of Well Operations) Regulations 2004 (Cth) to prevent the situation in which a titleholder might avoid an obligation to suspend its well activities by failing to take adequate steps to inform itself of well integrity hazards, or being wilfully blind to them.<sup>41</sup>

### A single regulator

The inquiry found that the NT Department was not a sufficiently diligent regulator and recommended that the federal minister consider:

- (a) revoking the designated authority’s powers and functions currently delegated to the Director of Energy of the NT Department; and

- (b) transferring the NT Department’s responsibilities to NOPSA, or the Commonwealth Department of Resources, Energy and Tourism, or a designated authority of another state.<sup>42</sup>

Further, the inquiry recommended that the creation of a National Offshore Petroleum Regulator (NOPR) be pursued<sup>43</sup> and that responsibility for the regulation of well integrity be shifted from the designated authorities to NOPSA.<sup>44</sup> This recommendation mirrors the conclusion regarding a single national regulator that was reached in the *Productivity Commission Research Report (Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector, April 2009)*. NOPSA and NOPR’s key roles would then be combined to establish a single independent authority responsible for safety, well integrity and environmental plans.<sup>45</sup> This body would be separate from those that make decisions regarding the allocation and management of petroleum titles.<sup>46</sup> The government has announced its intention that the single national regulator will be in place by 1 January 2012. The Western Australian Government repeated its opposition to the creation of a single national regulator soon after the inquiry’s report was released.

### Future changes

The inquiry makes 105 recommendations. In the draft response, the Federal Government notes 10 recommendations, does not accept three “technically inappropriate” recommendations and accepts the remainder. In light of the level of support from the Federal Government, there are likely to be significant changes ahead for the offshore petroleum regulation regime. In March 2011, the House of Representatives passed a bill that would impose various levies on the holders of offshore petroleum titles.<sup>47</sup> The levies would allow NOPSA to recover its costs incurred in performing its new regulatory role in relation to well integrity and safety, including a requirement for the relevant titleholder to foot the bill for the cost of investigations of suspected breaches of duties relating to wells.<sup>48</sup> The government has also committed to amending the OPGGS Act to increase civil penalties in the first half of 2011, and to finalising its examination and enhancement of the national plan for responding to oils spills by the end of 2011.

The government’s final response will be informed by a three-month public consultation process.<sup>49</sup> Further, the government is considering the findings of the United States National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, whose final report was released on 11 January 2011, in preparing its response. Australia also intends to host an international conference in 2011 for governments, regulators and industry members to discuss the lessons of the Montara and Gulf of Mexico spills, and other incidents.<sup>50</sup>

While the particular form of the government's final response is not yet known, we can be fairly sure that there will be significant change between the pre-Montara and post-Montara regulatory systems. The process for environmental approvals for offshore petroleum operations will likely tighten, and any approvals will probably be the subject of stricter conditions aimed at oil spills.

Whether the changes to regulation triggered by Montara make oil spills less likely will only be revealed by the occurrence (or absence) of spills in the future.

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Lawyer,  
Allens Arthur Robinson.

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## Footnotes

1. Montara Commission of Inquiry, *Report of the Montara Commission of Inquiry*, June 2010, p 5.
2. Above note 1 at p 39.
3. Above note 1 at p 7.
4. Above note 1 at p 7.
5. Above note 1 at p 26.
6. Above note 1 at p 26.
7. Above note 1 at p 21.
8. Above note 1 at [6.63].
9. Above note 1 at p 237.
10. Above note 1, Finding 70.
11. Above note 1 at p 22.
12. Above note 1 at [6.19].
13. Above note 1 at p 24.
14. The details of the inquiry were announced on 5 November 2009. The inquiry's report was presented to the Minister for Resources on 18 June 2010, though its release was delayed until the release of the government's response on 24 November 2010.
15. S Ryan and A O'Brien, "Report blames PTTEP for oil spill" (2009) *The Australian*.
16. Above note 1 at p 5.
17. Above note 1 at [6.99].
18. Above note 1 at [6.100].
19. Above note 1, Recommendation 89.
20. Above note 1, Finding 90 and Recommendation 95.
21. Above note 1, Findings 88 and 90, and Recommendation 96.
22. Above note 1, Recommendation 96.
23. Above note 1, Findings 87 and 90, and Recommendation 95.
24. Department of Sustainability, Environment, Water, Population and Communities, *Oil and Gas Industry and National Environment Law*, November 2010, p 2.
25. Approval available from the website of the Department of Sustainability, Environment, Water, Population and Communities.
26. A Hawke, *The Australian Environment Act — Report of the Independent Review of the EPBC Act 1999*, October 2009.
27. Above note 1, Finding 91.
28. Above note 1, Finding 92.
29. Above note 1, Recommendation 101.
30. Above note 1, Recommendation 102.
31. Above note 1, Recommendation 105.
32. Noetic Solutions Pty Ltd, *Review of PTTEP Australasia's Response to the Montara Blowout*, November 2010, p 39.
33. Deed available from the website of the Department of Resources, Energy and Tourism, under the "Montara Inquiry Response" page.
34. Proposal available from the website of Department of Sustainability, Environment, Water, Population and Communities, under the "EPBC Act" page.
35. Above note 1, Recommendation 66.
36. Section 7.
37. Above note 1 at [4.118]–[4.119], Recommendations 4 and 68.
38. Sections 274(c)(iii) and 569(1).
39. Above note 1, Recommendation 70.
40. Above note 1, Recommendation 72.
41. Above note 1 at [4.115] and Recommendation 67.
42. Above note 1, Recommendation 76.
43. Above note 1, Recommendation 74.
44. Above note 1, Recommendation 75.
45. Above note 1 at [4.217].
46. Above note 1 at [4.227] and Recommendation 73.
47. Offshore Petroleum and Greenhouse Gas Storage Regulatory Levies Legislation Amendment (2011 Measures No 1) Bill 2011.
48. Above note 47, Pt 4.
49. This process concluded on 25 February 2011.
50. Australian Government, *Draft Government Response to the Report of the Montara Commission of Inquiry*, 2010, p 3.

# The introduction of development assessment panels — a historic change in the determination of significant development applications in Western Australia

*David R Parry STATE ADMINISTRATIVE TRIBUNAL OF WESTERN AUSTRALIA*

## Development assessment panels

The commencement, on 25 March 2011, of Pt 3 of the Approvals and Related Reforms (No 4) (Planning) Act 2010 (WA) and the Planning and Development (Development Assessment Panels) Regulations 2011 (WA) heralded a historic change in the process of determining significant development applications in Western Australia. Since the commencement of Australia's first modern town planning legislation, the Town Planning and Development Act 1928 (WA) on 1 November 1929, local governments in Western Australia have been responsible for development assessment decisions made under local (formerly town) planning schemes. Since the commencement of regional planning in Western Australia in the form of the Metropolitan Region Scheme made under the Metropolitan Region Scheme Act 1959 (WA), the Western Australian Planning Commission (the commission) and its predecessors, or local governments under delegation, have been responsible for development assessment decisions made under region (formerly regional) planning schemes. However, under the legislation that commenced on 24 March 2011, these functions have been removed from local governments and the commission and conferred on development assessment panels (DAPs) where the estimated cost of the development is equal to or greater than nominated thresholds.

The government has given several reasons for this reform. It has said that the introduction of DAPs will promote “a single point of assessment... ensur[ing] a consistent application of policy in a timely manner” in the Perth, Peel and Greater Bunbury regions, where an applicant for development approval is required to submit dual development applications for approval of the same development under the applicable region planning scheme (administered by the commission) and local planning scheme (administered by the local government of the district).<sup>1</sup> The government has recognised that the requirement for dual approval “can be problematic as decisions made by each planning authority may conflict with one

another”.<sup>2</sup> The government has also suggested that the introduction of DAPs will enable local governments and the commission to “focus on the development of strategic planning instruments, rather than administering them”.<sup>3</sup> Finally, the change will “help alleviate resource pressures and improve decision making, through the participation of independent technical experts”. This consideration is of particular importance in the case of local governments with small populations or in remote locations, of which there are many in Western Australia.<sup>4</sup> The government's intention, in summary, is that DAPs will “streamline approvals, incorporate technical decision-making and provide consistency, reliability and transparency in decisions for significant development across the state”.<sup>5</sup>

Under the new legislation, any development application (other than an “excluded development application”)<sup>6</sup> for approval of a development that has an estimated cost of \$15 million or more in the City of Perth or \$7 million or more elsewhere in the state (known as a “mandatory DAP application”) must be determined by a DAP as if the DAP were the responsible authority under the relevant planning instrument in relation to the development and cannot be determined by the local government for the district or the commission.<sup>7</sup> Furthermore, an applicant for approval of a development application (other than an “excluded development application”)<sup>8</sup> in relation to development that has an estimated cost of \$10 million or more in the City of Perth or \$3 million or more elsewhere in the state may elect to have the development application determined by a DAP. Where an applicant has made this election, the development application (known as an “opt-in” or “optional DAP application”) must be determined by a DAP as if the DAP were the responsible authority under the relevant planning instrument in relation to the development and cannot be determined by the local government for the district or the commission.<sup>9</sup> A local government or the commission may also delegate its power to determine development applications in relation to a

development that has an estimated cost of \$10 million or more in the City of Perth or \$3 million or more elsewhere in the state (known as a “delegated application”) to a DAP.<sup>10</sup> Subdivision, which in Western Australia is subject to separate planning regulation from “development”,<sup>11</sup> is not affected by the introduction of DAPs and subdivision applications will continue to be determined by the commission. Strategic planning applications made under local planning schemes, eg, for the approval of a structure plan or outline development plan in a development area, are also not affected by the introduction of DAPs and will continue to be determined by the local government and/or the commission in accordance with the scheme.

Based on Australian Bureau of Statistics (ABS) data in relation to building licence approvals in Western Australia, the Department of Planning (the department) has estimated that there will be approximately 200 development applications made to DAPs per year.<sup>12</sup> However, as the ABS data does not capture development applications that were not approved or development approvals that were not progressed to building licence stage, it is likely that the number of DAP development applications will be greater than the department’s estimate.

While this reform is significant, the government’s original proposal, put forward in a discussion paper, *Implementing Development Assessment Panels in Western Australia*, published in September 2009, was far more extensive. The discussion paper proposed that the determination of all development applications (other than for single houses, up to 10 complying grouped or multiple dwellings or minor ancillary structures) with an estimated development cost of \$2 million or more in the Perth metropolitan region and \$1 million or more elsewhere in the state should be removed from local governments and the commission and should be conferred exclusively on DAPs. The government received 167 submissions in response to the discussion paper, of which approximately half were from local governments. Eighty-three of the 98 submissions that made specific comments in relation to the proposed development value thresholds argued that the thresholds were too low, and a majority of these respondents considered that a threshold of \$10 million would be more appropriate. Local governments also responded that delegations to officers were set above the originally proposed thresholds so that DAPs would be determining applications currently determined by officers under delegation.<sup>13</sup> The government considers that the revised thresholds that have now been implemented are “a reasonable compromise between the financial thresholds proposed in the discussion paper and by respondents and the most appropriate for focusing the panels on significant and complex applications”.<sup>14</sup>

On 2 May 2011, the Minister for Planning established a local development assessment panel (LDAP) for the City of Perth, five joint development assessment panels (JDAPs) for the other local government districts in the Perth metropolitan region, and nine JDAPs for the other regions of the state.<sup>15</sup> It is anticipated that the minister will shortly appoint members of each of the DAPs. DAPs will determine all mandatory and opt-in/optional DAP applications made on or after Friday 1 July 2011.

## Membership and operation of DAPs

Each DAP has five members for the determination of an application. The City of Perth LDAP consists of three “specialist members” appointed by the minister and two “local government members” nominated by the City of Perth and appointed by the minister.<sup>16</sup> Each JDAP consists of three “specialist members” appointed by the minister and, in the determination of a development application in respect of land within a particular local government district, two “local government members” nominated by the relevant local government and appointed by the minister.<sup>17</sup> The specialist members of a JDAP remain the same for all applications.

A specialist member of a DAP must have experience in one or more of the fields of town planning, architecture, urban design, engineering, landscape design, environment, law or property development, and must have either tertiary qualifications relevant to his or her area of expertise and experience practising or working in that area or, in the absence of relevant tertiary qualifications, extensive experience practising or working in that area.<sup>18</sup> Local government members do not have to have these qualifications, but a local government member will cease to be a DAP member if he or she is no longer a councillor of the relevant local government. At least two of the specialist members of a DAP must have experience and a tertiary qualification in town planning.<sup>19</sup> The minister must appoint one of the specialist members of a DAP with experience and a tertiary qualification in town planning as the presiding member of the DAP and another of the specialist members with that experience and qualification as the deputy presiding member.<sup>20</sup> Members of DAPs are appointed for up to two years, but may apply for reappointment.<sup>21</sup> A person may hold office as a specialist member of more than one DAP at the same time.<sup>22</sup>

A DAP member (including a local government member) who attends a DAP meeting, or who is invited or required by the State Administrative Tribunal (SAT) to attend a proceeding in the tribunal in relation to the review of a determination of the DAP, is entitled to be

paid a prescribed fee by the department.<sup>23</sup> DAP members are required to comply with a code of conduct<sup>24</sup> and will be provided with a guidance manual and training by the department.<sup>25</sup>

An application for determination by a DAP is lodged with the local government of the district in which the development is proposed together with the prescribed DAP fee.<sup>26</sup> Within seven days of receiving a DAP application, the local government must give the application to the administrative officer of the DAP that will determine the application (an officer of the department). Within 50 days of the lodgement of the application (in the case of an application made to the commission or not required to be advertised under a local planning scheme), or within a period that ends 10 days before the application would be deemed to have been refused (in the case of an application that is required to be advertised under a local planning scheme and there is a deemed refusal provision in the scheme), or otherwise, within 80 days of the lodgement of the application, the local government (in the case of a local planning scheme application or a region planning scheme application where the local government would otherwise have delegated authority to determine the application) or the commission (in the case of a region planning scheme application where the local government would not otherwise have delegated authority to determine the application) must give the presiding member of the DAP that will determine the application a report on the application.<sup>27</sup> The report must provide sufficient information to enable the DAP to determine the application, including a recommendation as to how the application should be determined, copies of any advice received from any authority that has been consulted by the local government or the commission and any other information that the local government or commission considers is relevant to determining the application. After receiving the report, the presiding member of the DAP may direct the local government or the commission to give the DAP technical advice or assistance or further information in connection with the application.<sup>28</sup>

A local government is also required to provide secretariat services to the DAP that determines DAP applications for land in its district in the form of at least one local government employee to provide administrative support to the DAP at meetings of the DAP and facilities at an office of the local government that the DAP may reasonably require to perform its functions, including an appropriate venue for DAP meetings, electronic equipment and catering.<sup>29</sup> The local government that hosts a DAP meeting is responsible for taking and providing minutes of the meeting. The local government must bear the costs of providing the report, technical advice or assistance and further information,

and secretariat services, but may claim some reimbursement for secretariat services from the department.<sup>30</sup>

A DAP application is to be determined at a meeting of the relevant DAP. Notice of a meeting of a DAP must be published at least five days before the meeting on the DAP website and on the website of each local government of a district in which development that will be considered at the meeting is proposed.<sup>31</sup> Quorum at a DAP meeting is constituted by three members of the DAP including the presiding member, another specialist member and a local government member in relation to the local government district in which the land that is the subject of the application is located.<sup>32</sup> Any DAP meeting to determine a development application is to be open to the public.<sup>33</sup> The presiding member of a DAP may invite a person to advise or inform, or make a submission to, the DAP in respect of a development application.<sup>34</sup> The CEO of the department may issue practice notes about the practice and procedure of DAPs and each DAP must comply with those practice notes.<sup>35</sup>

### Amending or cancelling a DAP development approval

An owner of land in respect of which a development approval has been granted by a DAP may apply to the DAP, within the period during which the development must be substantially commenced to:

- extend the substantial commencement period;
- amend or delete a condition;
- amend an aspect of the development which would not substantially change the approved development; or
- cancel the approval.<sup>36</sup>

Unless the presiding member of the DAP otherwise directs, a DAP meeting to determine such an application is to be held by telephone or other means of instantaneous communications and is not open to the public.<sup>37</sup>

### Review of (appeals from) DAP decisions

A person who has made a DAP application or an application to amend or cancel a DAP development approval may apply to SAT for a review of (ie, appeal against) a determination by the DAP to refuse the application, a condition imposed by the DAP or a deemed refusal of the application, as if the determination or deemed refusal were a determination of a responsible authority.<sup>38</sup> The department has estimated that applications for review by SAT will be made in relation to approximately 1% of DAP decisions.<sup>39</sup>

The discussion paper proposed that the local government or the commission that would otherwise have been the original decision-maker, rather than the DAP that

made the decision, “will be the respondent” in review proceedings before SAT.<sup>40</sup> However, a majority of respondents to the discussion paper in relation to appeals considered that it would be “inappropriate and inequitable for local government (or the [commission]) to be required to defend development assessment panel decisions”.<sup>41</sup> These concerns have been addressed by regulations that state that the DAP that made a decision that is the subject of a review is the “decision-maker” and the “respondent” to the review for the purposes of the State Administrative Tribunal Act 2004 (WA).<sup>42</sup> Furthermore, as noted earlier, the department will pay a prescribed fee to a DAP member who is invited or required by SAT to attend a proceeding in the tribunal in relation to the review of a determination of the DAP.<sup>43</sup> The department will also bear any legal or experts’ fees and disbursements incurred by a DAP in participating in a review by SAT of a decision of the DAP.<sup>44</sup>

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State Administrative Tribunal of Western Australia.

## Footnotes

1. Government of Western Australia Department of Planning, *Implementing Development Assessment Panels in Western Australia — Discussion Paper*, September 2009, p 8, available at [www.planning.wa.gov.au](http://www.planning.wa.gov.au).
2. Above note 1.
3. Above note 1, p 1.
4. Above note 1, p 9.
5. Government of Western Australia Department of Planning, *Implementing Development Assessment Panels in Western Australia — Report on Submissions*, April 2010, p 4.
6. The construction of a single house or less than 10 grouped or multiple dwellings, and any associated carport, patio, outbuilding or incidental development, development in an improvement scheme area, development by a local government or the commission, or development in a district in which a DAP has not been established or has been established for less than 60 days: Planning and Development (Development Assessment Panels) Regulations 2011 (WA), reg 3(1).
7. Planning and Development Act 2005 (WA), s 171A(2)(a) (inserted by s 43 of the Approvals and Related Reforms (No 4) (Planning) Act 2010 (WA)) and Planning and Development (Development Assessment Panels) Regulations 2011 (WA), regs 5 and 8(1).
8. Above note 6.
9. Planning and Development Act 2005 (WA), s 171A(2)(ba) (inserted by s 43 of the Approvals and Related Reforms (No 4) (Planning) Act 2010 (WA)) and Planning and Development (Development Assessment Panels) Regulations 2011 (WA), regs 6 and 8(1). In relation to the applicant’s election, see Planning and Development (Development Assessment Panels) Regulations 2011 (WA), reg 7 and Sch 3 Form 1.
10. Planning and Development (Development Assessment Panels) Regulations 2011 (WA), reg 19.
11. The definition of “development” in s 4(1) of the Planning and Development Act 2005 (WA) does not include “subdivision” and whereas subdivision is regulated by Div 2 of Pt 10 of the Planning and Development Act 2005 (WA), development is regulated by Div 5 of Pt 10 of that Act; see *Boulter v City of Subiaco* (2007) 52 SR (WA) 84; [2007] WASAT 71 at [61] and *Landpark Holdings Pty Ltd and Western Australian Planning Commission* [2007] WASAT 130 at [23].
12. Department of Planning DAP Information Session, State Library of Western Australia, 10 May 2011.
13. Above note 5, p 1.
14. Above note 5, p 2.
15. *Western Australian Government Gazette*, No 71, 29 April 2011, pp 1549–1556.
16. Planning and Development (Development Assessment Panels) Regulations 2011 (WA), regs 23 and 24.
17. Above note 16, regs 25 and 26.
18. Above note 16, reg 35.
19. Above note 16, reg 37(4).
20. Above note 16, reg 27.
21. Above note 16, reg 29.
22. Above note 16, reg 37(3).
23. Above note 16, reg 31 and Sch 2.
24. Above note 16, reg 45. See above note 1, pp 19–20.
25. Above note 1, pp 20–21 and above note 5, pp 18–20. Attendance at training will be mandatory for DAP members: above note 12.
26. Above note 16, reg 10 and Sch 1. The DAP fee is determined in accordance with a sliding scale depending on the estimated cost of the development.
27. Above note 16, reg 12.
28. Above note 16, reg 13.
29. Above note 16, reg 50.
30. Above note 16, reg 14. Reimbursement is limited to \$28 per hour for up to four hours for DAP meetings, up to \$100 for catering (per local government in respect of which development applications are scheduled for consideration at the meeting) and security where required by the presiding member: above note 12.
31. Above note 16, regs 39 and 40.
32. Above note 16, reg 41.
33. Above note 16, reg 40(2).
34. Above note 16, reg 40(3).
35. Above note 16, reg 40(5).
36. Above note 16, reg 17.
37. Above note 16, reg 40(4).
38. Above note 16, reg 18(2).
39. Above note 12.
40. Above note 1, p 21.

41. Government of Western Australia Department of Planning, *Implementing Development Assessment Panels in Western Australia — Policy Statement*, April 2010, p 4, available at [www.planning.wa.gov.au](http://www.planning.wa.gov.au).

42. Above note 16, reg 18(3).

43. Above note 16, reg 31 and Sch 2.

44. Above note 12.



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# Mandatory fast track court procedures for small scale development appeals in New South Wales

*Anthony Whealy and Jodie Wauchope GADENS LAWYERS*

For planning lawyers, the year started with a raft of amendments to the Environmental Planning and Assessment Act 1979 (EPA Act), Environmental Planning and Assessment Regulation, and Land and Environment Court Act 1979. Many of the changes amount to finetuning the legislative schemes or band-aids on an existing patchwork, depending on your perspective.

One key change stands out as a positive initiative because it introduces an innovative fast track system for small appeals in the Land and Environment Court. The fast track system applies to Land and Environment Court appeals for “small developments” such as:

- single detached dwelling and dual occupancy development applications;
- modification applications for single detached dwelling and dual occupancy development applications;
- some subdivision applications; and
- some other development appeals, at the discretion of the court.

In brief, the new process includes:

- short pre-hearing timeframes to fast track the court process;
- on-site conciliation, moving immediately to arbitration if the matter is not resolved; and
- a target of three months from commencement to hearing.

The changes aim to deliver an improved, shortened appeal process for a large number of small-scale development applications.

In theory, the new laws will ensure that appeals relating to single dwellings and dual occupancies (including alterations to them) will be finalised within three months, via a reasonably low-cost and informal process.

An overview of key aspects of the new process is set out below.

## **New court process — Planning Appeals Legislation Amendment Act 2010**

The Planning Appeals Legislation Amendment Act 2010 (Amendment Act) has the aim of making it “easier

for homeowners to seek a review of councils’ decisions on their development applications so they can exercise their rights as quickly and as cheaply as possible”.<sup>1</sup>

Indeed, the (then) government said the new laws are designed to “*encourage* more homeowners to exercise their existing appeal rights” (emphasis added).

The Amendment Act made some significant changes to the development application and review system (a summary of these changes can be found at the end of this article) and also amended the Land and Environment Court Act 1979 to introduce the fast track system. This is achieved by replacing the usual hearing process with a mandatory conciliation conference system, which applies to a specific class of development.

## **Types of development**

The new process applies to appeals (commenced pursuant to s 97 or s 97AA of the EPA Act) for the following types of development:<sup>2</sup>

- single detached dwelling and dual occupancy development applications (including subdivisions);
- modification applications for single detached dwelling and dual occupancy development applications;
- particular proceedings as ordered by the court on its own motion or at the request of a party; and
- some other development appeals, as provided in the Environmental Planning and Assessment Regulation.

Higher density developments and commercial and industrial development will be largely unaffected and will therefore continue to be dealt with via the usual court appeal processes.

The new process will apply to appeals commenced from 7 February 2011.

## **Pre-hearing process**

A new court Practice Note, “Class 1 Residential Development Appeals” (PNRDA), sets out the pre-hearing process for the appeals. The new practice significantly shortens the pre-hearing process (compared to the current class 1 appeal process) by:

- an abbreviated time for serving the initiating process — the application must be served within three days of filing;<sup>3</sup>
- the first directions hearing, 21 days after filing, normally the only directions hearing, brings some focus on to the often difficult task of encouraging a council to file its contentions on time prior to the first directions hearing;<sup>4</sup>
- a shortened informal production process — the consent authority is to provide its documents within seven days (not the usual 14 days) of the request;<sup>5</sup> and
- at the first directions hearing, the court will expect a timetable up to and including the mandatory conciliation conference and hearing — the hearing date will be expected to be no more than six weeks from the first directions hearing.<sup>6</sup>

A benchmark has been set whereby the court aims to seek to resolve 95% of these appeals within three months.<sup>7</sup> The usual benchmark for appeals has up until now been six months, with many taking longer than this.

The success of the short pre-hearing process will depend heavily on:

- Application documentation and plans being accurate. Solicitors acting for applicants should ensure that documents are in order and comply with all requirements. Although the applicant may seek to rely on an amended application by notice of motion, this process usually extends the pre-hearing timeframes.
- Councils filing contentions on time delays in filing contentions, not an uncommon event, usually lead to the need for additional directions hearings, adding to costs of councils and applicants alike.
- Both parties being well prepared at the first directions hearing, and for the conciliation and hearing.

### Conciliation and determination

The new scheme will involve “a new hybrid conciliation-arbitration model”, where a commissioner of the court will attempt to encourage the parties towards reaching an agreement (ie, “conciliation”), but if an agreement is not reached, that commissioner will then (either on the basis of what occurred during the conciliation conference or after hearing all arguments and any evidence, including expert evidence) make a binding decision on the matter (arbitration).<sup>8</sup>

The matters will generally start on-site and continue to be dealt with on-site rather than in court, and parties will still be entitled to be represented by lawyers and engage expert witnesses (eg, town planners).<sup>9</sup>

It will be difficult for applicants to significantly amend their plans, but amendments can be made where agreed between the parties (ie, as part of a negotiated outcome) or where the amendments can be achieved by imposing conditions on the approval.<sup>10</sup>

To ensure that binding agreements can be reached during the conciliation phase, it will be necessary for councils to have an officer who is authorised to settle the matter and attend the conciliation.<sup>11</sup>

Neighbours and other objectors will still be entitled to express their opinion to the commissioner early in the process, before a binding decision is made. This means it will remain difficult (politically) for councils to agree to compromises in the face of hostile neighbours who generally look to the councils to oppose new development.

The commissioners will in some instances refer the matter back to the usual court process. This may occur where a DA is “complex” or where “there are multiple expert witnesses”.<sup>12</sup>

It is yet to be seen how often the court will allow this, but it is expected to be used sparingly. This fallback power, if overused, has the potential to undermine the new process. It is well known that simple DAs for single dwellings can be made to look complex when councils raise numerous issues/contentions. An important role of the commissioner in the conciliation phase will be clearly identifying the nub of the issues.

Applicants who want a full and proper hearing (with the benefit of well-credentialed expert witnesses) can use this power to apply to the court, to seek that the matter be dealt with as a conventional appeal, having a fully contested hearing in court in the fullness of time.<sup>13</sup> The application must be made by way of notice of motion, which is to be returnable at the first directions hearing.<sup>14</sup>

### Appeal rights

Where a commissioner determines the appeal, there will be no further appeal rights other than where a party can identify that the commissioner has made a legal error (as distinct from a merit or subjective consideration).<sup>15</sup>

### Other important planning reforms

The amendments also introduce several unrelated but important changes to planning laws in New South Wales, in particular:

- The time within which an appeal may be commenced, for any type of
- development application in New South Wales, is slashed from 12 months from the date of decision (or deemed decision) to six months.<sup>16</sup> After that

time has expired, an applicant loses his or her appeal rights entirely. A decision as to whether to appeal will need to be made quickly.

- The ability to request that a council review (internally) its own decision on a development application has been overhauled. These reviews (known as s 82A reviews) now apply not only to most development applications, but also to s 96 modification applications<sup>17</sup> and to council decisions to reject development applications without determining them.<sup>18</sup>
- Moreover, where an applicant requests a review, the council now “must” review the decision.<sup>19</sup> This overcomes a certain Land and Environment Court decision,<sup>20</sup> which ruled that councils were not required to carry out a review when requested to do so, but that they “may” if they choose to.
- Where an applicant amends plans in a Land and Environment Court appeal process, the court will be required to order that the applicant pay the council’s wasted costs (costs “thrown away as a result of amending the development application”) if the amendment is other than a minor amendment.<sup>21</sup> This is a mandatory requirement. Nevertheless, it is an improvement on laws passed in 2008, which had required applicants to pay far greater costs. This proved to be a costly disincentive to amending plans, even where the amendments would have achieved a sensible compromise.
- Note that the amendments to s 97B of the EPA Act do not apply to development applications lodged before 28 February 2011 (the commencement date of the relevant schedule of Planning Appeals Legislation Amendment Act 2010). These applications, if the subject of a Class 1 appeal, will continue to be dealt with under the former provisions.<sup>22</sup>
- For appeals commenced after 7 February 2011, where the development application was a Joint Regional Planning Panel application. Typically for developments where the works will cost more than \$10 million, the Joint Regional Planning Panel will have an automatic right to be involved in the hearing as if it were a party in the proceedings.<sup>23</sup> The relevant local council will continue to be an actual party. This means the applicant will be opposed by two parties and perhaps two teams of expert witnesses.

## Conclusion

In summary, the new process is good news for people building new homes or dual occupancies, or undertaking alterations and additions to their existing home. The

Planning Appeals Legislation Amendment Act 2010 looks set to entice landowners to challenge council decisions more readily, in light of the lower costs and faster timeframes that apply.

On a historical note, this new scheme replaces the system that was proposed back in 2008, but which never commenced, of appointing independent “planning arbitrators” to review council decisions outside of the Land and Environment Court system. That concept has now been abandoned.

For solicitors practising in the jurisdiction, the short timeframes mean that application documents will have to be well prepared, council contentions will need to be prepared on time, and parties will need to prepare for hearing in a relatively short space of time. In short, solicitors will have to be ready to swing into action quickly.

**Jodie Wauchope,**  
*Senior Associate, and*  
**Anthony Whealy,**  
*Partner,*  
*Gadens Lawyers.*

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## Footnotes

1. Hansard, Second Reading Speech of the Bill by The Honourable Michael Veitch, 11 November 2010.
2. As set out in s 34AA(1)(a) and (b) of the EPA Act.
3. Practice Note “Class 1 Residential Development Appeals”, cl 13.
4. Above note 3, cl 17.
5. Above note 3, cl 17.
6. Above note 3, cl 23.
7. Above note 3, cl 31.
8. Land and Environment Court Act 1979, s 34AA(2).
9. Above note 3, cl 25.
10. See cll 37–44 of the Practice Note (above note 3), which specify the procedure for seeking leave to rely on amended plans.
11. As set out in the general requirements of the court’s Note to *Parties and Practitioners — Preliminary Conferences Under Section 34 of the Land and Environment Court Act*.
12. Above note 8, s 34AA(3).
13. Above note 8, s 34AA(3).
14. Above note 3, cl 29.
15. Above note 8, s 56A.
16. Environmental Planning and Assessment Act 1979, s 97.
17. Above note 16, s 96AB.
18. Above note 16, s 82B.
19. Above note 16, ss 82A(2), 82B(3) and 96AB(2).
20. *Hainbury Pty Ltd v Campbelltown City Council* [2007] NSWLEC 713; BC200709613.

21. Above note 16, s 97B.

22. Above note 16, cl 136 of Sch 6.

23. Above note 16, ss 97A(2) and (4).


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# Regional Planning Initiative: improving the strategic basis for planning in Tasmania

*Emma Riley and Damian Mackey SOUTHERN TASMANIA REGIONAL PLANNING PROJECT*

For the last few years planners working on developing and implementing a state government driven regional planning reform of the Tasmanian planning system have been busy. In the next 12–18 months, these efforts will come to fruition, effecting a more coordinated, consistent and contemporary planning system. This article examines these reforms, focusing on the experience of the Southern Tasmanian Regional Planning Project.

While many of the hopes and ambitions for the Regional Planning Initiative will not be fully realised, the changes about to take place will still undoubtedly change the operation of the planning system in Tasmania and the way in which professionals, the community and the industry interact with it.

## Planning in Tasmania

Strategic land use planning has not occurred effectively in Tasmania for many decades, either regionally or state-wide, with earlier efforts either failing to complete the final endorsement hurdle or never being fully implemented. Significantly, the planning system in Tasmania suffers from a considerable lack of higher-level policy direction. State policies, which were intended at the commencement of the Resource Management and Planning System of Tasmania in 1993 to be the “cornerstone” of what was then a “best practice” planning and environmental management system, are barely evident today. Indeed, after more than 15 years, there are only three state policies in existence: the State Policy on Water Quality Management, State Coastal Policy (currently subject to a protracted review) and the State Policy on the Protection of Agricultural Land. The quality and usefulness of these policies as strategic planning tools is often debated, particularly in the absence of state policies dealing with broader issues such as settlement and population.

The state’s planning schemes also remain an assortment of odds and ends. There is little consistency among the more than 30 planning schemes in Tasmania, with varying definitions, operational provisions, standards, zones and structures. This “non-system” of planning schemes creates a legal and administrative millstone around the neck of the Tasmanian economy, and results in unnecessary confusion and expense for both the

community and developers. Each scheme exists in its own legal world, with interpretations derived from decisions of the Resource Management and Planning Appeal Tribunal generally only applicable to the particular planning scheme.

While the state’s Planning Commission established a “Common Key Elements Template for Planning Schemes” (known as “Planning Directive 1”)<sup>1</sup> some five years ago, only two schemes have so far been developed in accordance with the template. In addition, the template provides just the overarching structure and definitions; it does not seek to provide any consistency in terms of scheme standards or operational provisions. Instead, these provisions are either intended to be provided through a suite of state-wide “codes” on specific planning issues (such as bushfire management, land contamination, sea level rise) or be determined at the regional level.

Over the past few years, there has been significant pressure on the state government to improve and modify the planning system to address the ever-increasing problems highlighted by planners, the legal profession, the community and the industry.

## The Regional Planning Initiative

In 2007, the Tasmanian Government announced the commencement of a joint state and local government initiative known as the Regional Planning Initiative. The initiative comprises regional planning projects across the three regions of Tasmania (North West, North and South), with each project team responsible for preparing a comprehensive regional land use strategy for its respective region and a suite of new contemporary and consistent planning schemes designed to deliver the strategy.

The Southern Tasmania Regional Planning Project (the project) commenced in March 2009 following the signing of a Memorandum of Understanding between the Tasmanian Government, the Southern Tasmanian Councils Authority (STCA)<sup>2</sup> and the 12 southern Tasmanian planning authorities.<sup>3</sup> The Tasmanian Government funds the project with in-kind resources provided by local government. Management of the project is through the STCA.

The overall intent of the project is to strategically plan for the future development of the southern region. The project will also establish new planning schemes designed to assist in the implementation of the agreed strategic directions, while eliminating unnecessary inconsistencies between schemes. It is envisaged that other non-statutory planning related activities of both state and local government, and the major infrastructure providers, will also be aligned with the strategy into the future.

Given the wide-ranging problems with the existing planning system, there are high but varying expectations for the Regional Planning Initiative. Some of these will be met, although invariably all the improvements or changes to the planning system advocated for will not be met, either because of constraints on time and resourcing or because regional planning is but one element within the planning system. Nonetheless there are at least two significant changes arising from the Southern Tasmania Regional Planning Project worth highlighting that will require those who interact with the planning system within the region to come to terms with:

1. the holistic management of urban growth, in particular, residential development, through specific policies and targets; and
2. the new and more consistent suite of planning schemes.

### The Regional Land Use Strategy

To support the Regional Planning Initiative, the Land Use Planning and Approvals Act 1993 (the Act) was amended in 2009. Under s 30C, the Minister for Planning may now declare a *regional area* by nominating constituent municipal areas. Section 30C also allows the Minister to declare *regional land use strategies* to exist for these regional areas. The Act further stipulates that any planning scheme, planning scheme amendment or project of regional significance must demonstrate consistency with the Regional Land Use Strategy.

Over the past two years, work on developing a Regional Land Use Strategy for Southern Tasmania (the strategy) has been ongoing. Without any existing strategy to review, background research and analysis started from the numerous municipal level strategies and policies in existence. Gaps and conflicts were identified and in late October 2010 a Draft Regional Land Use Strategy was released for public comment.<sup>4</sup>

While many policies within the strategy affirmed the current approach, thinking of planning authorities across southern Tasmania, once declared, the strategy will change the way urban growth occurs across Greater Hobart.

To date, there has been no “whole of settlement” planning for Greater Hobart. Indeed, it is the only capital

city in Australia that remains without some form of metropolitan plan. The pattern of urban growth has been largely the result of speculation on behalf of the development industry and what could be viewed, in our opinion, as competitive approaches between the metropolitan councils to accommodate the greatest amount of new development. Where planning schemes did not support further residential development, developers prepared combined rezoning and subdivision applications.<sup>5</sup> The result has been highly dispersed urban environment, with little infill development (nearly 85% of all residential development occurs through greenfield development), low densities (averaging seven to 10 dwellings per hectare), little coordination between the location of residential and employment opportunities, and little efficiency in infrastructure costs.

In the absence of any holistic understanding of housing supply and demand, development applications focused on more tangible considerations such as the presence of threatened vegetation communities, lot layout, road design and bushfire protection. Moreover, applicants, councils and the community enter into the Tasmanian Planning Commission's<sup>6</sup> assessment processes with little certainty regarding the issues that will be considered relevant or the outcome of the assessment.

Once declared, the strategy will be the first ever strategic document to guide the pattern of urban growth, coordination of infrastructure and assessment of rezoning applications. The strategy identifies a specific urban growth boundary for Greater Hobart on the basis of identified infill to greenfield targets. This urban growth boundary will be supported by a specific residential land release program and is intended to provide an orderly and sustainable release of residential land through a hierarchy of planning processes:

1. setting residential development targets, urban growth boundary (accommodating a 20-year supply) and greenfield development precincts;
2. preparation of precinct structure plans for each greenfield development precinct;
3. rezoning of land, ensuring that residentially zoned land does not exceed a 10-year supply at any one time; and
4. subdivision of residential land.

The introduction of an urban growth boundary and land release program has attracted considerable interest, not least from the building, construction and property industry, which have been supportive of developing a planning system that provides greater certainty through strategy and policy. This support will be tested once the strategy is in effect.

As the strategy will be a statutory document, which the Tasmanian Planning Commission must take into

account in making determinations regarding planning schemes and planning scheme amendments (including rezoning), it should follow that there will be little success for residential rezoning applications in Greater Hobart outside of the urban growth boundary.

Presently, the local government partners in the project are considering the final draft of the strategy.<sup>7</sup> Although the legislation does not require local government approval of a regional land use strategy, endorsement of the document by the southern councils is being sought pursuant to the project's partnership approach. The strategy will then be forwarded to the Minister for consideration for formal declaration, which at this stage is anticipated to be early July 2011.

Already, the looming presence of the strategy is a matter being considered by applicants, representors, councils and the Tasmanian Planning Commission in planning scheme amendments. The commission's Assessment Panel has approved deferral of the hearing on a major combined rezoning and subdivision application until late July/early August (by which time the strategy will have hopefully been declared). At least another two major residential rezoning and subdivision applications in Greater Hobart are already in the formal process.

### The planning schemes

As part of the 2009 amendments, Div 1A of the Act now provides for interim planning schemes, a significant alteration to the statutory process of planning schemes in Tasmania. In essence, the system has now reverted to the pre-1993 overhaul of Tasmania's planning legislation by providing for draft planning schemes to come into legal effect upon entering the Planning Commission's public exhibition and assessment process, not at the end of it. This change was intended to facilitate more efficient adoption of planning schemes and to retain the integrity of the regional common provisions.

The drafting and submission of new contemporary planning schemes based upon the Regional Land Use Strategy<sup>8</sup> will be the culmination of the Regional Planning Initiative. Once all three regional planning projects are completed, all planning schemes in Tasmania will be based upon the revised Common Key Elements Template, which provides for a consistent structure and suite of zones, and common operational provisions including definitions, use classes and exemptions.

While not the single planning scheme being advocated by the current chairman of the Resource Management and Planning Appeal Tribunal, this new suite of planning schemes will in our opinion largely address many of the current issues in the tribunal with having to deal with a multitude of defined uses, terms and planning scheme structure, and the consequential increased number of jurisdictional and interpretation issues.

In our opinion, a single planning scheme is not possible for Tasmania without major structural and governance reform. You cannot have 30 planning authorities administering one planning scheme. It would create an administrative nightmare! The alternative, redirecting development control powers from local government to a statewide development control body would create a fundamental governance issue in that local governments will no longer retain the ability to implement local policy. The only two jurisdictions that have the "single planning scheme" model are the Australian Capital Territory and Northern Territory, where local governments do not exist.

The drafting of the new planning schemes will be a joint effort between the project and the individual planning authorities in southern Tasmania. The new schemes will contain content derived from three sources:

- the state, by virtue of the revised Common Key Elements Template for planning schemes, along with any state-wide codes (formally referred to as "schedules") that the state may choose to produce;<sup>9</sup>
- the region, through the establishment of regional-common planning scheme provisions by the Southern Tasmania Regional Planning Project — these provisions, assimilated into the Common Key Elements Template, will form a non-statutory<sup>10</sup> document referred to as the (Southern) Regional Model Planning Scheme;<sup>11</sup> and
- the local planning authority (council), through the drafting of planning scheme provisions necessary to address particular local issues.

The application of zones will be strongly guided by what is known as "The Zoning Framework", as part of the implementation of the strategy. This approach arises from the implementation principles articulated in the review of the Common Key Elements Template that:

- the planning scheme must reflect the planning strategy;
- zoning is the primary mechanism for expressing the spatial strategy;
- zone provisions will contain the primary directions relating to the use, development, protection and conservation of land within each zone;
- zones will identify the range of use and development that is allowable; and
- use qualifications, development plans, schedules and overlays are additional mechanisms for delivering the strategy and are to be used to qualify but not distort the underlying objectives of the zone.

The other relevant implementation principles are:

- a planning scheme must be user-friendly and, as far as possible, written in plain English;
- a planning scheme must contain minimal regulation but must be legally robust;
- planning schemes must have common definitions, layout and administrative processes to reduce unnecessary complication;
- common mandatory provisions within a planning scheme must be easily identifiable;
- use and development standards can provide either acceptable solutions or performance criteria, or both;
- performance criteria must not simply repeat the zone objective but must be drafted to provide clear criteria for assessment and can provide measurable limits; and
- any development which relies on a performance criterion will always be dealt with as a “discretionary” application.

Because interim planning schemes will take effect prior to the final endorsement of the scheme by the Planning Commission, the southern Tasmanian councils have decided that the development of draft planning schemes under the project will include a public consultation process prior to draft interim planning schemes being forwarded to the Minister and the Tasmanian Planning Commission.

## Conclusion

Tasmania’s Regional Planning Initiative seeks to commence the process of bringing the state’s planning system into the 21st century. The regional projects will partially fill the policy vacuum that has never been filled since the advent of the Resource Management and Planning System in 1993. They will also provide, for the first time, a system of contemporary and consistent planning schemes, particularly across each region. This is a positive step towards integrated and strategic planning in Tasmania.

It is however important to recognise that the completion of the regional planning projects is not the end, but rather the beginning of a consistent process to regional planning in Tasmania. Both state and local government has agreed that a permanent governance body will need to be established for each region. Negotiations are just starting to take place, but clearly governance is required to consistently monitor and review the strategy and

planning schemes into the future to ensure their ongoing success in achieving the objectives of the Regional Planning Initiative.

**Emma Riley,**  
*Project Manager; and*  
**Damian Mackey,**  
*Project Manager;*  
*Southern Tasmania Regional Planning Project.*

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## Footnotes

1. Planning Directive 1 is currently subject to a comprehensive review by the Tasmanian Planning Commission. Information regarding the review is available at [www.planning.tas.gov.au](http://www.planning.tas.gov.au).
2. The Southern Tasmanian Councils Authority is a joint authority of the 12 southern councils under the Local Government Act 1993.
3. The 12 southern councils comprise of the Brighton, Central Highland, Clarence City, Derwent Valley, Glamorgan Spring Bay, Glenorchy City, Hobart City, Huon Valley, Kingborough, Sorell, Southern Midlands and Tasman councils.
4. The draft strategy, background papers and public consultation report are available at [www.stca.tas.gov.au](http://www.stca.tas.gov.au).
5. Pursuant to s 43A of the Land Use Planning and Approvals Act 1993.
6. Formerly the Resource Planning and Development Commission.
7. A copy of the *Final Draft Strategy* is available to download from [www.stca.tas.gov.au](http://www.stca.tas.gov.au).
8. This alone reinforces that planning schemes do not exist for their own sake. The purpose of a planning scheme is to implement land use policy and strategy, which in Tasmania can be derived from the state, regional or local level. This critical fact has to date been undermined by the absence of strategy and policy, particularly at the state and regional level.
9. Planning Directives Nos 5 and 6, out on public exhibition until the 23 May 2011, contain the first five state-wide codes on bushfire management, land instability, contaminated land, flood prone land and road and rail assets.
10. Once the ongoing governance arrangements for regional planning in Tasmania have been confirmed and the outputs of the projects completed and implemented, it may be necessary to protect the integrity of the regionally common provisions through a planning directive process.
11. The Regional Model Planning Scheme will be included in the implementation report to the Regional Land Use Strategy (draft Implementation report available for download from [www.stca.tas.gov.au](http://www.stca.tas.gov.au)).

# Infrastructure charges reform for Queensland

*Nicole Leaney and Kathryn Pacey* CLAYTON UTZ

On 26 May 2010, Queensland Premier, Anna Bligh, announced the appointment of the Infrastructure Charges Taskforce (the taskforce), for up to one year, to prepare an independent report to the Queensland Government on the current infrastructure charging regime of local government. Its purpose was to streamline the infrastructure charging processes and standardise charging arrangements.

One of the questions considered by the taskforce was how to fund the shortfall between the actual cost of providing infrastructure and the amount recovered through infrastructure charges.

The taskforce considered alternative financing mechanisms and concluded that they may be appropriate in some circumstances, such as greenfield out-of-sequence residential and commercial development, where both the developer and ultimately the purchasers are sophisticated enough to understand the consequences of long-term obligations attached to such arrangements.

However, because of the limited application of alternative financing mechanisms in Queensland, the taskforce considers that the higher priority for investigation and action is the level of conditioning attached to developments and the holding costs incurred as a result of the time it takes to bring new developments to market.

An interim report was released for consultation on 18 November 2010, with a total of 73 submissions received and considered by the taskforce. Those submissions raised key issues in relation to standard charges for residential development, and an appropriate approach for a standard charging arrangement for non-residential development.

The taskforce report has now been finalised and presents 10 final recommendations, which it considers will deliver more certainty, transparency and accountability to the infrastructure charging regime.

## Final recommendations

The taskforce's final recommendations included:

1. the principles of certainty, transparency and accountability, equity and reasonableness, simplicity, consistency, efficiency and economic impact be adopted as a guide to improving the current infrastructure charging system;
2. a maximum standard charges framework be introduced and implemented;

3. arrangements should be put in place to manage the payment, distribution and apportionment of charges under the standard charges framework (a split of infrastructure charges for residential and non-residential development will need to be considered by local governments and water entities when regulatory water pricing is introduced);
4. maximum standard charges for residential development and non-residential development to be applied in a standard planning regime (areas declared as master planned areas under the Sustainable Planning Act 2009 and urban development areas subject to the Urban Land Development Authority Act 2007 will continue to be subject to site-specific infrastructure charging regimes);
5. maximum standard charges for residential development and non-residential development to be introduced as soon as possible and be set for three years from the date of commencement with transitional arrangements;
6. maximum standard charges for residential and non-residential development to be escalated annually by the ABS PPI Construction Index — Queensland Roads and Bridges (on a three-year moving average);
7. standard charges for residential and non-residential development to be monitored and an ex-post evaluation conducted;
8. the Queensland Government to undertake reforms for infrastructure planning and charging to take effect beyond three years that see a sustainable and simplified planning and charges system;
9. the Queensland Government to place a moratorium on the collection on its behalf by local governments of local function charges for three years; and
10. the Local Government Association of Queensland and local governments to explore appropriate improvements to the administration of infrastructure charges, including a publicly accessible standard charges framework.

## Other key findings

The taskforce noted that wider development reforms need to occur, however this was outside the scope of the

taskforce's appointment. A wider development reform program may be addressed in the Premier's Building Revival Forum to be held in mid-2011.

Notwithstanding this, the taskforce did note that the following areas need to be further investigated for possible reforms:

- improvements to development application assessment timeframes;
- scoping of conditioning in development approvals;
- review of appeal arrangements for all conditions, in particular, infrastructure provision related conditions placed on development approvals;
- alternative development approval dispute resolution mechanisms;
- enhancing the role of priority infrastructure plans in continuing to provide a clear and consistent benchmark for imposing additional costs conditions;
- alternative financing mechanisms, similar to those contained in the Urban Land Development Authority's interim Infrastructure Funding Framework; and
- expedited development assessment of large complex projects that have been delayed as a result of excessive or inconsistent charging and conditioning.

## Government response

On 12 April 2011, the Queensland Government released a response to the report by the taskforce supporting the recommendations of the taskforce. The government proposes to implement the following over the next three years:

- introducing legislation to amend the Sustainable Planning Act 2009 by mid-2011;
- introducing a state planning regulatory provision to give effect to standard charges (details of which are outlined further on) by mid-2011;
- establishing an advisory panel to provide independent advice to the minister on the appropriateness of infrastructure by mid-2011;
- agreeing to a split of infrastructure charges between South East Queensland (SEQ) local governments and SEQ water distributor-retailers by mid-2011;
- completing priority infrastructure plans without an infrastructure charges schedule by December 2011;
- commencing deferred payment by early 2012;
- evaluating the standard charges regime to inform charging methodology applied after 1 July 2014 by January–June 2013;

- commencing pricing for SEQ distributor-retailers as well as removing water and wastewater infrastructure from standard charges framework for SEQ local governments by July 2013;
- updating priority infrastructure plans to include any new charging methodology by June 2014; and
- implementing sustained infrastructure charging and planning framework by July 2014 and onwards.

The government proposes that for residential development where water infrastructure is not subject to regulatory pricing, the State Planning Regulatory Provision will set the maximum standard charges (a slight variation of the charges recommended by the taskforce in its final report) at:

- \$28,000 per three or more bedroom dwelling; and
- \$20,000 per one or two bedroom dwelling.

For non-residential development where water and wastewater infrastructure is not subject to regulatory pricing, it would be set at:

- Accommodation (short-term) — maximum 0.5 per standard residential rate.
- Accommodation (long-term) — maximum as per standard residential rates.
- Places of assembly — \$70 m<sup>2</sup> GFA + \$10 per impervious m<sup>2</sup> for stormwater.
- Commercial (bulk goods) — \$140 m<sup>2</sup> GFA + \$10 per impervious m<sup>2</sup> for stormwater.
- Commercial (retail) — 180 m<sup>2</sup> GFA + \$10 per impervious m<sup>2</sup> for stormwater.
- Commercial (office) — \$140 m<sup>2</sup> GFA + \$10 per impervious m<sup>2</sup> for stormwater.
- Education facility — \$140 m<sup>2</sup> GFA + \$10 per impervious m<sup>2</sup> for stormwater.
- Entertainment — \$200 m<sup>2</sup> GFA + \$10 per impervious m<sup>2</sup> for stormwater.
- Indoor sport and recreational facility — \$200 m<sup>2</sup> GFA, court areas at \$20 m<sup>2</sup> GFA + \$10 per impervious m<sup>2</sup> for stormwater.
- Industry — \$50 m<sup>2</sup> GFA + \$10 per impervious m<sup>2</sup> for stormwater.
- High impact industry — \$70 m<sup>2</sup> GFA + \$10 per impervious m<sup>2</sup> for stormwater.
- Low impact rural — nil charge.
- High impact rural — maximum \$20 m<sup>2</sup> GFA.
- Essential services — maximum \$140 m<sup>2</sup> GFA + \$10 per impervious m<sup>2</sup> for stormwater.
- Specialised uses — use and demand determined at time of assessment.
- Minor uses — nil charge.

In response to the other key findings by the taskforce, the government proposes the following reforms:

- By the end of 2011, the government will work with the Local Government Association of Queensland to complete a study on the feasibility of standardising development conditions on development approvals to avoid cost shifting from infrastructure charges to conditions.
  - The government will consider options for alternative development approval dispute resolution mechanisms that aim to improve efficiency and transparency, and speed up the process of dispute resolution.
  - By the end of 2012, the government in cooperation with the Local Government Association of Queensland will produce a municipal infrastructure design and service standards guide for Queensland local governments.
- The government will consider options to potentially establish a “Major Projects Office”, which would function as a one-stop-shop within government for economically significant projects and would, among other things, coordinate state planning and approvals processes to expedite development assessment of large, complex retail and industrial development projects.
  - The government will monitor financing and funding trends in Queensland and work with local government to consider alternative financing arrangements on a case-by-case basis.

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# The approval of a development in part

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*The cases of SLS Property Group Pty Ltd v Townsville City Council; Catchlove v Townsville City Council<sup>1</sup> and Metroplex Management Pty Ltd v Brisbane City Council<sup>2</sup>*

These two recent decisions by the Queensland Court of Appeal (QCA) provide some guidance on the power of assessment managers and the Planning and Environment Court (the court) to approve a development application in part. The significance of approving a development in part is that it can avoid the requirement for the applicant to restart the application process and thus avoid delays and costs. While both cases concerned provisions under the now repealed Integrated Planning Act 1997 (IPA), the provisions have been replaced under the Sustainable Planning Act 2009 and the decisions will have relevance for future applicant and assessment managers.

In both decisions, it was held that both the court and an assessment manager have the power to approve part of a development application without regard to whether the effect of the part approval is to change the application in more than a minor way. However, depending on the relevant facts, part approval may not be possible where the “parts” of the application are mutually dependent or interconnected.

In *SLS Property Group Pty Ltd v Townsville City Council; Catchlove v Townsville City Council (SLS)*, the QCA upheld the decision of the court to refuse an appeal by commercial competitors against the granting of a development application for Stage 1 of a two-stage development.

In *Metroplex Management Pty Ltd v Brisbane City Council (Metroplex)*, the QCA considered the decision of the court to uphold a deemed refusal of a development application by the council on the basis that it had no statutory power to approve an application in part where to do so would be to effect a change that was more than minor. The QCA unanimously disagreed with the primary judge and remitted the matter back to the court.

An issue raised on appeal in both cases was that neither the court nor an assessment manager could approve a development application in part where the part approval would change in more than a minor way the development applied for and publically notified under.

## The facts: *SLS*

Consolidated Properties Pty Ltd (Consolidated Properties) made an impact assessable material change of use application for a “district centre (extension) and fast food store” to be developed in two stages. Stage 1 involved the construction of a supermarket, speciality shops and a community building. Stage 2 involved the construction of a discount department store, shops and kiosks.

The council approved Stage 1 of the proposed development but refused Stage 2. SLS Property Group Pty Ltd (SLS) and Centro Properties Group (Centro) appealed the council’s decision to the court.

## The facts: *Metroplex*

Metroplex Pty Ltd (Metroplex) had sought preliminary approval for an ‘integrated industry and business complex’ which was to include large amounts of industry and warehouse space, office space ancillary to industry and warehouse use, and up to 98,000m<sup>2</sup> of office space not connected with industry and warehouse use. The latter use was inconsistent with the South East Queensland Regional Plan.

Metroplex asked the court to approve its application in part excluding the component of non-ancillary office space, ie, to approve a part of the original application. The court refused Metroplex’s appeal on the basis that it did not have the power to do so because there was an implied limitation on approving part of an application on the basis that doing so would be approving more than a minor change. The decision was appealed.

## The Court of Appeal decisions

In *SLS*, both the court and the QCA upheld the decision of the council to approve Stage 1 but to refuse Stage 2 of the development. While it was held that the power to approve in part cannot extend to approval of something that is materially different from what is sought in the development application,<sup>3</sup> this was not applicable where the development application clearly showed the parts and separate stages. It was also held that it was within the comprehension of a proponent that

the development application might be approved in part, and there was no additional, unannounced or unplanned element of the proposal that an interested proponent was prevented from considering.

The QCA noted that the application was not an 'all or nothing' application, and that it would always have been within the contemplation of interested members of the public that either or both of Stage 1 and Stage 2 of the application could have been approved.

Similarly, it observed that the concepts of "material" or "substantial" difference were unlikely to apply where all that was contemplated was the approval of part of the development applied for.

In *Metroplex*, the court found that:

[A]pproval of part of an application does not change the application. The part that was approved was always encompassed by the larger ambit of the application. The public, and all interested parties, would have received appropriate notice of the whole and been aware of the possibility that only part of it might be approved. A partially approved application would not result in a materially different application because it was within the whole of what had been applied for.<sup>4</sup>

The QCA in *Metroplex* considered that the limitation in s 4.1.52(2)(b) of the IPA, namely that on appeal by an applicant the court must not consider a change to the application that is more than a minor change, was not applicable as the court was in effect standing in the shoes of the assessment manager and thus exercising powers under s 3.5.11 of the IPA to approve an application in part. The court stated that this was "impermissible" and "would impose a limitation upon the Planning and Environment Court's appellate powers without limiting the assessment manager's powers under s 3.5.11 whose decision may never be the subject of an appeal".<sup>5</sup>

## The impact of the *SLS* and *Metroplex* decisions

The *SLS* and *Metroplex* decisions clarify that while an applicant can only make minor changes to a development application and can only seek minor changes on appeal, assessment managers and the court are not similarly constrained when exercising powers under s 3.5.11. It will be interesting to see whether, as a consequence of these decisions, increased pressure will be placed on assessment managers, and the court, to issue part approvals rather than going through the applicant initiated change process.

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## Footnotes

1. *SLS Property Group Pty Ltd v Townsville City Council; Catchlove v Townsville City Council* [2009] QPEC 12; [2009] QPELR 586.
2. *Metroplex Management Pty Ltd v Brisbane City Council* [2011] QPELR 181; [2010] QCA 333; BC201008868.
3. Above note 1 per Wilson DCJ at [14], referencing *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 at 737; (1991) 73 LGRA 349 and *Barakat Properties Pty Ltd v Pine Rivers Shire Council* (1994) 85 LGERA 99 at 102; [1995] QPLR 107.
4. Above note 2 per Chesterman JA at [68].
5. Above note 2 per Chesterman JA at [58].

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