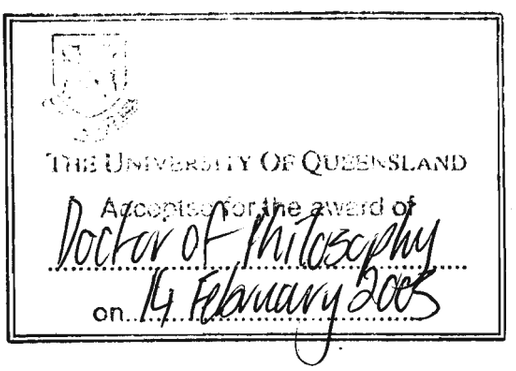
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A comparative analysis of the Integrated Development and Assessment Systems of NSW and Queensland on the basis of equity and efficiency.

by

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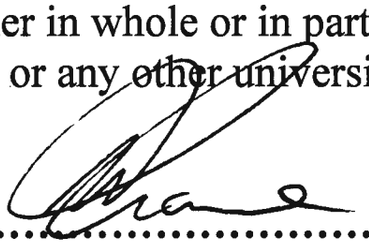
A Thesis submitted for the award of a Doctorate in Philosophy within the T.C. Beirne School of Law of the University of Queensland.

CANDIDATE'S STATEMENT

I DECLARE THAT the work presented in this thesis is to the best of my knowledge and belief original and my own work, except as otherwise acknowledged in the text AND THAT this material has not been submitted, either in whole or in part, for a degree at this or any other university.



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William Crane

Acknowledgments

I express my genuine and heartfelt appreciation to Emeritus Professor Alan Fogg and his wife, Penny for their support and encouragement over a rather problematical period. Professor Fogg's suggestions were of continuing value in the preparation of this thesis and the lunches and dinners prepared by Penny were of great intellectual and nutritional consolation. It became a matter of some pride that in his 32 years at the University of Queensland, during which he made an outstanding national contribution to the discipline, I was his first and only candidate to attempt a Ph D in Planning Law. Why this was so became apparent when I was faced with the reality of unremitting statutory and regulatory amendment in both jurisdictions, sometimes on a monthly basis. My sincere thanks also to Dr Donald Gifford whose many helpful suggestions have been incorporated.

My thanks also go to Paul Lalich of Allens in Sydney and to Rosanne Meurling of Allens in Brisbane for their suggestions and assistance. In addition, many helpful references were provided by officers of the NSW and Queensland planning ministeries.

Planning law today has come to reside at the intersection of competing and sometimes regrettably irreconcilable ideological perspectives. Ideas on both sides however can often be clarified by discussion and debate. In this context I must express my gratitude to Noeleen McNamara, lecturer in Environmental Law at the University of Queensland with whom I often disagreed but whose perspective on the environment/planning interaction I found to be challenging and intellectually incisive.

Finally, something quite beyond thanks must go to my 86 year old father, William Eric Crane OAM. whose intelligence, wit and understanding belie his age and whose patience and belief in a sometimes wayward son will remain as an example to me always.

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES

Planning and Environment Act 1987 (Vic)

Pollution Control Act 1970 (NSW) Repealed

Resource Management Act 1991 (NZ)

Rivers and Foreshores Improvement Act 1948 (NSW)

Roads (General) Regulations 1994 (Qld)

Roads Act 1993 (NSW)

State Development and Public Works Organisation Act 1971 (Qld)

State Development and Public Works Organisation Amendment Regulation (No1) 2001 (Qld)

Threatened Species Conservation Act 1995 (NSW)

Waste Minimisation and Management Act 1995 (NSW)

Water Act 1912 (NSW)

Wilderness Act 1987 (NSW)

ONE

SCOPE AND OBJECTIVES

A. INTRODUCTION

At very few times in the past has Australian planning law been the subject of such concerted review by the Commonwealth and State governments and by increasingly active stakeholders from the environmental and development communities. Out of this review has emerged a climate of expectations about assessment systems and approval systems generally, which reflect an increasingly complex interplay between often-conflicting public and private aspirations. The desire, often expressed at Commonwealth and State levels, for the economy to become globally competitive,[1] for growth rates to be maintained, for the external trade deficit to be in balance, for employment to be maintained at high levels requires, as a precondition, that an assessment and approval system[2] be established and maintained which is transparent, flexible, and simple and which is based, conceptually, on notions of equity and efficiency.

In turn, these, essentially economic, expectations must increasingly be set against a strengthened perception that environmental factors must occupy centre-stage in any such system. These two sets of expectations, which often reflect quite differing

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1 Which is the central purpose of National Competition Policy [NCP] and the Productivity Council.

2 Throughout this work the *Integrated Planning Act,* 1997 (Qld) [IPA] designation IDAS or Integrated Development and Assessment System has been used as a short-form expression. It comprises 4 discreet stages; application, information, public notification and decision. These have their NSW equivalents in Pt four, of *The Environmental Planning and Assessment Act, 1979,* [EPAA]

philosophical, ethical and cognitive perceptions concerning the role of the state, the rights of various underprivileged groups, the debate over specificity or holism, the relative value to be placed on public consultation and participation and many other issues which will be considered subsequently, come into play in the development control portion of the overall planning process. In social and legal terms then, development control is often at the crossroads of competing principles such as the private right to use land, the public right to mitigate the consequences of that private right, mediation, negotiation and outright regulatory and statutory prescription.[3] The intention of this work is examine two sophisticated IDAS systems[4] in the context of their relative equity or fairness to all participants and their relative efficiency in procedural and economic terms.[5]

To achieve this the following hierarchical framework, which moves from general statements of principle (Hilmer) to greater degrees of specificity, is proposed. The overall intention is to contribute towards a micro economic, social and legal comparison, which contributes towards the dynamic of national and State policy development and research. Accordingly, in Chapter One after outlining the framework of National Competition Policy, the following issues will be examined:

- National Competition Policy and the Public Interest

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3 It is appropriate, at this early point, to acknowledge that underlying intellectual position adopted in this work is the protection of private rights wherever possible. See McAuslan, P *The Ideologists of Planning Law,* (London, Pergamon Press, 1980) and Note 17, Chapter 4. McAuslan supports public participation.

4 In this work, IDAS is used inter-changeably with "development control system".

5 For a structural comparison of the two IDAS systems see, Pickles, Ian "IDAS: Queensland and New South Wales Comparisons" *Qld Planner,* Vol 41 No 2, June 2001.

- The National Context of Development Control

Beyond NCP the thesis will provide the basis for a comparative analysis of the two IDAS systems with a view towards contributing towards the broader national project and, where appropriate, this will be done in the context of a detailed examination of the component parts of the two systems against specific benchmarks and best practice criteria.[6]

Consequently, some highly significant issues in planning do not form a part of this study not because they lack importance in themselves, but because they do not form part of the assessment and approval matrix that is constituted by four discreet processes.[7] These issues include, in the case of NSW, the cumulative role of LEPPs, REPPs, SEPPs and DCPs, the process of Plan formulation[8] and approval and the operation of the State planning courts. In the case of Qld, no consideration is given, similarly, to transitional IPA provisions, to the "roll-in" of additional concurrence and referral agencies or to the compensation or the appeal process.

On occasion, in the analysis that follows, some consideration is given to the informal processes which underpin any IDAS system and, on occasion, no authority in the

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6 An overview of the first two points is given subsequently. It was felt more appropriate to deal with the larger issues in the context of the individual chapters dealing with the component parts of the IDAS systems.

7 The new IPA consultation draft actually increases this to five with the incorporation of "compliance" as an additional factor in the case of self-assessable or exempt developments.:IPA, s 3.1.12.

8 Local, Regional and State Environmental Planning Policies respectively. The multiplicity of local and other plans is currently being addressed by DUAP in an initiative named "Planfirst". On completion NSW will have a) a single local plan for each council area, b) a single regional strategy for each region in NSW and c) all state policies in a single document. This will represent a quantum leap beyond the situation which still prevails in Qld. Details of Planfirst are available at <http://www.duap.nsw.gov.au/planfirst>.

formal sense, may be given for a proposition being advanced. In this situation acknowledgement will be made, as far as professional confidences will permit, of the organizational source for that proposition. A genuine attempt has been made to avoid the charge of dogmatism in portions of the following work, however it has, on the basis of a 15 year involvement with IDAS systems at Local Government level in Qld, (as an applicant or agent representing an applicant) sometimes been difficult not to express opinions and sometimes critical ones. It is hoped that, even in these passages, it will be apparent that the overall intention is to be constructive and that dogmatism in planning, given the changing philosophy and the heightened involvement of the Commonwealth, would be fatal to any attempt to propose reform to the systems which is attempted at the end of the thesis.

At various points in the following work comment is made concerning the risks which may attend the incorporation of very general statements of principle as core elements within IDAS systems, which is to say that development control may be at risk of concerning itself with a totally impossible "everything". The work, at these points, attempts to suggest how these principles can be converted into operational tools, which will assist administrators rather than inhibit them. Equally, consideration has had to be given to Commonwealth Government policy which is mediated through National Competition Policy [NCP] and the new *Environment Protection and Biodiversity Conservation Act*, 1999 [EPBDC] both of which bear down equally on both the NSW and Qld systems and which, to some extent, are pulling in different directions. For the latter Act to function, assessment and eventually approval bilaterals will need to be executed by both States and this, together with a corresponding agreement on associated management plans, must have an effect, not

only on the respective IDAS processes, but also on the structural aspects of both systems.[9]

The rate at which the applicable law is changing under these circumstances poses challenges[10] in itself. Every attempt has been made to ensure that the law quoted in this work is correct and applicable as at 1 March 2002.

B THE FRAMEWORK OF NATIONAL COMPETITION POLICY

The involvement of the state in matters relating to the subdivision of land or the private use of land and premises follows from the obvious fact that private land use can have broad or specifically deleterious affects on the rights of others. The concept, which is used as a justification for state intervention, is the "public interest" and it has grown in scope from its origin in the common law doctrine of nuisance, which operated to protect fairly limited classes of defined rights, to the position today where, as a concept, it can now be said to include a large, and growing, collection of social, cultural, environmental and economic factors.

Since land use planning and their associated approval processes are the essential first steps in any economic activity and since a high rate of economic activity is taken as a positive social value in itself, economic efficiency is an increasingly prominent public policy rationale for an oversight role for government at levels higher than the local

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9 Because the EPBDC will result in structural and other process changes at the State and Local Government levels, and will need to be taken account of in the IDAS systems, the Act is considered in the following chapter. For confirmation that State planning ministers are aware of the potential affects of this Act on their respective development control systems, see *Property Insider* at http://www.propertyoz.com.au/data/info/insider/0006/planmini.html

10 Major amendments are proposed to IPA to be enacted by June 2002 and NSW has recently carried out a substantial revision of the EPAA regulations.

one where immediate development issues arise and historically have been adjudicated.

This process has been accelerated by the actual, or perceived trend towards the globalisation of trade and investment and in this new global sense the common economic presumptions are:

- that capital will seek areas of investment which generate the highest return

- that sub-optimal investment returns may be justified on the basis of an analysis of competing risk: but that,

- given similar aggregate risks, global investment will flow to areas which generate the highest return.

A decision to invest is thus a function of the highest possible return set against the lowest possible risk and one of the factors involved in the assessment of risk can be categorised as the "institutional risk factor". Institutional risk may, in land use terms, reflects the degree of efficiency and fairness of the approval and assessment regime within the jurisdiction and it is one element of the total dynamic of risk which is an inevitable complement of most investment.

Some jurisdictions may be perceived to possess low institutional risk at the approval level because the risk is underwritten by a pervasive, but nevertheless effective,

culture of corruption. In such a system, approvals emerge quickly on the basis on known inputs and, at least from the applicant's point of view, the process is demonstrably fair and efficient. However the same jurisdiction that can generate efficient approvals may possess a constitutional or political structure which entrenches social, political or economic divisions which, in the longer term, may be exacerbated by the same phenomenon of corruption. This may result in very high degrees of political and economic instability which will, in turn, cause a rapid decrease in investment as the market begins to appreciate the wider dynamic of risk applicable to that particular jurisdiction.

Since it is clearly not open for Australia to adopt the cultural patterns of another country, no matter how dubiously efficient their development approval system may be, the emphasis can only be to improve institutional practice within the various jurisdictions in Australia so that, in terms of efficiency and equity, the total processes are acknowledged to be amongst the best in the global marketplace. To use the popular parlance, the drive is towards "global best practice".

In Australia this has resulted in an acknowledgment that regulation is a major cost input in the business cycle and that much of it exists without good and sufficient justification. [11] The Hilmer Committee Report of 1993[12] represents, to date, the most significant attempt yet in Australia to establish a set of principles in terms of which all regulatory inputs should be considered, and re-considered, on a progressive basis.

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11 A similar acknowledgment is contained in the policy platform of the American Republican party.

12 Indeperndent Committee of Enquiry into Competition Policy in Australia, *National Competition Policy* (Canberra, A.G.P.S., 1993).

Since all economic activity, at some point in time, involves the question of land use and since land use regulation has historically been devolved to the lowest jurisdictional area viz. Local Governments, which have rarely felt restrained in their regulatory activity, the findings and policy recommendations of this committee are of major significance.

The Hilmer report however, did not arise in an historical vacuum. On the contrary, it was the end product of a long period which saw the role of Local Government recognised by both State and Commonwealth governments as an essential third tier which could, potentially, respond quickly to emerging issues.[13] As Balmer remarks,

> Local Government is the sphere that can be the most responsive; State Government is the one best able to perform developmental tasks with efficiency and, as an intermediate sphere of government, is best suited to meeting emergent needs. Where uniformity and equality (as special cases of a more general equity) throughout the action are required, federal government is the applicable sphere.[14]

This recognition has its genesis in 1976 in the establishment of the Australian Council of Intergovernmental Relations (ACIR) that brought Local Government into the formal processes of national government and recognised the importance of its role in

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13 The Hilmer recommendations were adopted by all State governments in April, 1995 and were underpinned by three intergovernmental agreements; the *Competition Principles Agreement,* the *Conduct Code Agreement,* and the *Agreement to Implement the National Competition Policy and Related Reforms (Implementation) Agreement.* The adoption process was, no doubt, ably assisted by the federal government's commitment to provide AUD$19 billion in incentive grants to the States over a nine year period.

14 Balmer, C "Criteria for the allocation of responsibilities: an interpretative discussion" in *Towards Adaptive Federalism* 1981.(Information Paper Paper No.9, Canberra, AGPS, 1981) pp 218-240. The 2001 Lake Eyre Basin Intergovernmental Agreement is a good example of the last category involving, as it did, joint agreement between the Commonwealth, South Australian and Queensland governments.

a national perspective.[15] In subsequent years what was to become known as the Australian Local Government Association (ALGA) was established as a peak body representing the interests of this sector on a national basis. With a structural basis now in place, the Commonwealth instituted "The Local Approvals Review Program" (LARP)[16] which channelled federal funding directly to Local Government most notably for the "Building Better Cities Program".[17] The assumptions behind the establishment of LARP were essentially that the local assessment and approval processes were politicised, bureaucratic and multi-layered and accordingly, generated inefficiencies which depressed economic development.[18] Building further on this basis a series of Special Premiers Conferences[19] resulted in the formation of the Council of Australian Governments (COAG), in 1990, with the ultimate view of developing a single, integrated approval system that would function irrespective of the class or nature of the development. [20] Additional portions of this intergovernmental framework were added in 1993, in Queensland, with the signing of the "State and Local Government Systems Protocol"; at the national level a similar accord was signed between the ALGA and the Commonwealth Government in 1995 and in 1998,

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15 Three important publications emerged out of ACIR during this period: "The Nature of Intergovernmental Arrangements involving Local Government"; "Options for Local Government" and "Recognition of Local Government" (ACIR, 1980).

16 See England, P *Integrated Planning in Queensland* (Sydney, Federation Press, 2001), p 16.

17 The "Better Cities Program" ran between 1991-96.

18 *The Local Approvals Review Program* (Dept of Immigration, Local Government and Ethnic Affairs, 1990).

19 Which began in 1990.

20 See Chapman, R "Intergovernmental Relations" in Dollery, B and Marshall, N *Australian Local Government: Reform and Renewal*(Melbourne, MacMillan Education Australia, 1997), pp 40, 50, 54, 65.

the Productivity Commission[21] was established and all States and Territories agreed to combine with the Commonwealth Government in the Development Assessment Forum [DAF].

In its 1993 review of what it described as "regulatory restrictions on competition" the Hilmer committee recommended four principles as a basis for a national policy.

- There should be no regulatory restrictions on competition unless clearly demonstrated to be in the public interest. Governments which choose to restrict consumers' ability to choose among rival suppliers and alternative terms and conditions should demonstrate why this is necessary in the public interest.

- Proposals for new regulation that has the potential to restrict competition should include evidence that the competitive effects of the regulation have been considered, that the benefits of the proposed restriction outweigh the likely costs, and that the restriction is no more restrictive than necessary in the public interest. Where a significant restriction on competition is identified, the relevant regulation should be subject to a sunset provision deeming it to lapse within a period of no more than five years unless re-enacted after further scrutiny in accordance with principle two.

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20 The relationship between the Productivity Commission and the NCC is difficult to categorise. It is currently reviewing Pt 3 of the *Trade Practices Act* 1974 for the NCC though, in the past, it has been preoccupied with cross-media ownership issues.

- All existing regulation that imposes a significant restriction on competition should be subject to regular review to determine conformity with principle one. The review should be performed by an independent body, involve a public inquiry process and include a public assessment of the costs and benefits of the restriction. If retained after initial review the regulation should be subject to the same requirements imposed on new regulation under principle two.

- To the extent practicable and relevant, reviews of regulation undertaken pursuant to principles two and three should take an economy-wide perspective of the impact of restrictions on competition.

When these broad statements of policy are applied to the planning and approval processes of Local Governments the following observations should be made. First, is it illusory to suggest that a global competitive principle should, or can, operate at a Local Government level? The answer here, in terms of land use approvals, will turn on the particular facts driving a given development. It is most unlikely for example that a proposal to build a shopping centre in a particular Local Government will be driven by any other factors but demographic ones. To such an applicant, an onerous or arbitrary regulatory regime of the Local Government is a regrettable fact of life which simply has to be tolerated and endured. However it is possible to envisage a situation where such a regulatory regime may have a negative effect and this is where the development proposal is itself in competition with others in a broader national or international perspective. In this situation where two locations are in contention and

where the project, such as a resort, could be constructed in Phuket or at Port Douglas, the nature of the regulatory regime and the time involved in obtaining approvals could be critical.

The Hilmer Committee, not incorrectly, assumes that if the second issue is addressed by making the indigenous regime more efficient and equitable on an international comparative basis then the applicant in the first situation will also benefit. It would clearly assist this process however if the Local Government could be made to compete with *something*. This has been attempted in Queensland by stating, in the overarching planning legislation, the presumption that all development is "exempt development" and as such not subject to the regulatory purview of the Local Government at all.[22]This is an attempt to create a form of notional or perceptual competition though, in reality, the presumption is rather empty since both Acts proceed to make nearly all development assessable.

Of more significance in the longer term may be the expansion of "private certification" throughout both jurisdictions. Although currently the ability to employ a private certifier is only available in designated situations that are considered to lack political and emotional volatility, such as the assessment of applications against standard Building Codes, there are good reasons why the category should be encouraged to grow over time. Perhaps more than any other single factor the creation of a genuinely competitive environment at the local level may ultimately, after many other approaches have been tried, depend on the expansion of private certification into areas previously reserved for Local Government departments. Additionally, both

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22 IPA, s 3.1.2(1)

NSW and Queensland have provisions in their planning legislation, or in other legislation, to enable large or "significant" projects to be extracted from the local approval process and dealt with at the level of the State Government, presumably on the basis that the public interest requires such projects to be assessed by an altogether more flexible procedure than that enjoined for everyone else.[23]

The second of the Hilmer principles directly opens up the issue of justification. All legislation and regulation is ultimately justified on the basis that it is in the public interest and this claim has echoed consistently throughout the relatively short history of land use planning. There are reasons why this claim has been so conspicuous in the planning area. Although all government may be local, Local Government is more local than most. There is immediacy at this level of government that flows from its smaller scale and its more parochial concerns, where a citizen's access to their elected representative is relatively unimpeded and where grievances can often abound. In this highly social but also highly political milieu the tendency of a local politician to respond to virtually any sign of organised (or disorganised) complaint by proscribing the conduct giving rise to the complaint is often large indeed. When this domestic real politik is superimposed over an approval process which is, in most cases, an inescapable first step in a development process which underpins most forms of economic activity, the consequences have very often been unsatisfactory.

It is consequently hard to find fault with a general proposition which merely asks Local Governments to consider the economic cost of their regulatory activity and to

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[23] IPA, s 3.6.5 and EPAA, s 88A(1). Specialized legislation such as the *Local Government (Robina Town Centre Planning Agreement) Act* 1992 will almost certainly continue to be produced.

examine whether the benefits of the proposed restriction outweigh the likely costs. In reality however, this analysis can be difficult because, unlike the regulation, say, of working conditions or road transport, land use issues are multi-dimensional in a manner which surpasses most others. For example, a regulation which prohibits the use of trucks above a certain axle weight on public roads is readily reducible to an economic factor viz. the annual cost per kilometre of road maintenance. However, a planning scheme or planning policy which prohibits the removal of heritage houses or which insists that the inclination of roofs in a designated area should not be less than a given amount is, on the contrary, not reducible to economics, it is reducible to "value" and it is in this attribution of value where many of the difficulties arise.

Consequently, though some specific criteria, which are relevant to development control issues and which are reasonably quantifiable, will be examined in this work one must always remain cognisant in this area of the risks associated with knowing the cost of everything and the value of nothing.[24]

In most instances the word 'value' and the phrase 'public interest' can be taken as synonymous with the latter being the political articulation of the former more abstract concept. Hilmer does not attempt to remove from government the task of assessing value or determining what the interest of the public may be in a given situation. This, the Committee acknowledges, is at the heart of the political process itself. Hilmer does ask however that government at all levels be more attune to the general

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24 See F.H.J.M. Coenen et al (eds), *Participation and the quality of environmental decision making* (Dordrecht, Kluwer, 1998). Clearly all planning problems cannot be approached on the basis of 'efficiency' or indeed even 'equity' because assessments and decisions will always involve value judgments.

economic consequences of their actions.[25] With this in mind, in terms of land use, there appear to be two questions that should be asked, as it were, on the value side of the ledger:

- what values should be protected; and,

- who should pay for the protection

Perhaps the best, or alternatively the most cogent summary, of what values are considered by communities as worthy of protection at particular points in time, is now contained in the various definitions of the "Environment" in relevant planning and environment legislation.

Section 4 of the *Environmental Planning and Assessment Act*,1979 in New South Wales defines "environment" as including:

> All aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings.

By way of comparison, s 2. of the New Zealand *Resource Management Act*, 1991, includes the following elements within the ambit of the environment:

> (a) ecosystems and their constituent parts, including people and communities; and,
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and

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[25] NCC *National Competition Policy: Some Impacts on Society and the Economy* (Canberra, AGPS, 1998) p 47. The focus of NCP is "to promote the best value for money in delivering goods and services which the community values".

(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

The most extensive definition is given in Sch 10 of the Queensland *Integrated Planning Act,* 1997 where the environment is stated to include:

(a) ecosystems and their constituent parts including people and communities;

and,

(b) all natural and physical resources; and,

(c) those qualities and characteristics of locations, places and areas, however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony, and sense of community; and,

(d) the social, economic, aesthetic and cultural conditions affecting matters in paragraphs (a), (b) and (c) or affected by those matters.

The NSW and Queensland definitions will be examined in detail subsequently but at this point is it possible to extract some general statement of principle that would indicate, even in the broadest possible sense, the nature of these community values that are considered to be "protection-worthy"?

Regrettably the answer appears to be "no" if tautology is to be avoided. In fact despite their differences in emphasis (though the genesis of the Queensland definition is clearly discernible in the New Zealand one) the concepts covered specifically in the

Queensland or New Zealand Acts or sparsely alluded to in the New South Wales Act are, in total, broad enough to include anything. In short, community values which may properly figure as aspects of the regulatory activity of Local Governments, are any individual or group concern which is able to be transmitted through the political process to those in authority. The process of accretion by which concerns become values and then attract a constituency is a political one, not a legal one.

It was noted above that these values are only "givens" at particular points in time and it follows that their content or the emphasis given, by the Local Government or eventually the courts, to particular issues will change over time as community values change. And these changes can occur over fairly short periods of time. It is, for example, almost inconceivable now that a development application which necessitated the demolition of streetscapes of 19th century buildings would even remotely be entertained in Brisbane a mere 30 years after such demolition was undertaken as a matter of course.

The second point which relates to who should pay for the protection of politically defined community values is the more interesting one since the Hilmer Report does not set out to deny the right of local communities to establish their own set of, perhaps idiosyncratic, values since this process often leads to the creation of a degree of colour and variety throughout a nation which, itself, is now perceived to be a positive national value. Equally, if a set of draconian regulatory requirements at the local level operate as a positive disincentive to developments which may generate employment in the local community, then the appropriate remedy for aggrieved citizens may be through the ballot box. Having said this, and in the main, most Local Governments

see such issues as employment creation as an essential political goal, and the value/cost dichotomy is relevant for the reasons given earlier while compensation remains a vexed question in many jurisdictions.

The "cost" portion of this dichotomy can be considered in two senses i.e. in terms of:

- the costs imposed upon individual applicants as conditions of obtaining approval and which reflect directly on the "equity" and "efficiency" of a particular assessment system: and,

- the social, economic and other costs which arise and which in the normal course of events are passed on by an over-regulated or inefficient assessment system as hidden costs to the community at large.

Although the two overlap to some extent, the first element relates more to the individual applicant and their relationship with the Local Government and the second to the public interest questions that are broached by National Competition Policy.[26]

C NCP AND THE PUBLIC INTEREST

Given that regulation is likely to abound in a process which is capable of legitimising virtually any matter that can establish a political constituency, how are the specific costs of a process, which translates these expectations into regulation or restriction,

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26 *Competition Principles Agreement,* cl 1(3)

able to be estimated and how can meaningful comparisons be made between different assessment regimes? As a first step can the public interest be identified with a Local Government policy that has arisen out of local grievances or sectional expectations such as a policy on the provision of respite care? What, in short, is the public interest anyway?[27]

It is interesting to compare the NCP "public interest test" which is contained in cl 1(3) of the *Competition Principles Agreement,* April 1995[28] with the three definitions of environment given above. The overlap between what is perceived to constitute the public interest and what is increasingly perceived to be the central issue in development control and land use planning viz. the environment and environmental sustainability is immediately obvious.

In the context of NCP the following matters should be taken as evidencing the public interest.[29]

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27 See Buchanan, J *The Calculus of Consent.* (Indianapolis. Liberty Fund. 1999) for a discussion of the term that he considers "illusory". For the public interest in relation to National Competition Policy see, Zumbo, Frank. "Administration and NCP" *Trade Practices Law Journal* (1998) Vol 6 No 4 at p 234. See also a discussion of this topic in Chapter 5.

28 cl 1(3) Without limiting the matters that may be taken into account, where this Agreement calls:
(a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or
(b) for the merits or appropriateness of a particular policy or course of action to be determined; or
(c) for an assessment of the most effective means of achieving a policy objective;
the following matters shall, where relevant, be taken into account:
(d) government legislation and policies relating to ecologically sustainable development;

29 The list is described as open-ended. So, of course, can be the concept of amenity and certainly the environment.

- government legislation and policies relating to ecological sustainable development

- social welfare and equity considerations, including community service obligations

- government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity

- economic and regional development, including employment and investment growth

- the interests of consumers generally or of a class of consumers

- the competitiveness of Australian business and,

- the efficient allocation of resources.

On the basis of this seemingly all-encompassing test, a respite care policy would appear to meet the "public interest" test on at least the second ground.

It is not surprising that both the NCC and Local Governments share these aspirations in common. The same, no doubt, could be said of all levels of government. Where they differ is in the NCC's utilisation of these values as a starting point for an

attempted cost analysis of the legislative and regulatory means by which governments set out to achieve them.

The framework established by NCP ostensibly enables an analysis of the efficiency and equity of a given system to be conducted within a context of a national competition policy which, as has been suggested, is, in reality, the measurement of the competitive characteristics of the system in terms of cost and benefits which are not simply limited to economic factors. As such it represents an analysis at a more "macro" level than the one which is undertaken here. Nevertheless many of its principles and assumptions are directly relevant to a similar analysis of the efficiency and equity of the development control process since it can be argued that both efficiency and equity are inherently implicit in the description of any system as "competitive".

Within the context of NCP how then are regulatory regimes of Local Governments assessed against an overarching set of criteria which, taken together, are said to constitute the public interest?

The costs of existing regulation are, according to the NCP, broadly calculable in specific instances and include:

- administrative, enforcement and compliance costs

- a loss of technical and allocative efficiency across the board, and

- the consequent loss to society of the economic growth potential of enterprises as they become locked into relatively unproductive pursuits (the allocation of excess resources to compliance matters instead of expansion, new product development or the development of export markets).[30]

However, even if this assertion is taken at face value,[31]how can a framework be established which will permit a calculation to be made of the economic consequences of suggested modifications to the regulatory system? How, in short, can the benefits of change be quantified?

A review of this issue has been carried out for the NCC by the Centre for International Economics[32]and in general terms the process of analysis proceeds on a "what if" basis. In other words, if a set of regulatory requirements were to be removed what would be the likely affects in terms of the efficiency of the system? Although this is demonstrably not a quantitative methodology or, indeed, necessarily an objective one, it is possibly the only approach to the issue.

Essentially, the analysis of suggested reforms can only proceed on a probability basis since the various systems and attendant sub-systems interact in such complex ways that the total picture will always, to some extent, remain out of sight. Nevertheless, it

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30 Hahn, R and Hird, J "The Costs and Benefits of Regulations: review and synthesis" (1990) *Yale Journal of Regulation,* Vol 8, p 233.

31 How does one quantify "the loss to society of potential economic growth potential"?

32 Centre for International Economics. *Guidelines for NCP Legislation Reviews* (Canberra, AGPS, 1999).

is argued, the process can be, and is, disciplined by reference to international benchmarks and other comparative studies.

In the final result however the matter lacks a certain rigor. Case by case analyses and comparisons of transaction cost between the two planning jurisdictions simply do not exist and are unlikely to ever exist.[33] Similarly, any attempt at a definition of "the Public Interest" will remained conditioned by the values, the ideology or the plain prejudice of those who constitute any one of dozens of segmented and competing interest groups.

D THE NATIONAL CONTEXT OF DEVELOPMENT CONTROL.

Increasingly over the last decade a consensus has emerged within all three levels of government that a harmonised or consistent system of development assessment procedures will be essential in order to reduce cost impacts on business and the community and to facilitate the associated task of planning on a regional basis.[34]

The Prime Minister himself gave support to such an integrated approach in his March, 1997 report, *More Time for Business:*[35]

> To achieve the systemic and long-term reform the [existing] concurrence agenda needs to be augmented to include urban and regulatory reform of development and

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33 Hence the calls for a national, integrated development control system.

34 For a discussion of regional integration see: *Unfinished Business*, a multi-stakeholder industry submission to State and Federal planning ministers, on the "Prospects for an Intergovernmental agreement on Development Assessment" (Property Council, Sydney, 26 February, 1998).

35 *More Time for Business,* Statement by the Prime Minister, the Hon. John Howard MP, 24 March 1997, pp 44-45.

> building approval processes. [...] The National Office of Local Government will sponsor a national regulatory reform workshop with a view to reaching consensus with State, Territory and Local Governments for a new national regulatory framework.

Shortly after, as previously mentioned, the Development Assessment Forum was established. [36] Comprising representatives of all three levels of government, together with industry and professional associations. It's task was to:

- facilitate harmonisation between State, Territory and local development assessment systems
- facilitate integration of approval requirements, and reduction of unnecessary referral and concurrence requirements
- develop and exchange information regarding leading practice in planning systems between sectors and jurisdictions
- identify benefits of and priorities for agreed common approaches between jurisdictions
- reduce unnecessary resource duplication in developing individual state/territory development assessment systems

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[36] In June, 1998.

- promote cost savings to both the building and development industry and all tiers of government.[37]

The problems inherent in a federal structure with numerous Local Governments had previously been identified in *Unfinished Business*[38] and had been listed as:

- The gradual accretion of incremental adjustments to the various assessment systems has led to more approval requirements and an unclear delineation of responsibilities.

- The systems are too complex with a single proposal required to be processed through different approval systems. Its complexity militates against transparency and openness.

- It is too technical and the use of jargon peculiar to planning jurisdictions makes meaningful public participation difficult to achieve.[39]

- It is too prescriptive. It is too focused on process and not on ends, frequently stifling innovation.

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37 Development Assessment Forum (DAF)-Charter. On <http://www.daf.gov.au/charter.html> Commonwealth Department of Transport and Regional Services, 11 August, 2001.

38 Note 34 at pp 8-11.

39 Work is currently being done, through DAF, to prepare a nationally agreed set of core definitions . These definitions are contained in the draft *Discussion Paper on National Development Assessment Definitions.* At <http://www.daf.gov.au>. Similarly the Department of Local Government and Planning is attempting to introduce commonality throughout the State in regard to development application fees and charges. Media Release. Property Council of Qld. 12 March, 2001.

- It is anti-competitive. It reserves to public monopoly the right to approve development proposals when the necessary private expertise to undertake the same task exists in abundance.

- There is inadequate cooperation between Local Governments and other authorities with some proposals being totally acceptable in one area and totally unacceptable in another.

- There is no adequate system of benchmaking which could be used to rank the performance of differing development assessment systems.

The last point is of particular significance in this work. In fact, benchmark standards do exist, the difficulty however is arriving at an agreed list which is common to all systems and which will enable realistic assessment of the performance of each system.

Though related more to plan making than development control the benchmarks listed in the Property Council report entitled, *Planning: A New Way Forward*[40] represents a very useful analysis of the appropriate performance indicators, as does the Property Council of Australia's 1996 report titled, *Planning For Change.*[41]

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40 JBA Urban Planning Consultants P/L and Phillips Fox, Solicitors, September 1998

41 October, 1997 reprint, pp 23-25

The most thorough analysis, at an operational level, however is contained in a further 1996/97 report from the Property Council, *States Of Progress.*[42] It is these indicators together with the relevance and efficiency criteria applicable to the various component parts of the IDAS systems in the two jurisdictions which will be used in the analysis.

These criteria together with relevant equity criteria from *Planning: A New Way Forward*, are used subsequently to provide, in tabular form, a succinct comparison and evaluation of the two regimes' IDAS components.

E AN ADMINISTRATIVE LAW FRAMEWORK FOR PLANNING LAW?

In Chapter 6, the observation is made that administrative law principles have traditionally made a rather easy transition to planning law.

The question which follows from this observation is whether planning law can properly be considered as merely one aspect of administrative law and accordingly, whether administrative law can provide a type of broad, inclusive legal framework within which the various categories of decision making within a development control system can be profitably analysed.

In order to answer this question, some initial consideration must be given to the types of powers which come into play in any development control structure or process. These are:

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42 October, 1997 reprint, pp 4-91.

1. A legislative power which determines the statutory rights and obligations of the participants, including third parties.
2. An executive power operating within the confines of subordinate legislation.
3. A delegated executive power exercised by Local Authorities and Concurrent Agencies.
4. A judicial power which is able to adjudicate the rights and obligations of the various parties as set out by statute and regulations.

Planning law is distinctive because each of the four jurisdictions are capable of rendering decisions "in specific cases".

1. Legislative Decisions

Apart from establishing the statutory framework for development control, the legislature has a residual right (or an over-riding right) to enact specific legislation to enable specific applications. Examples are the *Sanctuary Cove Resort Act 1985* and the *Local Government (Robina Central Planning Agreement) Act 1992*.

Such projects proceed outside the formal development control processes and in accordance only with the terms of the enabling statute.

2. Executive Decisions

Most jurisdictions permit the 'calling in' of 'state significant' projects for decision by the relevant minister. These matters, again, are processed outside the formal structure and allow for no right of appeal and no right of judicial review.

3. Delegated Executive Decisions

This category constitutes the vast bulk of matters processed within the formal structure and such decisions may broadly be categorised as arbitral.[43]

'Arbitral' however need to be carefully defined and the analysis provided by Isaacs and Rich JJ in *Alexander's Case* (1918) 25 CLR 434 at 463 is apposite:

> [Arbitral power] is essentially different from the judicial power. Both of them rest for their ultimate validity and efficacy on the legislative power. Both presuppose a dispute, and a hearing or investigation, and a decision. But the essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted ; whereas the function of the [arbitral] power... is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other.

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[43] Mant J, "Development Control Systems: Less Not More", Planning Research Centre, University of Sydney, Occasional Paper No 3, August 1980, pp 4-10.

After describing the nature of the powers and duty of the industrial arbitrator and of the source of the binding force his determination possesses, Isaacs and Rich JJ. proceeded :

> The two functions therefore are quite distinct. The arbitral function is ancillary to the legislative function, and provides the factum upon which the law operates to create the right or duty. The judicial function is an entirely separate branch, and first ascertains whether the alleged right or duty exists in law, and, if it binds it, then proceeds if necessary to enforce the law.

In the context of *Alexander's case*, the decisions which issue from a Local Authority are clearly arbitral – they declare what ought to be the respective rights and duties of the parties in specific instances.

Such decisions, however, are not final and determinative of those matters because the function is arbitral and is not legislative, executive or judicial. Some serious consequences flow from this simple categorisation, however:

1. Since a declaration is being made concerning the rights of the parties, as perceived by the arbitrator i.e. the assessment manager, the question obviously becomes 'who can or should determine the relevant parties to be included in the process'? Does not the characterisation of the decision as 'arbitral' virtually force an open, or inclusive, concept of the third party?

   The view subsequently expressed in this thesis is that it does not, and that the category of third party, 'who may be affected by a decision' has been allowed

to grow too large for a variety of reasons, though most of them have no fundamental relationship with the realities of an arbitral process per se.

2. Can a representative body subject to transitory political pressures consistently make fair and reasonable arbitral decisions? This matter is taken up subsequently. In short, however, the answer is again in the negative. Local politicians have habitually failed to appreciate the quasi-judicial (or arbitral) aspect of development control. In this context a recommendation is subsequently made for the expansion of private certification into the assessment arena. There is no intrinsic (or legal or constitutional) difficulty with private arbitrators putting forward recommendations to Local Authorities who can adopt or, with the reservations outlined in the thesis, reject them. Equally, that criminal; sanctions may operate in certain circumstances is not germane if the Local authority remains the "approval" as distinct from the "assessment" authority.

4. Judicial Decisions

The responsibility of the Court is, in line with *Alexander's case*, to define rights inter se on the day the matter comes before the Court and at this level acknowledgement must be made of the two discrete jurisdictions exercised by planning Courts, namely their declaratory and de novo jurisdictions.

Only the declaratory jurisdiction has aspects in common with the traditional judicial review process of administrative law. It is concerned with due process and fairness and accordingly operates an open system of legal standing.

The more important merit review jurisdiction has nothing at all in common with the administrative law approach. The issue that arises out of the de novo jurisdiction, however, is whether the Court in its exercise assumes the *planning* role of the planning authority. All planning courts emphatically reject such a notion and the reason behind such judicial unanimity once again goes back to *Alexander's case*, namely that the court is determining rights not exercising planning discretions.

Accordingly, administrative law does not provide a framework which is of any more than marginal utility in describing the operation of a development control system and the exigencies which are an inevitable part of it. On the contrary, it may lead to the conclusion that since no one can properly determine who may be affected by a given decision then open standing and an extravagant degree of public participation is an essential part of the system. This thesis sets out *inter alia* to establish that this conclusion is incorrect and that can only be maintained in the face of the many considered objections outlined in Chapter 3.

TWO

FEDERAL INTERVENTION: POTENTIAL DYSFUNCTIONAL EFFECTS ON STATE DEVELOPMENT CONTROL SYSTEMS

A. INTRODUCTION

Even 10 years ago few would have thought it necessary, or in any event, certainly not essential, to consider a substantial statutory intervention by the Commonwealth government in nation-wide planning matters. Planning, historically, fell clearly within the constitutional purview of the States and the Commonwealth government's involvement would properly be limited to matters that impinged on Commonwealth lands. In a short period of time the situation has changed fundamentally. The Commonwealth government not only feels inclined to become involved but, without necessarily overstressing the fact, it now feels a moral imperative to take a lead role.

There are a number of reasons why this has occurred and these will be discussed subsequently though the demand by environmental groups for a more reactive and prescriptive role to be undertaken by the Commonwealth, together, paradoxically, with calls from the development sector for a national, integrated development control system have certainly combined, in an unlikely synergy, to push the matter forward at the federal level.

The point immediately at issue here is whether this additional third tier of intervention and regulation is likely to have a detrimental effect(s) on the equity and efficiency of a previously locally based system which was, arguably, already under strain as a

result of the gradual incorporation of a raft of new environmental considerations into the local assessment process.

The proposition advanced *inter alia* in this chapter is that despite the "manageable" demographic of Australia, (though its huge geographical area and attendant logistical, financial and infrastructure constraints are often under stressed) the prospects for confusion, overlapping of responsibilities, duplication of effort and delays caused by the use of counter-suit injunctions and other Federal Court mechanisms could, in aggregate, result in greater inefficiencies throughout the expanded system and a significant increase in the inequity of a system which is now swinging more in favour of international agreed norms.

Accordingly, in this emerging context it is highly appropriate, and indeed essential, to examine in some detail the likely points of conflict between the existing development control systems of the States and Territories and the national initiative which is now principally mediated through the *Environment Protection and Biodiversity Conservation Act,* 1999 (Cth) (EPBC)

The following matters will be considered as part of this analysis:

- Overview of the legislative background to the EPBC

- An outline of the EPBC

- Equity and Efficiency within the EPBC envelope

- NSW and Queensland: Assessment Bilaterals.

- Conclusions.

B OVERVIEW OF THE LEGISLATIVE BACKGROUND TO THE EPBC

1. Structure and operation of the Environmental Planning (Impact of Proposals) Act 1974 (Cth)

The EPIP arose out of early concern that environmental issues associated with some development proposals of potentially broader significance than those which possessed purely local dimensions, were not being given adequate weight in an assessment matrix which was, at that time, perceived to be slanted in favour of social or economic factors.

At the time of its enactment the then Minister for Environment and Conservation, Dr. Moss Cass said this of the legislation:

> It will not grant me the exclusive power of veto over proposals or policies. It will not force developers to abandon environmentally unsound objectives. It will ensure that the government makes environmentally sensible decisions. It will not give individual

citizens the power to stop bad projects or to set conditions for moderate ones. The legislation will, instead, enable me to gather extensive information on specific proposals. It will force developers to include environmental impact in their planning. It will present the government with comprehensive information about environmental impact as an aid to decision making. And it will enable the public to argue a case publically, to have their case published, and to force governments to justify their decisions.[1]

The core oversight element, as indicated by the Minister's remarks was the potential to require an Environmental Impact Assessment in respect of the proposal in question and the subsidiary issues, consequently, were the nature and validity of the Commonwealth's jurisdictional claim and the triggers which would give rise to the exercise of Commonwealth oversight.

The operative provision in this respect was s 5 of the Act which stated that the object of the Act was:

> (1) [t]o ensure, to the greatest extent that is practicable, that matters affecting the environment to a significant extent are fully examined and taken into account in and in relation to:
>
> (a) the formulation of proposals;
>
> (b) the carrying out of works and other projects;
>
> (c) the negotiation, operation and enforcement of agreements and arrangements (including agreements and arrangements with, and with authorities of, the States);

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1 Commonwealth Hansard, House of Representatives, 26 November 1974, p 4082. Quoted in Bates, G.M. *Environmental Law in Australia.*, 4th ed (Sydney, Butterworths, 1995), p 143-144.

(d) the making of, or the participation in the making of, decisions and recommendations; and

(e) the incurring of expenditure;

by, or on behalf of, the Australian Government and authorities of Australia, either alone or in association with any other government, authority, body or person.

(2) The matters referred to in subsection (1) extend to matters of those kinds arising in relation to direct financial assistance granted, or proposed to be granted, to the States.[2]

Before the jurisdiction conferred by s 5 could be exercised however the development proposal was required to be assessed as environmentally significant by the Minister, though his or her action in this regard was circumscribed only by the requirement that the response be not unreasonable.[3]

The EPIP was essentially an administrative approach to oversight and a reasonably light-handed one at that. Munchenberg[4] points out that in 1992-93, 174 matters were referred to the then Commonwealth Environment Protection Agency (CEPA) but only

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2 A claim for jurisdiction under s 5 based on the provision of Commonwealth grant or a proposal for funding was a genuinely novel approach. It should be noted however that such a claim could only be supported by a "specific" grant, not a "general" grant to a State or Territory government

3 *Australian Postal Commission v Botany Municipal Council* (1989) 69 LGRA 86. See also *Murphyores Inc P/L v The Commonwealth* (1976) 136 CLR 1. where the High Court, effectively adopting the much earlier English decision in *Sharp v Wakefield* [1891] AC 173 at 179, concluded that the exercise of an executive discretion was conditioned "... according to the rules of reason and justice, not according to private opinion."

4 Munchenberg, S "Judicial Review and the Commonwealth Environment Protection (Impact of Proposals) Act,1974, *Environmental and Planning law Journal,* Vol 11, p 460.

three EIAs and one PER were ordered to be conducted. [5] In large part proposals which came under review were isolated from the glare of public criticism or review since although it was open to the department to recommend an EIA, only the Minister could actually order one. Equally, Munchenberg suggests, these decisions tended to be largely free from court challenge because of cost, the problematic legal status of the administrative guidelines and because of the extensive executive discretion afforded to the Minister under the Act.

2. Criticisms of EPIP.

Apart from what was perceived as a systemic failure to effectively implement the principles of ecological sustainability EPIP was criticised from within the government and from the external environment lobby on the following bases:

- The triggering process, as outlined above, could only result in the Commonwealth becoming involved in a rather limited class of issues and then only if there existed a demonstrable environmentally significant issue.

- The EPIP was, conversely, not triggered by some proposals with attendant matters of genuine national environmental significance. Lacking the jurisdictional foundation subsequently afforded by the

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5 It is useful to compare this statistic with the performance of *Environment Australia* between 1999-2000: of 238 proposals again only 5 were subjected to a full EIS and 3 PERs were published. (All these projects were examined under the EPIP not EPBC). For a national perspective see: Ramsey, R .and Rowe, C. *Environmental Law and Policy in Australia.* (Sydney, Butterworths, 1995) Ch 14

incorporation of international convention within domestic legislation, issues such as developments which impinged on Ramsar wetlands or world heritage areas could only be addressed indirectly through foreign investment approvals, export licence controls and such like.

- The reliance on these indirect enforcement procedures, the necessity to coordinate such activity across other departments such as Treasury, Finance and Trade led to unnecessary delay and duplication.

- The triggers under the Act were often initiated late in the development approval cycle causing unnecessary uncertainty and expense to applicants.

- Applicants for development consent at State and local levels were often unable to assess the likelihood of their project being caught by what, in reality, amounted to a federal Ministerial "call-in" procedure.[6]

3. The Intergovernmental Agreement (1992)[7]

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6 Department of the Environment *Reform of Commonwealth Environment Legislation.: Consultation Paper.* (Canberra, Cth of Australia, February 1998). pp 8-9.

7 In the same year the *National Strategy for Ecologically Sustainable Development* [NSESD] was finalised which, in turn, gave rise to 1) The Natural Heritage Trust, 2) the Council of Australian Governments and Water Reform, 3) the COAG Salinity and Water Quality Action Plan, 4) the National Strategy for the Conservation of Australia's Biological Diversity, 5) the National Greenhouse Strategy, 6) the National Oceans Policy and 7) the Regional Forest Agreements.

The largely derivative nature of the concepts in this agreement and which were contained in s 3, "Principles of Environmental Policy" is obvious from the following summary.

(a) Ecological Sustainability (ESD)

The agreement does give a perhaps grudging acknowledgement to a principle that is stressed in this work viz. the inherent interrelationship of environmental planning and the economic health of the nation. At section 3.3 the parties accept that:

> [s]trong, growing and diversified economies (committed to the principles of ecologically sustainable development) can enhance the capacity for environmental protection. In order to achieve sustainable economic development, there is a need for a country's international competitiveness to be maintained and enhanced in an environmentally sound manner.

Despite the qualifications spread throughout this statement, it nevertheless represents a sensible acknowledgement of the fundamental relationship between ecology and economics. This point, which is missing in so many articles, has its reflection in other areas of human life. For example, though the creation of wealth within a community may not guarantee democracy emerging, it is, at least, a precondition for its emergence. Likewise, the creation of successful and internationally competitive enterprises may not guarantee environmentally sound management practices, but it is almost certainly a *precondition* for such practices to be implemented. The ESD principle has now received judicial consideration in *Sol Theo v Caboolture Shire*

Council[8]. In this instance, which concerned a proposal to establish an irradiation sterilization and de-contamination plant, McLaughlan DCJ while adopting the IPA definition of ESD in s.1.3.3, effectively integrated the constituent elements by suggesting that the unifying principle should be whether the harm is "reasonably foreseeable" which goes part the way towards making this principle an "operational" tool.

A supplementary, but interesting, point is made by Rose[9] in his paper which deals with the interplay between the environment, environment protection, environmental auditing and performance standards. After considering the EPBC definition of ESD in s 3A, he comments:

> It is difficult to imagine how any Commonwealth body's accordance with the ESD principle set out... might be demonstrated in the environmental sections of its annual reports. No quantified criteria or governance processes are prescribed.

He goes on to describe the potential reporting task as either "vastly unmanageable, or trivial and superficial.

(b) The Precautionary Principle

The definition, which has been carried over into the EPBC, is as follows:

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8 [2001] QPELR 101 at 108-109.

9 Rose, G, "Environmental Performance Auditing of Government" *Environmental and Planning Law Journal,* (2001) Vol 18 No 3 p 293.

> Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used to as a reason for postponing measures to prevent environmental degradation.[10]

As can be appreciated from Note 11, the literature already generated by this short statement is considerable and shows no signs of abating. Sympathy must go to the courts which will be required to adjudicate the issue when presented, and invariably in the face of conflicting scientific evidence and also with applicants and developers who are now required to incorporate this principle into corporate strategic planning and feasibility studies. At present there is simply no way this can be done but it is they who are now required to bear a considerable cost in uncertainty and expense while academic and legal debate rages as to whether this is a mere statement of political will, a genuine scientific proposition, an operational tool, another term for approved minimum emission standards or merely "common sense". Since both NSW and Qld will shortly possess the same definition the inequity is shared equally. Few, if any, solutions have been proposed for this dilemma though one immediately comes to mind which is to permit the planning courts to appoint their own independent experts

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10 This is the same definition as the one which appears in the NSW *Local Government Act*, Schedule 9. The current Consultation draft on IPA also proposes (under Commonwealth government pressure) to also incorporate it in the Act. The "Precautionary Principle" has been extensively treated in many works, though without much consensus emerging as to its efficacy as an operational tool. See: Harding, R. and Fisher E, *Perspectives on the Precautionary Principle* (Sydney. The Federation Press, 1999). Also: Steven Dovers. "Adaptive Policy, Institutions and Management" *Grifith University Law Review.* 1999 Vol 8(2) at p. 374; J.Peel. "Taking a Precautionary Approach in Queensland." *Local Government Law Review.* 1998, Vol 4 at p. 50; Alan Bradbury. "Reality or Rhetoric? Ecologically Sustainable Development in NSW." *Local Government Law Journal,* 1998, Vol 3 at p. 86,; Lisa Wyman. "Acceptance of the Precautionary Principle" *Environmentaland Planning Law Journal.* 2001, Vol 18(4) at p. 395; R.Lyster. "Relevance of the Precautionary Principle" *Environmental and Planning Law Journal,* 1997, Vol 14 at p. 390,; W. Gullett. "Environmental Protection and the Precautionary Principle" *Environmental and Planning Law Journal.* 1997, Vol 14, at p. 52

and to allow these experts to appraise the relative merits of conflicting scientific evidence. This issue is taken up further in Chapter 7.

(c) Intergenerational Equity

The Agreement defines this concept as:

> The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

In philosophical terms such sentiments reflect a sense of compassion and of sacrifice that is genuinely laudable. In practical terms however what does such a proposition mean?[11] Since coal fired power stations emit carbon dioxide should no proposal to build one be entertained? Should no new coalmines be allowed to be developed? Indeed this debate has already unfolded in respect of uranium mining in the Northern Territory.[12] Conversely, one could well argue that it is well within the range of possible expectations that future generations might place a much higher value on *employment*.

Indeed this is the crux of the matter; the proposition is predicated on a value judgment about indefinable and highly unpredictable future human, social, economic and environmental conditions. Unfortunately these value judgments affect enterprises *now*

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11 See generally, Dovers, Steven. "Adaptive Policy, Institutions and Management". *Griffith University Law Review.* 1999, Vol 8(2) p.374.

12 See McGrath, C. "Uranium Mining, Use and Disposal Law in Australia". *Environmental and Planning Law Journal.* (2000) Vol 17, No 6 p 502.

and a coal company, frustrated by regulatory obstacles in Australia, can easily open another mine in Brazil. After all, the Rio Convention specifically ensures that implementation of its policies should reflect the state of development of the indigenous economy which suggests that a further implicit proposition may also be operating viz. *Intragenerational Equity*.[13]

The inequities wrought by huge increases in regulatory and enquiry powers which must flow from an attempted application of this principle will be borne, not by governments who are, by and large, the beneficiaries, but by corporations and those seeking, admittedly for corporate self interest, to expand production, maintain growth and create an environment which will generate the very wealth necessary to enable environmental issues to be addressed. In short, it is logically self-defeating. And through the quiet acquiescence of the State governments, this principle has been made one of the central pillars of the new planning orthodoxy which is now global (or at least global in the sense of the developed economies and rather less "global" in the case of the undeveloped nations).

At a practical, corporate level[14] the results of any given feasibility study often turn on the sometimes arbitrary (or "best guess") choice of an appropriate discount rate to assess returns on capital over extended time periods. For the intergenerational equity concept to be meaningful some method must be found to value so-called "natural

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13 The North – South Dialogue, and the writing off of third world debt being only two expressions of this proposition. Finally, this issue resulted in the collapse of the Kyoto Summit talks on Climate Change.

14 The writer confesses to having worked in the Strategic Planning Units of two multi-national corporations.

capital". And even if this is achievable what discount rate should an environmental agency choose to reflect a return on this capital over time periods which may be measured in generations? Further, if we are dealing with a non-renewable resource (eg oil), then presumably at the end of the period nothing of this natural capital will remain. Assuming the agency has chosen the correct discount rate and levied the appropriate royalties, when and to whom should this money be released ie yearly, by decades, by generations of 20, 30,or 70 years?

Arguably, over time, the principle will probably merely form part of the ideological background noise to specific environmental debates and governments will see it simply in terms of royalties in the resource sector and as inapplicable, in practice, to matters pertaining to natural heritage which, in any event, will be protected by overlapping international conventions.

The Agreement goes on to highlight "biological diversity and ecological integrity" and to insist on "improved valuation, pricing and incentive mechanisms" which need not be dealt with in detail.

At two points in Section 3 the Agreement comes close to entrenching equitable and, if implemented correctly, economically efficient propositions. First, at 3.4(iii), it suggests that environmental considerations be integrated into government decision making by "ensuring that measures adopted should be cost-effective and not disproportionate to the significance of the environmental problems being addressed"

[15]and at, at 3.5.4, that "environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, which enable those best placed to maximise benefits and/or minimise costs to develop their own solutions and responses to environmental problems."

The most that can be said of either proposition is that they acknowledge costs and benefits. We still do not know however who will assess the costs or benefits, which market mechanisms are contemplated and to what real extent individual corporations will be allowed to innovate within an overall framework of national policy.

Subsequent to the Intergovernmental Agreement, in 1997, the Council of Australian Governments (COAG) agreed in principle to the *Heads of Agreements on Commonwealth/State Roles and Responsibilities for the Environment*[16]and these subsequently became the rubric under which the provisions of the EPBC were drafted.[17]

This then was the situation faced by the federal government at the beginning of 1998. In short, the government, under increasing pressure from a variety of sources, undertook to comprehensively review federal environmental legislation with a view to

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15 A principle that has found expression in Qld in *Harrison v Caboolture Shire Council* [1996] QPELR 201 where Judge Quirk, in answer to an alleged deficient EIS, remarked that the applicant (given the size of the issue) should not be forced to assume the costs of a full anthropological examination.

16 Glindemann, R.."Reform of Commonwealth Environmental Legislation", (1998) 26 *Australian Business Law Review p 224*

17 The content of this Act will be considered later in this chapter.

incorporating environment protection (including the enforcement provisions), international treaty and convention obligations and substantially upgraded procedural requirements on issues such as legal standing, in one consolidated Act. The result was EPBC which is outlined below.

C THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1997 (CTH): AN OVERVIEW

The EPBC establishes a genuine third tier of assessment and approval in many instances ie it does not necessarily displace the necessity to obtain approvals through the State development control system; it creates a duplicate set of requirements. As Fisher has pointed out,[18] (in reference to Queensland), EIA issues, in a given case, may now necessitate that consideration be given to four separate Acts: to EPBC, *The Environmental Protection Act* 1994 (Qld), the *State Development and Public Works Organization Act* 1971 and the *Integrated Planning Act* 1997.

A very useful, tabular summary of the Act has been prepared by Chris McGrath, and it is given in a subsequent page. In the context of this overall schematic a short outline of the Act together with an examination of its potential impact on State development control systems is warranted.

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18 Fisher, D. "Environmental Impact Assessment in Queensland." (2000) 18/2 EPLJ p 109.

Structure of the Environment Protection and Biodiversity conservation Act, 1999 (Cth)

After, C. McGrath. "An Introduction to the EPBC Act". (2000) 18/6 *EPLJ.* p 28.

OBJECTS (S 3)

Protection of the environment, conservation of biodiversity and ESD.

Recognises an appropriate role for the Cwth in relation to the environment is involvement in matters of national environmental significance.

Act to bind the Cwth and States (s4)

Matters of "national environmental significance" (ss12-25)

- World Heritage Properties
- Ramsar wetlands
- Threatened species and ecological communities
- Migratory species
- Nuclear actions
- Cwth marine areas
- Coastal waters
- Other (by regulation)

Commonwealth actions and areas

- Actions on or affecting Cth land which have a significant impact on the environment (s26)
- Actions by the Cth which have a significant impact on the environment
- Minister's advice on foreign aid, air traffic, and airport development with possible significant impact on the environment (s160)
- Cth decisions (including funding decisions) are not assessable (ss524-524A)

Environment Protection – Ch2 &4

- Offence provisions (ss12-28)
- "Controlled Action" (s67; ss552B-524A)
- Assessment of Impacts (Part 8 ss 68-129); Referrals
- ,Preliminary information, PERs, EISs, Public enquiries, and strategic assessments (s146)
- Approvals and Conditions (Part 9 ss130-=145B)
- Ministerial declarations & Accredited management plans (Part 4 ss 32-36 and 840
- Ministerial exemptions (s158)
- RFA and GBRMPA exemptions (ss38-43)

Biodiversity Conservation-Ch 5

- Indentification and monitoring (ss171-175)
- Bioregional Plans (s176)
- Listing: Threatened species and ecological communities
- Species offences and permits (ss195-264)
- Register of critical habitat (ss207A-207C)
- Australian Whale sanctuary (s225)
- Recovery and threat abatement plans (s267)
- Wildlife Conservation Plans (ss304-312)
- Conservation agreements (ss304-312)
- Biosphere and Cwth Reserves (ss337-390A)

Bilateral Agreements-Ch3 ss 44-65A

- Agreements between the Cwth. and State and Territory governments accrediting State and Territory development control processes for the assessment stage ("Assessment bilaterals') or or assessment and approval stages ("Approval Bilaterals") under EPBC
- Cwth retains ability to suspend or cancel Bilateral Agreement (s590)

Administration-Ch 6 ss 391-516B

- Precautionary principle to be applied (s391)
- Wardens, rangers and inspectors; search powers (ss392-462); Conservation orders (ss464-474)
- Injunctions (ss475-4800; Widened standing for litigation (s476; ss487-488) and no undertaking as to damages if applying for interim injunction (s478)
- Executive officer liability (s493-5); due diligence (s496); false and misleading information. (s489-91)
- Committees (ss502-14); Annual reports (s516A); 5 yearly State of the Environment reports (s516B)

1. When is an approval required

The Act uses the concept of matters of "national environmental significance"[19] to trigger the involvement of the Commonwealth government. Apart from the obvious example of Commonwealth lands, the Act uses s 51(29) of the Constitution to claim jurisdiction over:[20]

i) Wetlands (Ramsar Convention sites)

ii) Threatened species

iii) Migratory species

iv) The Commonwealth Marine zone.

v) World Heritage properties

vi) Nuclear actions.[21]

Reflecting the content of existing, ratified international conventions, this list is fairly predictable. What will create a high degree of unpredictability however are the extensive powers given to the Minister to make "declarations" in respect of all the above categories.[22] Whether this factor enhances or detracts from the achievement of

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21 Which is not defined in the Act, cf. the COAG Agreement (7 November 1997) which contains a far more extensive listing of matters of national environmental significance in Sch 1.

20 A list of World Heritage Areas and International Environmental Conventions ratified by Australia is given in Appendices 1, 2 & 3. These could form the basis for even further expansion of federal jurisdiction.

21 An EPBC approval is required if a significant impact is likely to occur in respect of any of these categories. See: ss 28, 16, 12 *inter alia.*

22 It is of passing interest that the degree of Ministerial discretion increased between the original consultation draft and the Act. SeeJohnstone, F. "Revamp of Commonwealth Environment Legislation". (1998) 4 *Local Government Law Journal.* p 12 at p 13.

NCP principles and in particular the ecological sustainability component of the public interest will remain unclear for some time.

For example:

i) Under s 17(2) the Minister can declare "A wetland, or part of a wetland, is also a declared Ramsar wetland for the period for which a declaration of the wetland as a declared Ramsar wetland is in force." This is, quite literally, an extraordinary power to be vested in the executive. Conceivably any moderately damp area of land anywhere in Australia could be the subject of a declaration which effectively imposes all the statutory and regulatory apparatus of the Act on an person who proposes to develop the land.

ii) Under s 34D, the Minister may, subject to few reservations, [23] list a species as threatened or an ecological community as threatened. The affect, again, is to establish Commonwealth jurisdiction.[24]

iii) Under s 34E, again the Minister may declare a species as migratory. In this instance however some genuine constraint is placed on his ability to make a declaration.[25]

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23 Of which he is the final arbiter in any event.

24 The bluegrass dominant grasslands of the Brigalow Beltbioregions and the semi-evergree vine thickets of the Brigalow Belt and Nandewar Bioregions were listed as threatened ecological communities in April 2001.

25 See EPBC, s 209.

iv) In the case of "World Heritage" properties, and contrary to the general understanding, such a property need not be submitted to the World Heritage Committee under Article 11 of the *World Heritage Convention.* The Minister pursuant to s.14 (1)(b) may declare a property to be a World Heritage property unilaterally. Such a declaration does not require the consent of the State in which the area is situated though the Minister "must inform the appropriate Minister of the State or Territory... and give him or her a reasonable opportunity to comment on the proposal", though should he fail to comply with this requirement the validity of the declaration is not affected.

By means of such largely unrestrained powers, the Minister has the capacity to bring extensive land areas and issues within Commonwealth jurisdiction.[26]

In concert with the jurisdictional claim outlined above the offence provisions (ss 12-28) make provision for very large penalties should the Act be breached. In the case, for example, of actions which are subsequently held to have had a significant impact on a threatened species, the Act[27] provides for a term of imprisonment of up to 7 years and a fine of 450 penalty points,[28] or both. In the case of a body corporate however,

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26 Ministerial discretion is conditioned in the case of a lawful continuation of a use, which does not constitute an "action" under s 523, however enlargement, expansion or intensification of a use does not constitute a "continuation".

27 EPBC, s 18A.

28 For the meaning of "penalty points" see the *Statute Law Revision (Penalties) Act* 1998.

the fine can be up to five times that which can be levied against an individual and in all such cases the evidentiary burden of disproving the claim rests on the defendant.

2. What is a matter of national environmental significance

Given its central importance in the Act it is strange that no attempt is made to actually define this term and this will almost certainly create difficulties in the longer term. What does exist in the Act is, in reality, a compendium of various elements from other Commonwealth legislation.[29] One solution may be to import the definition from the COAG Agreement dated 7 November 1997 which contains an extensive listing of matters of national environmental significance in Sch 1.

3. What is an "Action"

The meaning of the term "action", together with "significant impact" which is dealt with subsequently, is central to an understanding of the operational extent of the Act. The term is defined across a number of sections and since it is an essential element in EPBC it is given in detail below:

s 523(1)

Subject to this Subdivision, ***action*** includes:

(a) a project; and

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29 The Act only broadly indicates the content rather than the meaning, of the term and this itself must be derived at from quite a large number of section, notably Ch 2, Pt 3, Div 1, ss12, 16, 18, 20, 21, 22, 23, 24, 25.

(b) a development; and

(c) an undertaking; and

(d) an activity or series of activities; and

(e) an alteration of any of the things mentioned in paragraph (a), (b), (c), or (d).

The following section defined things which are not ***actions.***

s 524(1)

Things that are not ***actions:***

This section relates to decisions of the following classes of persons:

(a) the Commonwealth

(b) a Commonwealth agency

(c) a State

(d) a Territory

(e) decisions by a government agency to grant an authorisation for another person to take an action is not, for the purposes of the Act, an *action.*[30]

McGrath[31] is firmly of the opinion that point (e) effectively undermines the ability of the Act to deal with cumulative impacts.

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30 s 524(2).

31 McGrath, C. "An introduction to the *Environment Protection and Biodiversity Conservation Act,* 1999 (2000) 6 *Queensland Environmental practice Reporter* p 102.

He remarks:

> By removing government decisions from the definition of "action" the Commonwealth has lowered the operation of the Act to a level where, in many cases, the impacts of individual projects may not pass the threshold of being a "significant impact". However, if viewed collectively at the level of government policy these actions may well pass the threshold of being a "significant impact". For instance a policy decision to fund or allow clearing and drainage of coastal lands for cropping, while potentially having a significant impact on a regional scale, will not trigger assessment and approval under the EPBC Act. At the smaller scale of individual clearing and drainage works a "significant impact" may not be able to be established.

Whatever will eventually prove to be the case, in the specific instance of cumulative impacts, there does seem little doubt that the incorporation of ss 524(1) and (2) leaves a large area of federal government policy discretion effectively isolated from the purview of the Act

.4. What is a "significant impact"

An additional element of uncertainty is the strange omission from the Act of any definition of "significant impact", a term which is clearly important to any understanding of threshold issues which are central, in turn, to triggering

Commonwealth involvement. Paradoxically, the criteria to be used in assessing "significant impact" appear in the Administrative Guidelines to the Act.[32] which, of course, have no legal weight. Concerning the legal effect of administrative guidelines the full bench of the Federal court in *Randwick City Council v Minister for the Environment* concluded: [33]

> The Administrative Procedures [so made] are exactly what their name suggests - rules which lay down the procedure to be followed by persons seeking, considering or taking administrative action. They are not declared by the Act to have the force of law; on the contrary, they must be `consistent with relevant laws' (s 6), and in this respect they differ from regulations which, according to s 9, `have effect notwithstanding any other law.

McGrath notes that some 70 terms are used in the guidelines to characterise "significant impact" under the various jurisdictional headings, ranging from "degraded" to "harmful" and "adverse change". Interestingly, the guidelines themselves indicate that the list is "not exhaustive". It would therefore seem then that only prolonged examination on a case-by-case basis by the courts will enable some degree of certainty, however vestigial, to be extracted from this list.

To date the issue of the meaning of "significant impact" has been considered in a number of cases which are summarised below:

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32 Department of Environment and Heritage. *Administrative Guidelines for determining whether an action has, will have, or is likely to have a significant impact on a matter of national environmental significance under the Environment protection and Biodiversity Conservation Act, 1999.* (Canberra, DEH, July, 2000) see web site: <http://www.ea.gov.au/epbc/assessapprov/referrals/significanceguide.html>

33 (1999) 106 LGERA 47

CASE	DECISION
Jarasius v Forestry Commission (NSW)[34]	Applied the *Macquarie* dictionary meaning: "Important"; "more than ordinary"
Drummoyne Municipal Council v Roads and Traffic Auth. NSW[35]**.**	"an important or notable effect on the environment…"
Tasmania Conservation Trust v Minister for Resources. [36]	"an important or notable effect on the environment."
EPA v Mobil Oil Australia[37]	"…Giving rise to heightened level [of contamination] well beyond accepted guidelines"
Byron Shire Business for the Future v Byron Council[38]	"a significant effect…"

These decisions, even on the most charitable reading, border on tautology but they, at least, represent the beginnings of an examination which, as indicated earlier, can only proceed incrementally.

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34 (1988) 71 LGRA 79 (L &E Court,Hemmings J).

35 (1989) 67 LGRA 155(Stein J).

36 55 FCR 516 (Sackville J).

37 (2000) NSWLEC 43

38 (1994) NSWLEC 159

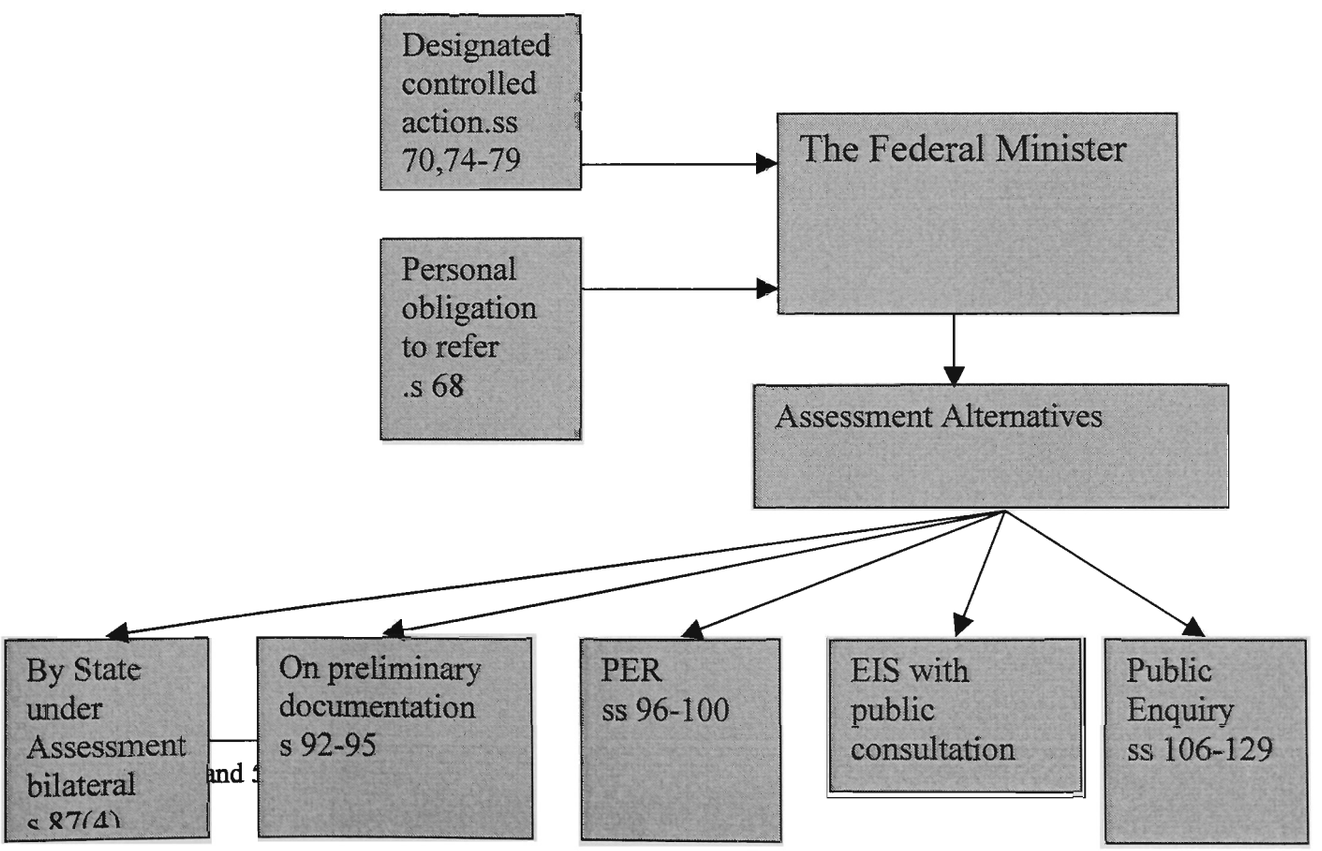
5. Existing actions

A lawful continuation of use of land, sea or seabed occurring immediately before the commencement of the Act is not an *action.* Nevertheless, an enlargement, expansion or intensification of use is not a *continuation* of use and consequently it becomes an *action* sufficient to bring the proposal within the ambit of the Act.[39]

6. The assessment and approval process under EPBC

The fundamental proposition which underpins the EPBC assessment and approval process is that of a "controlled action" ie an *action* which is likely to have significant impact on a matter of national environmental significance.[40]

For conciseness the alternative assessment models open to the Minister are outlined in the following flow chart:



In addition, there are a number of areas where the Ministers assessment is not required, viz:

- where an assessment or approval bilateral exists. (ss 44-65A, 83)
- in a matter subject to a Ministerial declaration and where an accredited management plan exists (ss 32-36)
- in an area where the Minister has made a declaration relating to a class of actions. (s 84)
- where an exemption has been granted "in the National Interest" (s 138)
- where the action is authorised by a Regional Forest Agreement (ss 38-42) or by the *Great Barrier Reef Marine Park Act*, 1975 (Cth)

On completion of the assessment the Minister can alternatively a) grant an approval, b) refuse the application or c) approve it subject to conditions.[41] Such conditions are subject to judicial review in terms of sufficiency of nexus, the well-established *Wednesbury Principle* and, perhaps, the growing public law doctrine of proportionality.

In any event the necessity for such conditional approvals to be in accord with the underlying international norms which gave rise to the domestic legislation will create many opportunities for creative submissions to the federal court.

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41 ss 130, 134.

7. EPBC and personal approvals.

Approvals under EPBC are personal in nature[42], unlike State planning jurisdictions where the approvals run with the land, and in the case of Queensland, which bind successors in title. There is, consequently, an inherent incompatibility between the two processes. One consequence of such a personal approval system is that an approved activity can lose its approval if the ownership of the land or project changes without the Minister's approval which, in traditional planning terms, must fundamentally call into question whether the "finality principle" can retain any credibility in the midst of such a concerted shift in paradigm. Having said this, State environmental approvals are personal in nature as well and major problems in the area have, to date, not emerged.

8. Accreditation of State assessment and approval systems.

The Commonwealth's expressed intention is not to create a huge assessment or development control bureaucracy but rather to "accredit" individual State systems which comply with Commonwealth management plans, benchmark standards and

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42 EPBC, s 133

regulations.[43] To date only one State, Tasmania has ratified as "assessment bilateral" though draft agreements are in place for all States and Territories and Victoria and Queensland are close to ratifying. This conceptual or process framework has lead one writer to comment that:

> [T]he rationale as to why the federal government would go to the effort of identifying matters of national environmental significance only to devolve its powers for assessment and approval of those issues to a State or Territory government is not entirely clear.[44]

D. EQUITY AND EFFICIENCY WITHIN THE EPBC ENVELOPE

As indicated on page 30 of this chapter consideration is given here to equity and efficiency within three dimensions: to equity and efficiency within the EPBC itself, to the external legislative environment ie the relationship between EPBC and State development control systems and finally to an actual examination of EPBC in operation.

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43 As a consequence, the EPBC EIS requirements have now been incorporated in Pt 5 of the *State Development and Public Works Organisation Amendment Regulation. (No 1) 2001*

44 Ogle, L."Environmental Protection and Biodiversity Conservation Act, 1999: How Workable is it?" (2000) 17 *EPLJ* p 473. Laura Hughes in "Environmental Impact assessment in the EPBC" (2000) 16 *EPLJ* p 304 goes further and suggests the accreditation process will produce "lowest common denominator effects" Her suggestion is for a standardised EIS national procedure.

1. EPBC: internal issues affecting equity and efficiency.[45]

(a) General criteria of equity and efficiency.

An attempt to create a riged bifurcation between efficiency and equity is fraught with difficulty and, even if technically accomplished, it may be of minimal usefulness for the simple reason that equity and efficiency issues are often expressed in economic, social and normative contexts and the concepts of equity or fairness, in purely economic terms, clearly derive from value judgments associated with the distribution of scare resources. As the 1998 Property Council Report suggests:[46]

> Arguments about fairness are always subjective and cannot be separated from social values and expectations. Efficiency and equity mechanisms, together, deal with costs and benefits of land use and development in a regulatory framework that necessarily involves socially acceptable trade-offs between the two.

With this reservation in mind then the following analysis concerns itself with the nominated criteria on an intra-statute basis.

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[45] The criteria under this heading are derived from the 1998 PCA report titled, "Planning: A New Way Forward" at p 14.

[46] At p 14

(b) Efficiency Criteria.

- Does the EPBC minimise public and private externality costs ie nuisance costs, prevention costs and administrative costs?

(i) Nuisance Costs.[47]

The nuisance that the Act seeks to address is the occurrence of significant environmental damage or degradation. It is not possible to argue against the fact that Australia has significant environmental problems such as salinity, soil erosion and water conservation. There are direct nuisance costs associated with all these, and many other issues, which are economic, social and personal and range from the loss of productive land, to the future of rural townships or the suicide rate in rural Australia. Precise quantification of even the direct economic costs is impossible, though it could be taken as a common-sense proposition that they are, in national terms, immense and, consequently, attempts to reduce such costs by taking remedial or preventative measures now is highly appropriate. In this sense every citizen is, or should be, an environmentalist.

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47 EPBC, s 3.

(ii) Prevention Costs.

Across the broad spectrum of environmental issues a total estimate of prevention or remedial measures in purely dollar terms is, again, impossible though the word immense continues to be applicable.[48] It is in the province of individual management plans to estimate these costs realistically.

(iii) Administrative costs.

To date no one has attempted an estimate of the total direct and indirect administrative costs that will be a consequence of Commonwealth government's intervention, as a very active, or to use Fisher's [49]word "purposive" actor, in a broad spectrum of environmental management issues. The criticisms of the Act that emerge from the literature tend to relate more to the need for a national EIA system and similar issues than to the direct economic costs of the administrative aspects of the Act. If however we apply the Commonwealth government's own criteria contained in The Centre for International Economics' report for the NCP entitled "Guidelines for NCP legislation reviews",[50] then this legislation is "complex", has "big potential for misunderstanding" and there is "much at stake " because :

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48 They could be compared to waging war at a high level for generations. Prevention costs, in this sense, relate to the actual work done on the ground. Which may force the closure of whole industries.

49 D Fisher. "Considerations, Principles and Objectives in Environmental Management". 2000 17/6 *EPLJ* p 487.

50 Centre for Internal Economics, Sydney, 1999 at p 19.

- the entire economy is affected
- particular industries will be greatly affected
- particular regions will be greatly affected
- major precedents will be established.

On this basis alone, it is quite valid to ask whether this legislation is justifiable at all and whether "the benefits [of the regulation] outweigh the likely costs".[51] Another criterion applied by the NCP in examining regulatory structures is to consider the affects of the abolition of the structure.[52] If this simple test is applied to EPBC then, it is at least arguable, that the desired environmental outcomes could have been achieved by a much more informal understanding with the States.

(iv) Does the legislation avoid or minimise duplication?

As has already been discussed the Act attempts to avoid this consequence by the use of bilaterals, however grave doubts must be expressed as to the efficacy of such a system given the Commonwealth's reluctance to draft approval bilaterals which has already been remarked on, the ability of the federal Minister to oversight State assessment procedures[53] and the development, even at this early stage, of a small body of case law which uses the Act to attempt federal, judicial intervention in the State planning and assessment systems. In reality, it is much more probable that the

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51 See comment Chapter 1, p 14.

52 See also Chapter 1, p 22

53 See EPBC ss 59, 60.

Act will entrench duplication which will affect proposals in all jurisdictions in Australia. On this basis alone whether the Act will contribute to efficiency is doubtful.

(v) Will the Act affect transaction costs and the ease with which property can be traded or developed?

The introduction, in many cases, of a duplicate set of assessment requirements will have two importance consequences. First, in trading property potentially affected by the Act, but currently protected by the "continuance of use" provision, consideration must necessarily be given by purchasers to the future development potential of the land. This is, particularly in regard to rural and industrial land uses, an essential part of the process by which a monetary value is ascribed to a property and the ability to intensify or expand an existing use is often an important portion of the valuer's equation (and is also highly relevant to the finance institutions). If any portion of this potential is called into question, or is likely to be made problematical, then the value of the property will decline and perhaps substantially decline. Secondly, if there is no existing use actively being pursued on the property but the proposed use is potentially captured under the Act, a similar decline in value will take place that will reflect the purchaser's estimate of the additional costs which will be incurred through the application of the Commonwealth government's duplicate requirements. Overall, however properties affected by the Act will, almost definitely, become more difficult to trade.

(vi) Will the Act generate the proposed public good?

Undoubtedly some of the more immediate objectives of the Act will be achieved including most, if not all, of the six categories that flow from international conventions. Whether both the Commonwealth's subsidiary objectives, or the broader purposes of the Act, which are contained in the s 3 objects clause will be, must remain in doubt for a considerable time to come.

2. EPBC: compatibility with State development control systems and inter-system issues

In one sense the EPBC, in its insistence on highly prescriptive rules together with the creation of a complex and highly process-driven administrative and approval system, reflects the planning ideas of the 1970s. It is certainly, at a cognitive level, lacking in the original thinking which is reflected in the development control frameworks established by IPA and, increasingly, EPAA.

In contrast, the Commonwealth seeks to protect the environment by creating elaborate assessment processes and an expanded federal administration, rather than through specifying desired outcomes and standards in an informal relationship with States and Territories. In addition to suffering from a number of technical flaws, the EPBC poses significant difficulties and concerns for applicants as well as for State and Local government development control systems.

The following examination canvasses 15 specific criticisms of EPBC. Prior to this however one particularly important issue must be dealt with and in some detail viz. the growing possibility of counter-suit actions impinging directly on State development control and appeal systems.

(a) Counter-Suit Actions.

The discussion in the previous sections clearly demonstrates the extensive discretion given by the EPBC to the Minister in many instances and the jurisdictional consequences of the exercise of such discretion. Additionally, actions that take place outside the boundaries of a matter of "national environmental significance" (ie constitutionally within the area and jurisdiction of a State or Territory) may be brought within the ambit of EPBC if they are likely to have a "significant impact" on that "matter of national significance".

The proposition, which is now advanced, is that the potential extra-territorial operation of EPBC now opens up the possibility of anti-suit actions against proceedings already underway in the State planning courts.

Traditionally, the difficulty with commencing such an action arises from the lack of legal standing of the party seeking to advance a claim. However, s 487 of EPBC allows for a large variety of persons to claim legal standing in the Federal court. The basic criterion is that the applicant must be an "aggrieved person" and a party is taken to be a person aggrieved by a decision, failure or conduct if:

a) "the individual is an Australian citizen or ordinarily resident in Australia or an external Territory; and

b) at any time in the 2 years immediately before the decision, failure or conduct, the individual has engaged in a series of activities in Australia or an external Territory for the protection or conservation of, or research into, the environment".[54]

The wording is so vague (indeed even fatuous) that virtually any person could satisfy standing requirements, which has almost certainly been the intention of the Commonwealth. The consequences of permitting wholesale access to the Federal Court on the basis of a set of expandable jurisdictional claims by the Commonwealth could have draconian consequences for the orderly hearing of applications and appeals in the State planning courts.[55]

It is not difficult to imagine an "aggrieved party", who lacks standing in the State courts, or who believes the Commonwealth Act is more potentially sensitive to their particular claim, attempting to take the matter out of the jurisdiction of the State planning court (even if the matter is being heard). This could be accomplished by applying to the Commonwealth court for a declaration that the matters properly fall

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54 The following subsection applies the same criteria to corporations or associations.

55 Raff suggests that the issue of standing has, even now, not gone far enough and that the Commonwealth should insist that the States establish the same opportunities for judicial review as exist in EPBC and for Tribunal appeals to be permitted during an assessment process. Raff, M "Environment Protection and Biodiversity Conservation Act". (2000) 17/5 *EPLJ* p 369.

within the purview of EPBC. The initial application would be coupled with an application to injunct the parties in the State proceeding from continuing with the matter.[56]

Additionally, there is a considerable body of High Court decisions that effectively enlarge the jurisdiction of the Federal courts, once such a declaration is made and an injunction has been granted. In *Stack v Coast Securities (No.9) P/L,*[57] Gibbs CJ., Wilson and Dawson JJ laid down the following proposition:

> In the exercise of the jurisdiction conferred [under a Commonwealth Act of Parliament][58] the Federal Court of Australia may adjudicate on non Commonwealth claims arising in a defence or cross-claim which arise out of the same transaction and are closely related to the applicant's claim or which are aspects of a single justifiable controversy [of] which the issues raised under [the Commonwealth Act] form an integral part...

This decision enlarges the ambit of the earlier High Court decision in *Felton v Mulligan*[59] and it has been applied in subsequent decisions in *Fencott v Muller; Basegrove Holdings P/L v Centaur Mining and Exploration Ltd* and in *Australian*

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56 Chris McGrath in his article, "Bilateral Agreements- Are they Enforceable?". (2000) 17/6 *EPLJ* p.485, ties the use of counter-suit injunctions to situations where a bilateral is in place. A counter argument however is that the existence of a bilateral agreement may be irrelevant. I agree, however, with his conclusion that bilaterals are unlikely to be enforceable at law. (Unless contained, of course, in subsequent State legislation.)

57 (1983) 154 CLR 261.

58 In the case of the FCA, the relevant provision is s 39B(1A)(c) of the *Judiciary Act*, 1903.

59 (1971) 124 CLR 367.

Solar Mesh Sales P/L v Anderson. [60] Though these decisions have arisen principally out of matters arising under the *Trade Practices Act,* 1974 there is no reason why the same logic cannot, and will not, eventually be applied to the EPBC.

The previous discussion concerned counter-suit injunctions however applications for interim injunctions under s 475 of EPBC have already been made to the courts.[61] In *Booth v Bosworth*[62] an application was made for an interim injunction under s 475(5) of EPBC. The respondent, a lychee grower, had erected a series of electrical grids to protect his crop that had some impact on the flying fox population. The applicant to be successful, needed to be able to establish that the actions of the respondent satisfied the requirements of s 12 of EPBC in that " it has, will have or is likely to have a significant impact on the World Heritage values" of the nearby, National Park. The scientific evidence presented was, predictably, conflicting and no consensus emerged as to the degree of impact this activity was causing. Under these circumstances Spender J refused to injunct the activity. [63] In reaching his opinion Spender J. quoted with approval two earlier decisions of the High Court: the decision of Mason CJ in *Castlemaine Tooheys v South Australia*[64] where the judge stressed the need to strike a balance between public and private interests and that of the same judge in *Richardson v Forestry Commisssioner* [65] where he rejected the contention

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60 (1983) 152 ClR 570; (2001) FCA 259; and (2000) 101 FCR 1 respectively.

61 These have been heard by the AAT and concern principally concern fisheries matters.

62 (2000) FCA 1878.

63 After an appeal to the federal court a prohibitory injunction has now been granted in this matter. See: *Booth v Bosworth* (2001) FCA 1453. (17 October 2001)

64 (1986) 161 CLR 148 at 155.

65 (1988) 164 CLR 261 at 275.

that an applicant need show that irreparable damage will be done, but rather that it was a possibility that irreparable damage may be done.[66]

The most recent decision, *The Fraser Island Dingoes Case*,[67] similarly concerned an application for an interim injunction to prevent a breach of s 12 of EPBC. Drummond J, while accepting that the local dingoes were part of the heritage values of the island, nevertheless felt that the culling program was so limited in scope and so close to the end of the cull that injunctive relief was not required. Commenting on this case, McGrath felt it was truly remarkable that the Federal Court could now rule on the actions of a State government in managing State land without the State, in response, raising any issues as to constitutionality or jurisdiction. As he further remarked "There are interesting times ahead..."[68]

The inequity and the potential for the applicant to have to bear a huge increase in legal and other costs should be apparent and it must doubted, if the procedures outlined are increasingly used (which seems inevitable), whether such a system is rationally sustainable even in the short term.

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66 These are applications for interim injunctions where clearly the potential for irreparable damage, even in the short term, is a highly important consideration.

67 (2001) FCA 756.

59 . McGrath, C "Fraser Island Dingoes Case", (2001) 18/3 EPLJ p 269

E EPBC: EFFECTS ON STATE DEVELOPMENT CONTROL SYSTEMS

The following 16 observations, for conciseness, are considered in tabular form on the following pages:

THE ISSUE.	THE PROBLEM.
• **The definition of "national environmental significance" and "significant impact"**	The general vagueness of these definitions, which has been commented on in the text, makes it extremely difficult for an applicant or a Local Government to determine in particular cases whether an application should be referred to the Commonwealth. This is exacerbated by the positive obligation placed upon an applicant to personally refer a matter if the applicant believes it may have a "significant impact".

• **Federal Ministerial discretions**	The Minister's ability to declare a development to be a "controlled action" and hence to determine the level of assessment required is highly arbitrary and will lead to uncertainty in the administration of both EPBC and State Planning Acts.
• **Revocations**	The ability of the Commonwealth to revoke a decision previously made as to either the need for a federal approval or the level of assessment required will create continuing uncertainty in the development community.
• **EPBC Triggers**	The potential now exists for unnecessary intervention in State assessment systems given the highly discretionary and arbitrary nature of the triggers under EPBC.

• **Counter-suit Actions**	Potential for huge costs burdens to be placed on applicants and for State matters to be adjudicated in federal courts
• **Ministerial Oversight**	The Minister can revoke an assessment or approval bilateral at his discretion.

• **Trigger Thresholds.**	As discussed in the text, considerable uncertainty exists as to the threshold levels which will be applied in the various management plans. This may force applicants to unilaterally refer the matter to the Commonwealth in the face of considerable criminal and financial penalties.

• **Information Requirements placed on applicants**	It is highly likely that applicants will be required to undertake extensive and expensive initial investigations prior to a determination by the Minister as to whether the development even triggers EPBC involvement.
• **Duplication**	The Commonwealth requirements effectively duplicate procedures already in place in the States. Neither is there any consolidated attempt in the Act to integrate assessments between respective regimes. This, in itself, is contrary to nation-wide move towards increasing integration.
• **Accountability**	The whole issue of State and Local Government accountability and potential legal liabilities remains unaddressed.
• **Cost burdens**	Internal, and hence externality costs, will increase as local systems are forced to administer a duplicate set of requirements.

• **Inconsistency with DAF**	There is a fundamental inconsistency between EPBC and the DAF principles which has previously been agreed to by all stakeholders and which seek to integrate development approvals and to create a single, transparent assessment system.

• **Environmental Assessment**	State EIA procedures have been overhauled in line with NCP and DAF principles. These reforms are implicitly ignored in EPBC.
• **Additional Costs**	Additional cost to the development community, to businesses and Local Government are inevitable. EPBC tends to negate other micro-economic reforms and will place an additional burden on economic growth and job creation.

• **Management Plans**	Uncertainty exists as to the nature and status of the associated management plans, what standards will be required to satisfy EPBC requirements and the implications should a plan be disallowed by the Minister.
• **Transitional Arrangements**	The EPBC fails to deal with projects in train and the hiatus preceding the signing of assessment bilaterals.

1. EPBC: Case study- Keswick Island, the Witsundays[69]

The following example provided by a property development group is illustrative of the impact or likely impact of the EPBC on major development projects.

This large scale project involves the construction of a 3000 person tourist and residential community on some 120ha of land. Two marinas and an airstrip extending into the marine park, which is World Heritage listed, were included in the project. By agreement between the Commonwealth and State governments a joint IAS/EIS was

[69] The case studies are extracted from a QELA seminar paper delivered by Greg Long of Transtate Ltd, held on 30 July 2001.

conducted with the process administered by the then Queensland Department of Environment and Heritage. Subsequently, a joint State and federal government environmental assessment was issued which recommended the project proceed though subject to 63 separate conditions. In general terms the developer found the total process to be facilitating and cooperative.

Long's comments about a similar application under EPBC are however worth recording. He feels that an EIS conducted now, under EPBC, could produce a different result. This, he suggests, may be the case for two reasons. In his words:

> I believe the thresholds for what is regarded as significant impact on the World Heritage listed and Commonwealth Marine areas, is now much higher… That is, the burden of proof for potential impacts now is substantially increased, and I cannot imagine that, as the developers, we could justify or indeed accommodate the financial impost that arises from endeavouring to demonstrate that no "significant impact" will be caused by the project, if it is developed according to best practice environmental management principles.

And secondly,

> I believe community and political sentiments would preclude a project like Keswick being approved now. The EPBC Act provides convenient and forceful mechanisms for the Commonwealth Minister to apply the precautionary principle, and refuse to approve such a project. That could be very bad for our tourism industry in the future.

As an additional point Long refers to the problems associated with the imposition of EPBC oversight over projects which are already underway He comments:

> I cannot imagine that any further assessment or surveys in relation to these issues under the EPBC Act will contribute in any way to better achieving the objects of the Act. However, a substantial cost to the developers may well be the result of any further assessments required if the Minister declares it a controlled action, and a considerable impact could be had on the valuation of the property because of the uncertainty that the Commonwealth's involvement creates. This is unacceptable when one considers the project has been proceeding according to pre-existing agreements which have stood for many years.

On the face of it these are very worrying comments indeed coming, as they do, from a large national development group with significant financial and technical resources at its disposal. Nevertheless, the jury is still out on most of these matters and firm conclusions will have to wait on further case by case examples to clarify threshold levels and the burden of proof.

F. NSW AND QUEENSLAND: ASSESSMENT BILATERALS

Currently the most significant of the two bilaterals agreements are assessment bilaterals with no substantial process yet evident on proposed approval bilaterals. As indicated, to date, only Tasmania has ratified an assessment bilateral, though draft agreements are in place for all States and Territories. Since these agreements are

central to the operation of the EPBC (at least in the absence of a huge expansion of *Environment Australia)* the draft NSW bilateral is given in Appendix 2. Currently, the NSW Department of Urban Affairs and Planning (DUAP), believes the Commonwealth will accredit the assessment regime already operating under EPAA. The process has been slow however because of the time taken for *Environment Australia* to respond to the DUAP proposals and the bilateral is unlikely to be implemented, by incorporation in a new SEPP, until mid 2002. The Director of Development and Assessment for DUAP, Mr Geoff Noonan, in a conversation with the writer, described the entire process as "immensely complex".

1. The Queensland experience to date.

Queensland has attempted to comply with EPBC/EIA guidelines and benchmarks by undertaking a review of the *State Development and Public Works Organisation Act,1971* notably by incorporating "prescribed developments"[70] within an EIA ambit. In these instances the Coordinator General is the sole concurrence agency and his or her EIS is fed back into the standard IDAS framework of the *Integrated Planning Act,* 1997.[71]

Despite Chadwick's opinion that, as a result, impact assessment has moved "from the margins to the very centre of development assessment"[72] the Commonwealth has

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70 Defined in s 5 of the Act as having a major economic significance for the State.

71 Why the Coordinator General, whose office has traditionally been more concerned with economic development, should be given this task, and not the Environmental Protection Agency, remains unclear.

72 Chadwick, J "Environmental Impact assessment under the Integrated Planning Act" (2000)

remained unimpressed with this process and this, in turn, has necessitated an amendment to the *State Development and Public Works Organisation Act,* 1971[SDPWOA][73] which effectively incorporates the EPBC assessment regime within the Queensland Act. In addition, further EIS requirements has been inserted in the *Environmental Protection Act* 1994 to cover mining projects which are not "prescribed projects" under SDPWOA and additional EIS requirements are intended to be included in the foreshadowed amendments to IPA.

2. The NSW experience to date

Despite the existence of developed and tested EIS procedures which apply to designated classes of development under EPAA, discrepancies exist between the Commonwealth benchmark criteria and the NSW Statement of Environmental Effects.[74] Nevertheless the draft Bilateral provides in Sch 1, Pt A 2.2, B 2.2, C 2.2 and D 3 for guidelines which should provide the federal Minister with enough relevant information to make a valid decision in the context of s 47 of EPBC.

G. CONCLUSIONS

At the broadest philosophical or perhaps more correctly, ideological level the EPBC represents a consolidated attempt to circumscribe private rights and arises out of an intellectual milieu where the notion of "public right" has a degree of cogency which

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40(1) *Queensland Planner* p7.

73 SDPWO Amendment Regulation (No 1) 2001.

74 Neither EPAA or the regulations prescribe precise requirements for a SEE.

is, in many instances, not shared by positivist lawyers. Such lawyers remain doubtful whether the concept of a public right can ever really be defined with the sort of legal precision which our judicial system demands. Equally, some members of the judiciary may be wary that in the absence of a degree of definitional precision they may be increasingly called upon to decide issues on the basis of an overarching judicial discretion.

It is inevitable however that, in the face of national environmental concerns, and pressure from many quarters for an integrated development control and EIS process the EPBC will assume an increasing importance at the State level.

Despite protests from some conservation groups that the EPBC, potentially, puts too much power into the hand of untrustworthy State governments, the mechanisms incorporated in the Act such as benchmark standards, approved management plans, accreditation procedures and federal Ministerial oversight are unlikely to generate a laissez faire response from State governments and they may, over time, result in a reasonably integrated national approach.

There are, of course, serious concerns with the Act which have been expressed by both sides of the conservation/development argument and many of these have been dealt with in the above. One factor, however, should not be overlooked and this is that the Act as it stands now will change over time and will be used as a basis to justify an further list of federal jurisdictional claims. One need only refer to the list of ratified international environmental agreements in Appendix 1 to appreciate the potential for this to occur.

The jury, of course, is still out though the impact of EPBC on State development control systems is evident now and matters of integration, duplication and cost are to the forefront. That the same result, or indeed a better result, could have been achieved by a genuine commitment to cooperative federalism and through DAF and COAG may be debatable though it may have been valuable to try such an informal consensual approach initially rather than wholeheartedly adopting the rather draconian and prescriptive system which is at the core of EPBC.

THREE

THE APPLICATION STAGE

A. INTRODUCTION

Both Queensland and NSW planning regimes conform to an assessment and approval process which, in total, encompasses the making of an application, the provision of supporting information by the applicant, the public notification of the proposed development and the making of a decision by the Consent Authority in the case of NSW or the Assessment Manager in the case of Queensland. In Queensland this four step process has formal statutory recognition[1] and, taken together, constitutes the "Integrated Development and Assessment System" (IDAS), which is one of the central component systems created by the *Integrated Planning Act* 1997. [IPA].

All Australian planning regimes share these four processes in common though it is possible to conceive of a three-step system which removes the public notification requirement entirely in regard to certain categories of otherwise impact assessable developments or alternatively, as is the case in NSW, to remove the right of appeal in respect of local developments.[2] There are few advocates for such a truncated process,[3] which would remove notification or appeal rights, though a case, of sorts, could be attempted based around the fact that all Local Governments are elected bodies and that ultimately all

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1 IPA, s 3.1.9(1). The same elements are present under EPAA though spread across Pt 4 of the Act. Effectively the various divisions constitute an integrated system as a result of the wholesale review and amendment of Pt 4 in 1998.

2 EPAA, s 98.

3 See Pardy, Bruce "Planning for Serfdom: Resource Management and the Rule of Law", (Feb 1997) *New Zealand Law Journal* p 72.

aggrieved citizens have recourse to the ballot box. One of the contentions in this work is that the IDAS process has, in both jurisdictions, become encumbered by too many public participation processes and public rights and that the systems need to be rationalised.[4]

The core material which forms the subject matter of this thesis, is the four-step process outlined and which, for the sake of simplicity, is subsequently referred to as IDAS. Surprisingly, the IDAS processes in both the jurisdictions under examination here have been the subject of little intensive review. The present preoccupation with guiding principles or statutory purposes, with environmental sustainability or with the mechanisms of planning scheme or planning policy creation results in the assignment of IDAS generally to the secondary literature.[5]

This is surprising since it is these processes and the law that has developed around them which frequently determines whether the total system is fair and efficient from the point of view of the applicants and ultimately the wider community who are called upon to bear the costs of the development control process in terms of the purchase price of land and rental charges. Accordingly, one of the premises of this chapter is that often the perception (whether it is efficient and equitable and whether it *works*) of an entire planning and assessment regime is, in reality, not determined by the sophistication of the various planning instruments but by the efficiency of the underlying application and assessment processes.

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4 This process is ongoing in Qld and NSW. The IPA Amendment Bill 2001 is currently in consultation draft and proposes substantial modification to the existing IDAS system.

5 For example: Pickles, Ian "IDAS: Queensland and New South Wales Comparisons" (2001) 41/2

The IDAS stages in both jurisdictions will be examined in detail where either the statutory procedures are distinct, where similar planning or policy issues are treated differently or where similar legal issues have been taken up by the courts and dissimilar legal principles have been established. Often both jurisdictions do have similar approaches and apply similar principles. There is, for example, little essential difference between the jurisdictions concerning the amendment, lapsing or withdrawal of applications and consequently these issues, and others like them, have been omitted. In other areas however such as the question of "related land" or "consent" to applications, the two jurisdictions have differing approaches and these areas will be analysed. There are clear structural differences also between both regimes in respect of the classes of development, the required levels of approval and in their definitions of development[6] and these differences do affect the manner in which IDAS unfolds in the two jurisdictions.

With this framework in mind, the following matters will be examined under this, the first stage of the IDAS process:

- Who may make an application
- What constitutes a valid application
- The issue of "Owners Consent" and misleading applications
- Receipt and acknowledgment of applications

and,

- Public scrutiny of applications.

Queensland Planner. p 23.

6 See Note 5 above.

B. WHO MAY MAKE AN APPLICATION

Section 1.3.8(a) of IPA defines an "applicant" as a "person" which, in turn, is defined as including "a body of persons, whether incorporated or unincorporated".[7] EPAA contains a similar definition that covers the same ground[8] though EPAA takes a further step by means of a supplementary definition in the regulations limiting those who can make applications to two groups, the owner of the land and any other person, with the consent of the owner.[9]

In a number of significant areas the approaches in the two jurisdictions differ and once again these differences tend to exemplify the differing philosophies which underpin the respective legislation. Some debate, for example, has occurred in Queensland as to whether consultants or agents on behalf of undisclosed principals can submit applications.

Two associated issues have arisen under this heading in Queensland:

- can an application be submitted by an agent for a principal who remains undisclosed throughout the approval process?

and,

- given that an application has been submitted by an agent, can a principal subsequently appeal in its own name.

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7 IPA, Sch 10.

8 EPAA, s78 (A) "Person" is defined in s 4(1) as including "an unincorporated group of persons or a person authorised to represent that group".

9 EPAA regs, cl 49.

This whole matter appears to have been obviated in NSW[10] by the simple expedient of requiring that an agent signing a Form 1 on behalf of a principal must also disclose the identity of that principal. The same approach could have been adopted in Queensland.[11] It has not and the IPA equivalent forms[12] still do not require disclosure of the principal. As a consequence, the case law developed under the previous legislation would appear to be still applicable.

Reference to this case law is appropriate as it points to the policy and equity issue which is effectively ignored by administrative fiat under EPAA viz. whether principals, and particularly developers, should be able to maintain their anonymity throughout the application process in view of the preference in both Acts for openness and disclosure.

The leading case is *Dorrstein v Brisbane City Council*[13] where Byth DCJ held that even though an application had been signed by an agent there were sufficient letters and other documents in the possession of the council to establish that the real applicant was, in fact, Dorrstein. The judge however did not refer to any principle which supported his finding and this rather cursory approach was followed subsequently in *Charles Calthorp P/L v Pine Rivers Shire Council*[14] and in *Bennett v Livingston Shire Council*[15].

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10 "Applicant" is not defined in EPAA or the EPAA regulations.

11 IPA, s 5.8.1.

12 Forms 1 and 2.

13 (1967) 14 LGRA 97.

14 [1980] LGRA 38.

15 [1985] QPLR 214.

Apart from the decision in *Wyndrone P/L v Townsville City Council,*[16] which in part, turned on the concern the judge had that the public could be misled by a non-disclosure of the principal, the larger issue of potential public prejudice was overlooked until taken up by Newton DCJ in *Grimley P/L v Gold Coast City Council*[17]. Here the judge specifically based his decision on whether or not anyone had been prejudiced by the non-disclosure of the identity of the developer. In this instance, and harkening back to *Dorrstein,* there was sufficient correspondence in existence which clearly identified the principal.

While *Grimley* identifies the important issue of prejudice, it does not canvass the whole of that issue. It establishes correspondence as an indicia of whether, in fact, the developer's identity was known but the two issues, of knowledge and prejudice, do not necessarily relate to each other. The issue of prejudice, if it is to be examined at all in these instances, should be done so in the context of public disclosure and the existence of essentially internal council correspondence which identifies the developer to council is not necessarily germane.

However, in *obiter dicta in Young v Gold Coast City Council,*[18] the same judge helpfully summarised the issue as follows:

> The application is to be considered by the Council and by the Court, where appropriate, in terms of the development proposal, and it really does not seem to form part of the scheme of the legislation that the identity of the developer is a matter of great importance.

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16 [1988] QPLR 55.

17 [1994] QPLR 252.at 253.

18 [1996] QPELR 399.

It is hard to disagree with this statement. The scheme of IPA concerns the approval and management of land use applications *per se* and the identity of the applicant, though it may be of great and abiding interest to a commercial competitor, is not relevant to the approval process.

As Homel has pointed out, though in a different context[19]:

> IDAS approvals run with the land and have been described as "people blind"- they are based on land use, not the personal responsibilities of the person carrying out the use.

A question has also arisen in Queensland as to whether earlier case law has been rendered a nullity because of the differing Sch 10 definitions of "applicant" for the purposes of Ch 3 and Ch 4 of the Act.

"Applicant" is defined for the purpose of Ch 3 as "the applicant for the development application" but in the immediately following definition with reference to Ch 4 it is defined to include "the person in whom the benefit of the application vests". It seems clear, in reference to the latter definition, that the intention of the legislature was to confirm that subsequent transferees and undisclosed principals could lodge an appeal.

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19 Homel, B "Just a Process Change: the Impact of IDAS on Environmental Protection in Queensland", 16 *EPLJ* p 79.

The consequence of the introduction of these additional words has raised the issue as to whether "applicant" for the purposes of Ch 3 should be read down on the basis of a strict application of *expressio unius, exclusio alterius est.*

There seems no merit in this argument. In operation, as a principle of statutory interpretation, the words which are excluded from the ambit of one section must be expressed in the other. In this instance the expressed words are "the person in whom the benefit of the application vests" and certainly, in this category would be the owner of the land. The *expressio unius* argument therefore, correctly framed, would mean, not that agents could not submit an application but rather that owners could not, which is unlikely to be the case.

If this interpretation is correct, then two things are certain. First, that agents who apply on behalf of principals need not disclose the name of the principal and secondly, that principals can subsequently appeal under Ch 4 of the Act. The developer/ principal, can thus, in Queensland, remain anonymous right thoughout the application and indeed appeal process. In contrast, under EPAA, the developer/principal must be identified on the initial Form 1 application.

The Queensland approach is preferable. The possibility of the public being prejudiced by ignorance of the identity of the developer hardly outweighs the occasional commercial need for confidentiality. If a balance is to be established between these two factors it should, on the basis of equity, be done so as to not create, on the one hand, a potential commercial disadvantage to one party in an attempt to address an illusory need or aspiration of another.

C. WHAT CONSTITUTES A VALID APPLICATION

Issues associated with the validity of applications or the requirement for a "proper application" provide a contrast between EPAA and IPA.

In Queensland the formal statutory requirements for a valid application are outlined in s 3.2.1(1) to (5) and, in summary, they mean that each application must be "in the approved form" viz. that it contains an accurate description of the land, the written consent of the owner of the land and the required fee.[20]

The IPA application is, in one sense, merely a formal request for a development approval with the larger question of supporting information not necessarily addressed at this stage. Although, in the normal course of events, an application will have attached to it various pieces of supporting information[21] the provision of this information at this point in time is not a mandatory requirement.[22]

The IPA situation is in sharp contrast to the EPAA requirements where the distinction between the application and information processes is unclear. Under EPAA[23] an application must be in the approved form and must be accompanied by all the information required by Form 1.[24]

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20 These issues, together with the relevant case law, are dealt with subsequently.

21 IPA, s 3.2.1(3)(b)

22 IPA Forms 1 & 2.

23 EPAA Regs, cl 50.

24 EPAA, Pt 1 of Sch 1.

It is at this point that again the contrasting philosophies of the two Acts become apparent. The underlying philosophy of IPA reflects a more modern approach to regulation with its implicit insistence that those who seek to regulate should themselves carry the burden of stating and clarifying the assessment criteria in each instance. Consequently, the onus under IPA of determining which advice or concurrence agencies should participate in the assessment process, as well as what information will be required to assist the assessment to move forward currently rests on the shoulders of the assessment manager or the concurrence agency, not on the applicant.[25]

In contrast, the older EPAA can be said to reflect the more traditional approach in placing the burden of correctly determining a range of potential information requirements as well as other necessary approvals directly on the applicant. In this sense EPAA is less in harmony with the prevailing ideology of National Competition Policy than is IPA.

The information requirements for an application under EPAA are extensive and are set out in Form 1. In addition to title description, owner's consent and the appropriate fee(s) the applicant is required to determine:

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25 Though this is already being undercut by the requirement in Form 1 for the *applicant* to nominate the referral agencies as a mandatory requirement. This is certainly contrary to the clear intent of the legislature expressed in s 3.2.3(2)(b). The 2001 Consultation Draft however, if carried over into amendment to the Act, totally obliterates this requirement by replacing s 3.2.3, "Acknowledgement Notices" (which contained the requirement to advise the applicant as to referral and concurrence agencies) with a new, "Non-acceptance notice" which does not refer to this obligation. In reality the amendments are, in this sense, merely recognising actual practice. The situation shortly under IPA should thus parallel that under EPAA though it is an unfortunate turn of events for the reasons of principle outlined in the text.

a) whether the proposed development is an Integrated Development as defined in s.91 of the Act. If so it may require the approval of one or more bodies established under any of the following Acts; *Fisheries Management Act 1994, Heritage Act 1977, Mine Subsidence Compensation Act 1961, National Parks and Wildlife Act 1974, Pollution Control Act, 1970, Rivers and Foreshores Improvement Act 1948, Roads Act 1993, Waste Minimisation and Management Act 1995,* and the *Water Act 1912.*

b) in addition, if the proposal is for a Designated Development[26] then, pursuant to s 78A (8)(a) of the Act, an Environmental Impact Statement must be conducted and be attached to the application.[27]

Even if the proposal is not for a Designated or Integrated Development the application must still be accompanied by a statement of environmental effects which must demonstrate that the applicant has considered the proposal's environmental impact and taken steps to protect the environment or mitigate the harm.

While accepting that the EPAA application process does cover some of the same ground as the subsequent Information Stage under IPA, the process outlined by IPA is both more equitable and potentially more efficient. In terms of equity those who establish and maintain regulatory regimes from which approvals must issue should have a responsibility to advise the applicant of the relevant assessment requirements. To place this burden on the

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26 As defined in Schedule 3 of the Regulations.

27 The language of ss 78A(8) & (9) and cls 49 & 50 of the regulations, uses various phrases such as "must be accompanied by" and "required to be submitted with". Decisions on point relate to the now repealed s 77(3).

applicant in an increasingly complex regulatory environment is unfair and generates an immediate advantage to those individuals or corporations who can afford to enlist the services of lawyers or town planning consultants. Equally, the consent authority should be in a better position to accurately determine the scope of supporting information and the extent to which other bodies will need to be involved in the decision process based on its decisional and assessment responsibilities.

The principal difference between the two Acts lies in the fact that an EPAA application inserts a major and mandatory information requirement into the determination of what constitutes a valid application. By contrast IPA maintains a simplified application procedure where the information aspect is postponed until the next designated stage[28] and where the responsibility for determining what information will be required is placed on the consent authority rather than the applicant.[29]

The EPAA situation more closely parallels the position under the IPA precursor Act[30] where a properly made application was one that satisfied all the statutory or mandatory requirements.[31]

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28 The Information and Referral Stage.

29 This is a statement of *principle* based on the intent of the Act. Whether Local Government practice accords with these principles will become apparent over time. Certainly the potential exists under IPA for Local Governments to simply disregard salient aspects of the procedure. (There are no penalties contained in the Act applicable to Local Governments who do not conform).

30 *Local Government (Planning and Environment) Act* 1990 (Qld) s 4.1.

31 The foreshadowed IPOLAA 2001 amendments to IPA tighten the formal requirements and remove the right of the assessment manager to receive an improper application. In future an application will need to be properly made, or otherwise it will attract a non-acceptance notice and lapse after 20 days.

That this is still the current EPAA position is illustrated, in part, by *Byron Bay Business v Byron Shire Council*[32]. Here the applicant submitted a development application in respect of which both an EIS (it was a designated development in terms of s 77) and a Fauna Impact Study were required to be submitted with the application. No such studies were tendered. It was held that it was a requirement of a valid application that it be accompanied by all the required information, (though not necessarily at lodgment). Pearlman J summarised the position under EPAA as follows:[33]

> The question is not simply whether a development application in the prescribed form has been made. It is, rather, whether a development application which fulfils the statutory requirements has been made...if they have not been met, then the council has no basis for making a determination to grant or refuse consent.

The key issue for her Honour was that the development application needed to fulfil the statutory requirements at the time the council made its decision in respect of it. This decision is inconsistent with the decision of Handley JA in *Helman v Byron SC* [34] who felt that the information requirements were more in the nature of condition precedents to a proper application and to the decision of the NSW Court of Appeal in *Botany Bay Council v Remath Investments No 6 P/L*[35] where Fitzgerald J stated (at 457):

> Whether or not it is technically correct to say that a development application is "invalid" while the requirements of s 77 [now s 78A] of the unamended Act are not substantially

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32 (1994) 84 LGERA 434.

33 Note 32.

34 (1995) 87 LGERA 349.

35 (2000) 111 LGERA 446.

> complied with, references to "invalidity" which can be "cured" are capable of suggesting that a "cure" is retrospective. If a development application in respect of which there has not been substantial compliance with the requirements of s 77 is accurately described as incomplete and ineffectual until there is substantial compliance, it becomes obvious that it is only then that a development application is completely or effectively "made".

No doubt had *Remath* arisen in Queensland under the previous Act it would have been decided in the same way and on the same grounds.[36]

However, the IPA position is likely to be substantially different in view, in part, to the discretion now given to an assessment manager by s 3.2.1(8) which is in addition to that possessed by the Planning and Environment Court.[37] Under s 3.2.1(8) the assessment manager now has power to receive an application even though it is defective in terms of the formal statutory requirements outlined in s 3.2.1. Given the thin statutory requirements to support an application, the non-existence of an information component at the application stage and the specific exclusion of any such discretion to forgive the non-presentation of an owners consent,[38] the assessment manager's discretion would seem to be necessarily limited to excusing minor errors in the title description or in the presentation of the fee.[39]

Question do arise, in both jurisdictions, concerning the validity of an application in two other specific situations: 1) where an application, though strictly complying with the

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36 See *Mayweld v Whitsunday Shire Council* [1993] QPLR 248.

37 IPA, s 4.1.53(2).

38 IPA, s 3.2.1(9)

39 Note that the proposed amendments to IPA extinguish this discretionary power.

statutory requirements, is in some other manner defective in the eyes of the relevant appeal court, and 2) where a request by an applicant, which did not comply with the statute in terms of form, may be converted into an application by the subsequent behaviour of the consent authority.

The first situation has been approached in a similar manner by the courts in both jurisdictions and has, in effect, resulted in the setting of judicial standards at the level of the initial application. In the specific instance under review the availability of public scrutiny at the application stage[40] has focussed attention on situations where there is a general vagueness or insufficiency in the applicant's description of the proposed development even though a description of some type has been provided and therefore there exists a strict, though technical, statutory compliance.

To ensure that the application possesses sufficient content for public scrutiny to be meaningful, the courts in NSW (and one suspects also in Queensland when the issue arises) have preferred to establish their own judicial minimum standards. Consequently, in *Rocca v Ryde Municipal Council*[41] a "block of professional rooms" was held to be such an insufficient description that a valid application could not be said to exist.

The issue has been summarised by Tadgell J of the Victorian Supreme Court, in *Marock P/L v Billjoy P/L*[42] in two points:

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40 IPA, s 3.2.8(1). EPAA, Pt 6 Divs 5, 6, 7.

41 (1961) 7 LGRA 1.

42 (1980) 44 LGRA 249.

- applicants must clearly inform the planning authority and also inform others who may suffer detriment as a consequence of the application,

and,

- that the scheme of the planning legislation is to encourage "a plain statement of purpose".

The assessment manager, of course, in this situation could use an information request but its ability to do this is constrained by time limits in Queensland though no time limits are stipulated under EPAA.[43] This has led to a judicial suggestion that the council could insist on an adequate description by inserting this as a condition on the consent.[44] However, it is difficult to see how a conditional consent of the kind suggested could appropriately address the policy issue of ensuring effective public scrutiny at the application stage.

The approach adopted in both jurisdictions is similar. One important function of the application process is to inform and advise the public and an application which, through inattention or artfulness, fails to do this may be judicially deemed not to be an application at all.

The second area of judicial elaboration concerns the effect, if any, of subsequent conduct by the consent authority. The situation is illustrated by *Morgan v Brisbane City Council*[45] where an applicant wrote to the council asking for a condition to be relaxed and where

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43 In general, 10 days under IPA, s 3.3.6(4)(a). See EPAA Regs, cl 54. where the time limits apply to the tendering of the information.

44 *Canyonleigh Environment Protection Society In. v Wingecarribee Shire Council* (1997) 95 LGERA 294 per Bignold J.

45 (1968) 16 LGRA 85.

council did subsequently formally consider the request. Byth DCJ concluded that council, by its actions, had converted a request into an application.[46]

A precondition for such a decision is the ability of the court to exercise a general discretion and not to be hamstrung by the obligatory nature of the statutory requirements as existed under the P & E Act and as currently exist in NSW. Consequently, though there is a respectable history of similar decisions in Queensland prior to the P & E Act[47] there appear to be none (and neither would one expect any) which have arisen in NSW.[48] Given the observations made above concerning the current administrative discretion under s 3.2.1(8), and particularly in view of the judicial discretion conceded by s 4.1.53(2), it appears likely that the approach in these decisions will again be relevant under the IPA.

The principle that is at issue here however will remain inapplicable under EPAA so long as a valid application is determined strictly as in *Remath.*[49]

D. OWNER'S CONSENT AND MISLEADING APPLICATIONS

1. Owner's Consents

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46 A similar, and indeed more extensive debate has occurred on the same lines in the UK. The judgment of the English Court of Appeal in *Western Fish Products Ltd v Penrith District Council* [1978] JPL 623, though narrowing the previous 'estoppel' principle, clearly supports Byth DCJ in this instance.

47 See *Jeteld P/L v Toowoomba City Council* (1995) QPLR 285, *Drysdale and Ridgway P/L v Pine Rivers Shire Council* (1970) 26 LGRA 152 and *R v Pine Rivers Shire Council; ex parte Raynbird* (1967) 14 LGRA 15.

48 Though the Queensland approach was adopted in NSW prior to 1979: *Hornsby Shire Council v Devery* (1965) 12 LGRA 34.

49 Note 35.

As already indicated, a development application can be made by the owner of the land or by another person, with the owner's consent. "Owner" is simply defined under IPA as "the person for the time being entitled to receive the rent for the land or would be entitled to receive the rent for it if it were let to a tenant for rent".[50] This definition would seem to cover a trustee, a mortgagee in possession as well as the beneficial owner or the holder of the fee simple but certainly does not go as far as the corresponding definition under EPAA.[51] Specifically on the issue of owner's consent two points of principle have been established and a third one remains in contention.

1) That an application which is submitted without an owner's consent is not a properly made application for the purposes of the Act and should not be received by council.[52]

2) That despite the decision of Skoien DCJ in *Petrie v Burnett Shire Council*[53] where the judge used IPA s 4.1.53 to bring the lack of consent within the exculpatory powers of the court, the consent of an owner is a mandatory requirement.[54]

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50 IPA, Sch 10 Dictionary.

51 EPAA, s 4 (1) The complete definition is given in Appendix 3.

52 *Greatlife P/L v BCC* [2001] QPELR 42 per Babarzon DCJ. In NSW, *Jeblon P/L v North Sydney MC* (1982) 48 LGRA 113.

53 (unreported, P & E Court, Skoien DCJ, 8 May 2001 at 4)

54 This conclusion is supported in *Gracie v Council of the Shire of Maroochy* [1999] QPELR 80; *Mirvale P/L v BCC* [2001] QPELR 125 at 127and by the decision of the Court of Appeal in *Rathera P/L v Gold Coast City Council* [2000] QCA 506.

3) That clarification is nevertheless required as to whether the court has the power to cancel a development approval that had proceeded to final decision before the mistake had been detected. Brabazon DCJ in *Greatlife*[55], felt that, because IPA, s 4.1.22(2) specifically limited this power to circumstances where the fraud of the applicant was involved, such an approval may remain standing as valid. Quirk DCJ in the *Queensland Investment Corporation*[56] case also had difficulty with the application of this section.

"Owner" under EPAA is given the definition which appears in the *Local Government Act 1919.*[57] It is an extensive definition and deserves to be outlined at length in Appendix 3.

Although clauses b (i) and b (ii) of the EPAA definition broadly cover the same ground as the IPA description it is clear that under EPAA a considerably larger group is accorded "consent rights" in the application process. Clause (a)(i) and clause (c) grant these rights to Crown lessees. This is not contemplated by the Queensland Act and neither is a similar grant to holders of equitable rights in property subject to a contract of sale.

The EPAA approach here is to be preferred on both equity and efficiency grounds. A purchaser in the interim period between execution of the contract and completion has not only a valid interest in the disposition of the land but also may suffer a potential prejudice

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55 Note 52.

56 [2001] QPELR 83 at 84. The Draft 2001-02 amendments to IPA have taken up this point. The court has now been given power to declare such an approval void, in any appropriate circumstances. This is supported by a power to order compensation to innocent parties. See also, *Clayton v Miriam Shire Council* [2000] QPELR 320.

57 Following its repeal, this now means the *Local Government Act 1993, Sch 9.*

which should support the equitable owner's rejection of an application by the most efficacious means, which is by simply withholding consent to the submission of an application. Under IPA this interest can, to some extent, be protected through the submission process, but the lodging of a submission does not stall the application process and the submitter may need to file an appeal in the Planning and Environment Court should the Local Government approve the application.

Similarly, in regard to Crown lessees, it is the lessee, rather than a portion of the executive government, who may be most directly affected by a development proposal and the consent of the lessee (particularly if the lease is a long term one which will often be the case) should be a pre-condition to the application for similar reasons to those given above.

In terms of efficiency as well, development applications in isolated local government areas are likely to be more effectively processed if the necessity of obtaining Crown consent could be dispensed with and replaced by the consent of the lessee.

The interests of the Crown also deserve protection, however and both Acts provide many avenues by which the Crown can subsequently intervene in the process by way of either ministerial "call-in", objection, application to the court under its declaratory jurisdiction or by appeal.[58]

Beyond the purely statutory requirements, the courts will become involved in issues which are not specifically covered or are insufficiently covered by the statute and judicial decisions in this area appear to indicate a greater willingness on the part of the NSW courts

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58 IPA, Pt 6 Div 2. EPAA, ss 92, 117.

to intervene in the interstices. For example, in part for technical reasons, the NSW courts have been prepared to open up the issue of "owner consent" and to elaborate two additional principles, at least one of which could have a potential application in Queensland.

The first issue concerns the necessity to obtain a consent from a local government where the local government is the owner of the land. In this instance the NSW courts have been able to make use of s 39 (2) of the *Land and Environment Court Act 1979* to impose a consent under (the then) s 77(1)(b) on a local council.

The issue arose in *Shellharbour Municipal Council v Rovilo P/L.*[59]. The Court of Appeal held that s 39(2) which gave the court "all the powers and functions which the person or body whose decision is the subject of the appeal had" could be used to provide a *de jure* consent to an application since one of the "powers and functions" of a Local Government is to consent to an application in respect of land owned by them.

This decision arose shortly after another decision of the Court of Appeal in *Sydney City Council v Claude Neon Ltd.*[60] on a similar issue and where Hope JA made the following important comments:

> [T]he council does not have a right arbitrarily to withhold its consent as the ordinary owner of private land might do...Its failure to do so simply because it wished to frustrate the right

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59 (1989) 68 LGRA 231.

60 (1989) 67 LGRA 181.

> of the adjoining owner to obtain approval to a projecting structure would be a use of its power for an improper purpose, that is, it would be a mala fide abuse of power.

This proposition viz. that in planning terms (or as an exercise of planning power) the rights which attend public ownership of land are not of the same order as those associated with private ownership and that the exercise of those rights is always to be constrained by the necessity of the public body to act fairly and properly is significant for both jurisdictions.[61]

Although the grant of power to the Queensland Planning and Environment Court does not contain a provision similar to s 39(2), s 1.2.3(1)(a)(i) of IPA requires all decision-making under the Act to be "accountable, coordinated and efficient". This, combined with a history of judicial decisions relating to "colourable" local government practices[62], the power to refuse, approve or amend an application under s 4.1.54(2) and (perhaps) s 4.1.54(3), together with general principles of administrative law, would seem to provide some scope for a similar proposition to be argued in Queensland, even in the absence of an equivalent to s 39(2). However, if this proposition were not correct, then the power of a Local Government in Queensland to preempt a development application by withholding consent would appear to be absolute.

Since a respectable pedigree of decisions now exists in NSW[63] which effectively curtail the ability of Local Governments to refuse to grant consent, the question arises as to whether

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61 The alternative description is that "private rights should not be lightly disturbed". See Judgment of Quirk DCJ in *Close v Kilcoy Shire Council* (unreported, P & E Court, Qld, 7 March 2001).

62 See, *Jesberg v Hervey Bay City Council* (1989) QPLR 190 at 193, *Lubrizol Corp. Ltd v Leichhardt Municipal Council* (1960) 6 LGRA 203 at 210, *Chippendale Estates P/L v Sydney City Council* (1960) 6 LGRA 194 at 201 and *Sommerville v Logan City Council* [1990] QPLR 264.

63 *Paino v Woollahra Municipal Council* (1990) 71 LGRA 62; *McDougall v Warringah Shire Council*

there exists a principled basis to refuse consent under *any* of these circumstances. The answer, it is suggested, should be no in most cases. It would seem to be very much in the interest of justice and equity for all such applications to proceed on the basis of a Local Government consent which, in any event, would not preclude that authority from objecting. The overriding consideration, in the court's opinion, remains the propriety of the decision making process as a whole and this concern appears to be well founded. There appears, as indicated before, no principled reason why the Queensland courts could not adopt a similar stand although, to date, no application has been made to the Court to address such an issue.

The second issue which arises from this line of decisions is whether, and if so under what circumstances, the same principle could be applied to *private* ownership. Although Clarke JA had pointed out in *Shellharbour* that it was difficult to conceive a situation in which a court could require an adjoining landowner to give consent, a number of decisions in NSW have indicated that, if there are sufficient statutory or policy reasons, the courts are prepared to examine and address the issues raised by such a refusal to give consent.

In *Kirkjian v Towers*[64] the plaintiffs were the owners of an allotment that had a right of way over the respondent's block to a nearby public road. The plaintiff applied for approval to concrete over this right of way and the respondents refused consent. In granting an order requiring the respondents to give consent the judge stated that he was merely applying the general law relating to rights of way and property.

(1993) 30 NSWLR 288 and *Primas Group P/L v Maritime Services Board of NSW* (1994) 82 LGERA 205.

64 (unreported, Waddell CJ in Eq, 6 July 1987.)

A subsequent case *111 York Street P/L v Proprietors of Strata Title Plan 16123*[65] concerned an application to operate a crane in central Sydney to enable construction to commence on a high-rise building. The tail end of the crane would in normal use transect the airspace of the adjoining residential unit building. The body corporate refused to consent to the application. Although the matter concerned an application under s 88K of the *Conveyancing Act 1919* for a court ordered easement, an EPAA application was still a requirement. Hodgson CJ concluded that the court had power under s 88K(3) of the *Conveyancing Act* to order that an implied term of the court ordered easement was that the owners of the adjoining property had consented to the application for consent under the then EPAA, s 77(1)(b).

It is significant, as Hodgson CJ in Eq subsequently pointed out in *Mulyan P/L v Cowra Shire Council*[66] in distinguishing *Kiekjian* and *111 York Street,* that the issues in both concerned the common law of easements and the ancillary rights which derived from them, and not from a specific planning instrument. Consequently, he sounded a note of caution in stating that:

> An owner of land over which there are no other property or other enforceable interests is entitled to withhold consent.

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65 (1998) 98 LGERA 171.

66 (1999) 105 LGERA 26.

A further matter arose in *Currey v Sutherland Shire Council*[67]. In this instance a written consent was not obtained from an adjoining owner whose property was required for access purposes. The NSW Court of Appeal held that the mere inclusion of a lot for access purposes and in respect of which no development was proposed did not make the consent of that landowner mandatory. A consent under the Act was required only if the lots were contained in the formal development application.[68]

As can be seen a combination of some statutory facilitation (s 39(2)) combined with a greater volume of applications to the courts has seen the emergence in NSW of a more elaborate treatment of the "consent" issue.

From the perspective of the Queensland experience, however, *Read v Duncanson and Brittain*[69] is of equal relevance to the EPAA[70]. Here the Full Court held that an application to which a consent had been given did not cease to be valid merely because the consent (in this case by a Local Government but the nature of the consenter is certainly irrelevant) was subsequently withdrawn.

A principle such as this is clearly essential in any planning jurisdiction if only to promote a degree of base-line certainty in administration. If the converse were to be the case and a

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67 (1998) 100 LGERA 365.

68 This approach would almost certainly invite disaster if used by a developer as a practical guide. There would be no point served by gaining a development approval for a project with no permitted access to the site. See also, *Grace Bros P/L v Willoughby MC* (1981) 44 LGRA 422. It is difficult to imagine a Qld Court being able to circumvent the definition of "use" in IPA Sch 10 in this circumstance.

69 (1988) 2 Qd R 701.

69 And the principle has been adopted in NSW. See *Stafford Quarries P/L v Kempsey Shire Council* (1992) 72 LGRA 52.

subsequent withdrawal were to have a legal effect the entire scheme of any planning Act would quickly be threatened as objectors, both commercial and otherwise, competed with applicants to offer the largest financial inducement to an owner to preserve or alternatively withdraw a consent.

2. Inadequate or misleading applications: the *Pioneer* principle

Associated with the issue of consent outlined above is the question of inadequate or misleading applications. Broadly, the question which arises here is two-fold: whether the proposed project assumes the utilisation of adjoining land to facilitate the new use on the block which is the subject of the application, or whether the segmentation of an application fails to reflect the true nature and significance of the total project and consequently where, for public policy reasons, some courts have been prepared to rule the application "misleading". In general terms the first issue has been more often reflected in the NSW courts and the second in Queensland.

For 20 years the decision of the High Court in *Pioneer Concrete (Queensland) P/L v Brisbane City Council*[71], though studiously distinguished in both jurisdictions, established four principles:

- when the proposed use is a single integrated use, a piecemeal series of applications is not permissible
- the proposed use must be stated in sufficient detail in the application

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71 (1980) 145 CLR 485.

- all the land to which the application relates must be the subject of the application
- land devoted only to ancillary uses is as much land to which the application relates as land devoted to the principal use.[72]

In *Pioneer,* the majority were motivated by a concern for full and complete disclosure of the proposed use in the notification process, a policy consideration, while the minority were cognisant of the fact that in efficiency terms the entire process could often proceed on a step-by-step basis without prejudicing the interest of the public right to know, because supplementary uses which were essential for the development to proceed (in this instance the approval for and subsequent construction of the road) would themselves necessitate additional approvals of various types.

The issue came up for consideration in *Grace Brothers P/L v Willoughby Municipal Council*[73] which involved, *inter alia,* the inadvertent inclusion of land within the application (the converse of *Pioneer).* Hutley JA distinguished *Pioneer* on the basis that the definition of "use" in the Queensland Act specifically included incidental uses associated with the proposed use, whereas the terms of Interim Development Order No 17, under consideration in this case, required only a plan "sufficient to identify the land to which the application relates".

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72 Job, B "Recent Decisions of the Planning and Environment Court" (2000) 40/3 *Queensland Planner,* p 20.

73 (1981) 44 LGRA 422.

This narrow view of *Pioneer* was subsequently confirmed by the NSW Land and Environment Court in two decisions, *King v Great Lakes Shire Council*[74] and in *Woolworths v Bathurst City Council*[75]. In the latter case the Chief Judge reaffirmed the *Grace Bros* principle by stating:

> It has been held that an application is not incompetent or a consent invalid by reason of the circumstance that there is not included in the application land the use of which is necessarily involved in the use of land the subject of the application.

Despite the narrower sense of the NSW legislation there appears to have been no insuperable difficulty which would attend their adopting the broad principle of the majority in *Pioneer* and the fact that they have uniformly avoided applying it must be taken as reflecting widespread dissatisfaction with it by members of the more specialised planning jurisdiction. It is, after all, a decision which generates a profound consequence (the nullification of jurisdiction) out of concern, and in the minds of many judges an unjustified concern, that the public may not be fully informed in certain instances.

Until recently *Pioneer* has attracted a similar judicial response in Queensland. It has been distinguished, with a number of exceptions, on a number of seemingly facile bases. It arose initially for consideration in *Brisbane City Council; ex parte Read*[76] where in the Full Court, de Jersey J distinguished *Pioneer* on the unpersuasive basis that it had been concerned with a consent application not a rezoning application. It was a distinction which

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74 (1986) 58 LGRA 366.

75 (1987) 63 LGRA 55.

76 (1985) 57 LGRA 1.

has never found favour with other courts though the basis used in the next case, the decision of the Full Court in *Gibway P/L v Caboolture Shire Council*[77] did so.

In this instance private land which was intended to be subsequently dedicated as a public road had not been included in the application. The court noted that *Pioneer* had been concerned with a private road and that there was a considerable difference between this and a public road which was open to all. The court appeared to have also been influenced by the statement of Byth DCJ at first instance who had said:

> [T]he present application sought rezoning of all the land for which rezoning is needed by the applicant. The future road land does not need rezoning.

In both instances the points raised do not really address the issue raised by *Pioneer.* In the first case the legislative inclusion of related land is intended to ensure that the public can be informed of matters such as traffic density, dust, pollution and other general amenity issues and whether the access to the land is by means of a public or private road is irrelevant. Equally, the point is not whether the use of the related land is, or is not, the subject of a separate approval process but whether the public should be given notice of its proposed use at the time of the original application in respect of the land.

Whatever the case, if the arguments around the *Pioneer* principle do not illustrate logic or consistency they do suggest a profound unwillingness on the part of the courts in both

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77 (1987) 2 Qd R 65. The Gibway public road/private road basis for distinction has since had a productive history having been utilised in *Queensland Retail Traders and Shopkeepers Assoc v Brisbane City Council* [1990] QPLR 79, *Leda Developments P/L v Pine Rivers Shire Council* [1996] QPELR 71, and recently in *Whitehead v Hervey Bay Shire Council* [1998] QPELR 55. This line of authorities however is now almost certainly inapposite under IPA.

jurisdictions to apply a general principle which is seen to be too restrictive.[78] The preference of the courts has certainly been to adopt any opportunity which would enable them to retain the ability to examine each application on an individual basis which reflects the alternative view of the minority judges Aicken and Gibbs JJ in *Pioneer.*

The same or similar issues arise in a related series of cases dealing with serial applications i.e where the subject matter or extent of the total project is alleged not to have been disclosed and where the intent of the applicant is, more directly than in the above cases, suggested to have been misleading. This is the second facet of *Pioneer* mentioned on p 107.

In *Burragate P/L v Albert Shire Council*[79] it was submitted that since two applications were made for the same use the application had been made piecemeal and was consequently misleading. After examining the two applications Rowe DCJ was able to conclude that they were in fact two separate applications since the proposed use in the first application could have been achieved without recourse to the subject matter of the second. Similarly in *Stubberfield v Redland Shire Council*[80] where two applications were submitted for a subdivision, which spread across both appropriately and inappropriately zoned land the Planning and Environment Court pointed to the obvious logistical advantage conferred

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78 The *Pioneer* principle has however been strictly applied in Qld. See the judgment of Robin DCJ in *Cunningham v Brisbane City Council* [2000] QPEC 57. Recent decisions include: *Fullbin P/L v Gold Coast City Council* (unreported, P & E Court, 8 May 2000); *Mirvale P/L v Brisbane City Council* (unreported, P & E Court, 26 October 2000); *Ecovale P/L v Gold Coast City Council* (unreported, P & E Court, 21 November 2000). Note also that the IPOLAA amendments replace the definition of "use" and replace it with one which includes any ancillary use of the premises. This, in itself, has the potential to revitalise the *Pioneer* principle once again.

79 [1991] QPLR 173.

80 [1993] QPLR 214.

on the developer by adopting this course of action. (He could proceed rather more quickly with the development works on the zoned land without waiting for rezoning of the adjoining block.) The public was not disadvantaged by this course of action for two reasons; first, the application in respect of the zoned block was an application for subdivision in respect of which there was no requirement for public notification and secondly, the public could object to the second "stage" in due course.

In contrast to NSW where *Pioneer* has never been applied, the Queensland courts have on at least six occasions been prepared to utilise the principle, though the two dimensions of *Pioneer* should always be remembered[81]. In *Kirk v Brisbane City Council*[82] an appeal arose out of two separate applications over two lots, one zoned Sport and Recreation and the other Residential A. In the initial application, approval had been sought to remove several tennis courts and to erect 86 town houses. After discussions with council the application was amended to omit the second lot and to apply for 22 town houses on Lot 1 only. Six months later a second application was made for the remaining 64 town houses on Lot 2. In addition, a proposed access to a nearby street had not been disclosed. Under these circumstances Brabazon DCJ concluded that the applicant had offended against both aspects of the principle in *Pioneer;* all the land that was the subject of the application had not been disclosed and, perhaps more importantly, that splitting the application into two made it difficult for the Local Government (and one suspects, in his opinion, the public) to deal fairly with it. In overall terms, the decision of Brabazon DCJ in *Kirk* is correct, based as it is on the suspicion that a deliberate attempt is being made to mislead the public.

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81 They are the questions of related land and prejudicial effect on the public's right to be informed.

82 [1998] QPELR 465. See also; *Grasso v Mulgrave Shire Council* [1993)] QPLR 86 and *Nashvying P/L v Mulgrave Shire Council* [1994] QPLR 392.

In three recent decisions, the ancillary or related land aspect of *Pioneer* has been brought back from near extinction. The three decisions are: *Cunningham v Brisbane City Council; Lewis v Mareeba Shire Council* and *Mitchel Ogilvie v Brisbane City Council*[83] and they deserve to be treated in some detail.

In *Cunningham*, a local football club made two applications to council:

1) to redevelop an adjoining swimming pool which the club had under lease, and
2) to make certain additions to the club premises.

The Local Government insisted on provision of additional car parking to which the club agreed provided the car parking was attached, as a condition, to the pool redevelopment (which was code assessable), rather than to the club redevelopment (which was impact assessable). The PEC concluded that the matter fell within the piecemeal prohibition of *Pioneer*[84]. A similar situation arose in *Lewis* where, subsequent to an approval by council to the applicant's shopping centre proposal, the applicant made a further application to amalgamate land it had recently acquired and to use this land for additional car parking, with a condition to this effect to be attached to the original application. The PEC found that the *Pioneer* principle effectively vitiated the approval.

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83 [2000] QPELR 400; [2000] QPELR 432 and [2000] QPELR 414 respectively. Robin DCJ was the judge in all three cases.

84 Arguably, this decision was the weakest of the three. It has now been overturned by the Court of Appeal, with Thomas JA confessing that he had difficulty with the notion that there was "one grandiose scheme". [2001] QCA 294.

In *Mitchell Ogilvie*, an application was made to carry out a re-development of the applicant's retail premises in the CBD of Brisbane. Though it was known at the time that a taxi-rank may need to be re-located underground, no reference to this fact was contained in the actual application made. The council responded by attaching two conditions to its approval; first, a condition requiring the applicant to address certain factors relating to the design and maintenance of taxi-ranks, and secondly, addressing the possibility that the underground taxi-rank need not be required if the council were able to locate a suitable alternative site. The PEC found the application defective in *Pioneer* terms and consequently the approval invalid. They also found that the failure to address the relocation of the taxi-rank, and its putative relocation to some undetermined site, were significant factors which may have undermined the rights of the public to be informed.

The common denominator of all three decisions and the decision in *Kirk* is almost certainly the intuition, in the mind of the judge, that the applicant has come to the court with less than sparklingly clean hands and that an attempt may have been made to mislead the public. Consequently, if the four decisions are reducible to this factor, then other decisions such as *Watpac P/L v Cairns City Council*[85] where it was held that the prospect of customers parking on an existing shopping centre car park, did not make that land an integral part of the development, are easily distinguishable. The effect of these decisions however will be to ensure that sufficient care is taken, in the original application, to detail the entire ramifications of the proposal including any ancillary land use implications.

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85 [2001] QPELR 122.

Given the resistance of the NSW courts to applying the *Pioneer* principle in any event it is doubtful whether there will be much change in that jurisdiction and even more so since the definition of "use" (and with it, one assumes, the issue of "related land" or "land in the locality") in the then s 4(1) of EPAA has been repealed by the 1997 amendment Act.

In Queensland however the IPA has effectively taken over the extended definition of "use" in the previous Act and defines it as:

> In relation to premises, includes any use incidental to and necessarily associated with the use of the premises.[86]

Consequently, the question of relatedness is, in principle at least, more potentially relevant in Queensland under IPA.[87]

In summary, though both jurisdictions have managed, in the main, to sail a sound course around the shoals which emerged with the *Pioneer* decision the retention of the concept of relatedness in the Queensland legislation will perhaps be regretted since it opens up the potential for a continuing dispute along the lines of *Kirk v Brisbane City Council* and with a renewed statutory basis for the dispute. In policy terms, and when the extremely flexible reasoning which has been involved in distinguishing *Pioneer* is discounted, the issue concerns the right of the public to a full and clear description of a development proposal.

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86 IPA, Sch 10.

87 The Consultation draft for the proposed 2001 amendments to IPA takes the matter even further and in s 1.3.4 defines "use" as including a) any ancillary use; and b) carrying out any works necessarily associated with the use. The intent is to clarify the issues referred to above and, presumably, to limit the application of "necessarily associated" to the carrying on of "works".

E. RECEIPT AND ACKNOWLEDGMENT OF APPLICATIONS

It is at this point when a properly made application has been tendered and received that more substantive differences begin to emerge, reflecting the philosophical differences referred to earlier.

On receipt of an application, EPAA Regulation cl 47(3) states that the following procedure is to be followed by the consent authority:

> Immediately after it receives a development application, the consent authority:
>
> (a) must register the application with a distinctive number, and
>
> (b) must endorse the application with its registered number and the date of its receipt, and
>
> (c) must give written notice to the applicant of its receipt of the application, of the registered number of the application and of the date on which the application was received.

In essence, the EPAA procedure provides for the formal issuing of a receipt. This particular step is of importance under that Act since much of the information tendering, which in Queensland takes place in a separate stage, must in NSW be undertaken prior to the lodgment of the application ie as a condition precedent to the issue of the receipt.[88] These matters are extensive and indeed in some instances, for example in respect of a

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88 See discussion of "A properly Made Application" above.

development which is covered by the *Wilderness Act 1987*, the application cannot even be lodged unless it is accompanied by a copy of the approval made under that Act.[89]

As an indication of the very involved considerations that must exercise the minds of applicants under EPAA, the following examination must be undertaken should for example the application concern a caravan park.

Pursuant to regulation[90] any application made under s 78A(3) of the Act (which relates to anything requiring approval under s 63 of the *Local Government Act 1993* [91]), must be accompanied by "such matters as would be required under section 81 of the *Local Government Act,1993*..."

In turn, s 81 of the *Local Government Act* 1993 states:

> An application must be accompanied by such matters as may be prescribed by the regulations and such matters specified by the council as may be necessary to provide sufficient information to enable the council to determine the application.

Even at the end of this convoluted process the applicant, who has the onus of getting it right, is no closer to certainty since the local council has the final say as to what the requirements are in any particular instance. The entire process is redundantly circular and effectively grants the local authority power to delay a decision by requesting further

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89 EPAA,Reg cl.50(2) and s.78A(7).

90 EPAA Reg, cl.50(4).

91 Listed are 25 applications relating to both "works" and "use", such as "Operating a Caravan Park" and "Placing a Waste Storage Container in a Public Place".

particulars. Moreover, these requirements are in addition to those already mentioned which relate to Sch 3, Designated Developments or Integrated Developments.

In contrast, under IPA no formal receipt of the application is provided for beyond the signature of the "Receiving Officer" provided for in Form 1, a copy of which in the normal course of events will be provided to the applicant.

Clearly, the application stage under IPA is simpler than the equivalent procedure in NSW. Though it is possible to imagine a layperson submitting an application in Queensland,[92] the same procedure under EPAA may frequently require the services of consultants.

In this area the IPA legislation is, in principle, a clear advance on EPAA. Planning law, in line with the broad principles contained in NCP, should not be the venue for procedural complexity primarily because it impacts so directly and frequently on ordinary citizens. In terms of efficiency and equity, any process then which would allow a citizen to conceive of submitting their own application is to be preferred. The key factors that may allow this to happen in Queensland are undoubtedly the obligations imposed on the assessment manager under s 3.2.3(2).

Assuming an application under an IPA compliant scheme, the assessment manager is required to give the applicant an acknowledgment notice within 10 business days of its receipt. The 10 day period thus created is known as the acknowledgment period.[93]

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92 Though other difficulties remain under IPA such as the meaning of "development works" and "material change of use" which may (hopefully only initially) add complexity to the process.

93 IPA, s 3.2.3(1)(a) Currently proposed amendments to IPA however foreshadow the extinguishment

Under subsequent subsections the assessment manager is required to supply the following information, *inter alia*;

- to identify the nature of the development approvals which will be covered by the application
- to advise the names of all the relevant referral agencies together with their addresses and whether the referral agency is a "concurrence" or "advice" agency as prescribed by regulation[94]
- which aspects of the development require "code" assessment and to identify the applicable codes
- which aspects require "impact" assessment and to advise the applicant on the public notification requirements
- in the event the proposal requires to be referred to three or more advice agencies, whether referral coordination is required.[95]

Unfortunately IPA contains no provisions which direct the local authority to comply with the requirements of s 3.2.3(2). There is judicial authority now relating to the effect of an inaccuracy in the acknowledgment notice. In *Powell v Bowen Shire Council*[96] the local authority had neglected to advise the applicant that referral coordination was required. Pack DCJ ruled that this non-compliance was of no practical effect and that the lack of

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of acknowledgement notices. See Consultation Draft, at p 36. These are to be replaced by "non-acceptance notices".

94 IPA, s 3.2.6(1)

95 IPA, s 3.2.5(1)

96 [2000] QPELR 45. See also, *Jezreel v Brisbane City Council* [2001] QPELR 92 at 93-94.

formal compliance with the form was not sufficient to form the opinion that there was a lack of jurisdiction.

Despite the reservations expressed concerning the enforcement of compliance with s 3.2.3(2) the Queensland process is, currently, in advance of the NSW situation where an extensive information requirement is loaded into the process as a pre-condition to the issue of a receipt. Under IPA, at least in theory, the assessment manager has an obligation placed upon it to correctly outline its broad idea as to how the application will proceed and which approval bodies will become involved in the process. The applicant, even at this early stage in Queensland should, by now, be able to develop a general conception of the dimensions of the task that has been undertaken.

F. PUBLIC SCRUTINY OF APPLICATIONS

Development applications become public documents from the time of their receipt in both jurisdictions[97] and thereupon become available for inspection.[98] In NSW this becomes the de facto commencement of the public notification period since the consent authority must "as soon as practicable after the development application is made"[99] place the application and any supporting information on public display. However under IPA, a hiatus period exists between the date of lodgement of the application and the commencement of public notification. Between these two events the following must occur:

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97 There are limited exceptions to the general principle in Queensland viz. sensitive information (IPA,s 3.2.8(2)(a) and (b)).

98 IPA, s 3.2.8(1); EPAA Regs, cls 56.

1) an acknowledgment notice must be provided to the applicant within 10 business days of lodgement,[100]

and

2) within a further 10 days after the giving of the acknowledgment notice, the assessment manager may ask the applicant for further information concerning the application. This is known formally as an "Information Request".[101]

In total a period of 20 (but more likely 30) days[102] will elapse between the date of original lodgement and the commencement of the public notification period.[103] During this pre-notification period the application will remain open to public inspection and irrespective of the applicant-assessment manager processes outlined above a quite supplementary information gathering procedure can be undertaken by the assessment manager or concurrence agency.

Under s 3.2.7 either of these two authorities "may ask any person for advice or comment about the application at any stage" and this advice may be requested by publicly notifying the application.[104] Unfortunately, consideration is now being given by at least one major

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99 EPAA, s 79(1).

100 IPA, s 3.2.3(1)(a). Such a notice will not be given however if the application requires "code" assessment only.

101 IPA, s 3.3.6(2). The period can be extended once by a further 10 days by s 3.3.6(6).

102 Note 101.

103 The entire procedure outlined above will change after the commencement of the IPOLAA 2001 amendments. The formal notification stage can commence as early as two days after the application however, in respect of complex applications, it may be postponed till after the end of the information request.

104 IPA, s 3.2.7(3).

local government to using this provision to insist on a form of public enquiry into the development at the *application* stage.[105] Although it can be understand why a local government would elect to proceed in this manner,[106] recourse to this procedure has the potential to undermine the integrity of part of the IDAS framework. Carried to its logical extent, local governments may elect as a matter of course, to insist on public notification/enquiry as an immediate condition subsequent to the lodging of the application resulting in two public notification processes, one *de facto* and the other, under Pt 4, Div 2, a *de jure* one. IPA s 3.2.7 is, potentially, not mere surplusage and, should this problem emerge, it may need to be addressed by the legislature. This could be done by simply proscribing the use of a public *enquiry* procedure in subsection 3 and repealing subsection 4.

The intention of some local governments in Queensland is almost certainly to bring forward submissions to a period prior to the formulation of the information request and thereby to overcome a perceived deficiency in the Act. However one of the most onerous tasks faced by applicants is the necessity to respond, and sometimes at considerable cost, to requests for information. That these requests could be continuous as they were under the previous *P & E Act* is to be regretted.[107]

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105 Conversations held between the writer and a legal officer and planning officer in Brisbane City Council.

106 A fundamental problem with the scheme of the Act is that the Information stage occurs before the Public Notification stage and consequently the occasionally valid points raised in submissions may not be reflected in the once-only Information Request.

107 Since the above was written the Brisbane City Council has indeed utilised this procedure to institute a public enquiry in respect of a proposed code assessable project in Chelmer Avenue, Graceville.

G. CONCLUSIONS

The scheme of the older NSW Act can be said to reflect the then prevailing assumptions concerning the relationship between regulatory bodies and those seeking to gain approvals from the regulatory system. These assumptions were that government intervention in furtherance of the always vaguely defined public interest or public rights was an unqualified public good and little attention was paid to the economic or social dysfunction which frequently flowed from such intervention.[108]

There is however a growing understanding, and the work of the NCC has certainly contributed to this, that too much regulation is deleterious to the operation of the free market and that significant social consequences such as unemployment and urban decay often result from a misguided assumption that central planning is able to take account of all possible variables.

Implicit in this approach is a degree of administrative legerdemain that would, as has been indicated above, place the onus on the applicant to determine accurately the scope of supporting information required to support the application. The operating principle is essentially that those who seek access to state approvals should bear the complete responsibility for complying with the statutory or regulatory pre-conditions of that approval.

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108 Ratnapala, S "Administrative Regulation in Australia." (1996) 8/1 *Institute of Public Affairs Backgrounder.*. Also generally, Heyek, F *The Road to Serfdom.* (London, Routledge, 1944)

The contrasting philosophy is exemplified by the Queensland Act which, currently, places this responsibility firmly on the shoulders of those regulatory bodies who are charged with the granting of approvals.

The one common denominator which both systems share however is the internal administrative systems which frequently remain unchanged[109] while the world, reflected in legislation or economic philosophy, changes around them. Consequently, the real risk in Queensland would appear to be that the local government administrations, faced with a completely different regulatory paradigm, will quite improperly "load" the application stage with requirements which are not supported by the specific terms of the Act or which are clearly contrary to the underlying spirit of the legislation.[110] Having said this, it is conceivable that a tradition of excess in respect of the information requested could lead, on occasion, to a beneficial community or developmental result by inadvertently raising an issue that had not previously been considered. The risk however is that, in administrative terms, the system may end up using a sledge-hammer to crack a nut. In any event neither Act provides any system which would enable an applicant to constrain administrative discretion in this area.

As indicated earlier, this has already begun to occur. Taken to an extreme this would produce a situation in Queensland where the regulatory requirements for a valid application could become little different to those under EPAA.

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109 Pickles notes that the practice of "informally" requesting information right through and into the decision remains unchanged. See Note 5 at 82-83.

H. THE APPLICATION STAGE: COMPARATIVE ASSESSMENT USING EFFICIENCY AND EQUITY CRITERIA

1) **Efficiency and Equity at the Macro Level.**	
Attribute	**Efficiency Issues**
• **Do the application systems avoid duplication?**	***Qld:*** IPA provides for a systematic roll-in of referral agencies and concurrence agencies. Duplication still exists with a totally separate application required to be made for certain uses eg licensed premises. IPA provides for only two classes of application; those requiring either Code or Impact Assessment. ***NSW.*** The Act seeks to achieve the same goal of integration but is hamstrung by too many application categories.
• **How do the systems affect transaction costs?**	***Qld:*** IPA was meant to be a simpler system than the one it replaced however too many simple applications are subject to the full impact assessment process. In Qld, Local Government has a discretion in the setting of fees leading to wide-scale variations for the same application. ***NSW.*** The application system is in advance of the Qld system in exempting local developments from the full notification and appeal process. All fees are standardised across the State. Potentially major information requirements on lodgement.

110 See Note 5, Ian Pickles at p 25.

Attribute	Efficiency Issues
• **Do the systems achieve their goal of creating a more flexible, responsive application process?**	***Qld:*** The Qld. approach is conceptually simpler than the one in NSW. Essential problems remain however such as clear definition in all cases of impact assessability. ***NSW:*** The State process is suffering from its age. A through-going review of the development classes is required. The "Planfirst" program should result in a more efficient system than exist in Qld.
• **Are all people treated equally by the application system?**	***Qld:*** Yes, subject to variations in access which may be possessed by different applicants. ***NSW:*** Yes, with the same proviso as in Qld. Grants owner consent rights to a larger category.
• **Are the values and expectations of the public recognised and met?**	***Qld:*** To an extent the Qld system may result in a more publicly understandable process over time. ***NSW:*** The system is complex and cumbersome resulting in a heavy emphasis on bureaucracy and less of a "can do" attitude than in Qld.[111]
• **Does the system provide for due process for all affected by it?**	***Qld:*** The Planning and Environment Court possesses a declaratory jurisdiction and this is accessible by all applicants ***NSW:*** The declaratory jurisdiction of the Land and Environment Court parallels the Qld situation.
• **Is the system transparent?**	***Qld:*** In a purely statutory sense, yes. Makes provision for non-disclosure of principals. ***NSW:*** Similar to Qld. Insists on disclosure of principals in Form 1.

111 See Note 6 at p. 26.

• **Does the system provide for effective public accountability.**	***Qld:*** Local Government remains under no obligation to comply with statutory time frames. Currently, it is the Local government's responsibility to advise the applicant concerning referral agency involvements though there does not exist any statutory compliance mechanism to enforce this. ***NSW:*** No obligation to comply with time frames. No obligation to advise on matters such as referral agencies.
2) Relevant Subordinate Characteristics	
• **Customer Focus.**	***Qld:*** ***Efficiency.*** Currently, the onus is placed on the receiving authority to subsequently advise the applicant of all relevant matters which the council will consider in the decision making process. ***NSW:*** ***Efficiency*** No formal information onus placed on local government. Information can be requested at any time. ***Qld:*** ***Equity.*** See observations on broad equity issues immediately above. ***NSW:*** ***Equity***. See immediately above.
• **Simplicity in operation and maintenance.**	***Qld:*** ***Efficiency.*** An increased ability to deal with only one agency. Development dichotomy in place but some confusion exists as to meaning of fundamental terms such as "impact assessable". ***NSW:Efficiency.*** Lays claim to the same degree of integration. Complex in operation, multi layered approach. Too many development categories. ***Qld:Equity.*** Unremitting, and fundamental amendments occurring leading to uncertainty. ***NSW:*** ***Equity.*** Complexity of a process driven system detracts from its accessibility to broad categories of users.

FOUR

INFORMATION AND REFERRAL

A. INTRODUCTION

From the perspective of an applicant the process by which supporting or clarifying information is requested and tendered is often perceived to be the heart of an IDAS system.[1] It is by this step that the total process can be advanced through public notification to, ultimately, a decision.

Undoubtedly also, it is this step which has often created the greatest uncertainty, the largest amount of unremitting aggravation to applicants and which, if improperly managed, has often produced an environment dominated by constantly burgeoning administrative discretion. Indeed the perception of an entire planning system as inefficient or intrinsically unfair is, often, a direct function of the inequities fostered by a badly structured or badly managed information and referral system.

As Fogg has suggested:

> The great mass of discontent lies not in that small portion of the disputed decisions that come before an appeal body, but in others which are buried below the surface of reported cases. The council servant's exercise of discretion is frequently reversed

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1 Applicants are generally not personally involved in the formulation of planning schemes.

> by his committee, and the committee is frequently overturned by the council. The council's exercise of discretion can be reversed by the Minister...[2]

That the consequences of bad management in this area can be quite draconian is in one sense remarkable because, in theory, the process need only address two issues [3]and if they are addressed directly and in a coordinated fashion then problems and issues should not be as compounded as they often are. Unfortunately, for a number of reasons, clarity in this area has been difficult to find. Quite often, for example, the potential electoral consequences (or perceived consequences) which may flow from the appearance of political support for an unpopular proposal (though one which may be supportable on appropriate planning grounds) has led planning administrators to second-guess the political fallout from their decisions. As a consequence they may often expand the scope of the information request to the point where the often rather simple nature of the development application is lost sight of in the internal scramble to generate protective walls against criticism by local politicians. The same approach, which is essentially to submit a "log-of-claims" information request, is unfortunately also used by planning administrators, and for the same reason, if they feel that a particular application may result in attention from an aggressive interest group or an objection from a large and historically litigious corporation.

Alternatively, where the involvement of a local politician in the decision process is direct and unremitting his administrators may be directed to adopt this approach. In this situation, which is common, the applicant is forced to participate in a type of Javanese shadow

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2 Fogg, A.S *Australian Town Planning Law: Uniformity and Change.* (Brisbane, University of Qld Press, 1974), p 253.

3 The two issues are, "relevant and reasonable" data and "associated or other approvals".

theatre where the master of the shadows, though ostensibly playing no active role, is in reality creating issues and generating problems behind the scenes which continually change the data context within which the application is to be accessed.

Referring to this most blatant form of political interference, Sir John Boynton has noted:

> The growth of party politics in local government has increased the number of councillors who will decide issues on political grounds and irrespective of professional advice; some genuinely fail to understand the quasi-judicial aspects of development control work.[4]

In short, if the history of planning law in any jurisdiction demonstrates any consistent trend it is that any broad statutory or regulatory power which gives administrators the sole right to determine the nature and scope of the information which must be tendered with a development application may be used for purposes which are improper and inappropriate and which are ultimately deleterious to the efficiency of the total planning regime.

The task which faces legislators in some jurisdictions therefore is to establish systematic statutory and regulatory constraints which will effectively circumscribe the exercise of administrative discretion in this critical area. In a similar fashion the courts, cognisant of the problems outlined above, have developed over time a set of principles which operate to moderate the worst elements of administrative excess.

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4 Boynton, Sir John K "Planning Policy- its Formation and Implementation" *Journal of Planning and Environment Law, Occasional Papers,* (London, Sweet and Maxwell, 1992) p 6.

It was previously suggested that there were only two issues which are involved in this portion of an IDAS process, first, an essential requirement of equity, that the information requested should be relevant and should be reasonable having regard to the nature of the application. Second, that an efficient method should be established to deal with additional approvals which must be obtained to give effect to an application but which exist in procedural terms quite outside the formal structure of a land use approval system.

These two core issues will be considered under the following headings:

- the statutory and regulatory frameworks applicable to information requests
- what is a "relevant and reasonable" request
- the problem of additional approvals

B. THE STATUTORY AND REGULATORY FRAMEWORKS

At the most abstract level the extent of the issues which can validly be the subject matter of an information request are established by the evaluation criteria in each Act. Under EPAA [5] this is given as follows:

> In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development;
>
> (a) the provisions of:
>
> (i) any environmental planning instrument, and

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5 EPAA, s 79C(1). These eight heads of consideration replace the 31 specific factors which were required to be considered prior to the 1997 amendment Act.

(ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority'

and

(iii) any development control plan, and

(iv) the regulations (to the extent that they prescribe matters for the purpose of this paragraph),

that apply to the land to which the development application relates,

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

(c) the suitability of the site for development,

(d) any submissions made in accordance with this Act of the regulations,

(e) the public interest.

Additionally, these statutory criteria exist in the equally rarefied context of the EPAA "Objects Clause"[6] which describes the purpose of the Act as encouraging *inter alia*; the promotion of the economic use of land[7], the protection of the environment[8] and the encouragement of "ecological sustainable development"[9]

Although the moderating phrase in this broad spectrum of considerations is "relevant to the development" (the meaning of which will be considered subsequently), the sheer scope of

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6 EPAA, s 5.

7 EPAA, s 5(a)(ii).

8 EPAA, s 5(a)(vi).

9 EPAA, s 5(a)(vii).

these planning principles is sufficient to generate a capacity, if not an enthusiastic willingness, on the part of administrators to seek additional information.

The Queensland Act contains similarly broad reference statements[10] and if anything the matters to be taken into account in "advancing this Act's purpose"[11] are even more intangible than in NSW including as they do; to provide for equity between present and future generations[12], to promote ecological sustainability[13] and ensuring the sustainable use of renewable resources and the prudent use of non-renewable ones.[14]

It would be difficult to find another area of law or administration where the criteria or the ambit of assessment is expressed in such broad, and possibly undefinable, terms.

It is, in fact, at this point that one of the central problems of present day planning law is confronted, which is the establishment by legislatures of such global, "holistic" terms of reference that virtually any matter can, from one perspective or another, be considered as a legitimate consideration. It is equivalent, perhaps, to obliging an administrator in a social security department or a social security tribunal on appeal to consider each case in terms of the "peace, order and good government of the Commonwealth".

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10 IPA, s 3.5.5(1).

11 IPA, s 1.2.3(1).

12 IPA, s 1.2.3(1)(a)(iv).

13 IPA, s 1.2.1.

14 IPA, s 1.2.3(1)(b).

A penchant for such statements of course may not constitute a problem if they can be safely ignored in the day to day process of administration. As Molesworth has pointed out, "Often these objective clauses contained nothing other than motherhood statements with which no one ever disagreed so everyone tended to ignore them."[15] If however, as is increasingly meant to be the case, they are to be used as a practical guide to decision making then statutory recognition of this fact in terms of specific implementation provisions, benchmark standards and other criteria will have to be developed over time if an already significant degree of administrative discretion is not to be further compounded.

Returning to the central point, one must ask why legislatures believe that such a huge range of quite disparate factors should form part of the legitimate administrative purview of this the lowest level of government. The answer appears to lie in the fact that all of them have their aetiology firmly rooted in 'values' or as Patrick McAuslan suggests, in 'ideology'[16]. Land use planning exists, in this view, at the conjunction of competing and essentially ideological conceptions of what the total process should encompass or set out to achieve.

> Lawyers, planners, politicians and laymen tend to stress a different ideology and argue for changes or reforms in the law or new laws in terms of the ideology they espouse and the resultant cacophony first translated into law and then continued in its administration and interpretation, leads to confusion and disarray.[17]

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15 Moleswoth, Simon. 'The Integration of Environmental Imperatives into Decision making.' (1996) *National Environmental Law Assoc. 1996 Conference Paper.* p 113.

16 McAuslan, P *The Ideologies of Planning Law.* (Oxford, Pergamon, 1980)

17 Note 16 at p 2. Quoted in Fogg, A. "Reform of Planning Law: Principles and Practice" (1989), *Queensland Planning Law Conference* p 1.

To McAuslan, there are three ideologies operating currently; the protection of private property rights, the public interest and now, public participation. Undoubtedly the fact that land use decision making exists at such a conjunction of attitudes fosters a large degree of administrative timidity which is so often expressed in requests from assessors for more and more information on more and more different issues.

The consequence of this, as indicated, is often that the integrity of the planning regime, which depends profoundly on a constructive balance being continually struck between competing ideologies, (or between private and so-called "public rights"), is placed under threat and calls begin to emerge for a wholesale review or replacement of the controlling statute.

If the scope of information requests need to be controlled however the legislature's options are always going to be limited. They are, for example, most unlikely to remove broad statements of planning principle simply because most people can agree which them, they cannot reduce the level of public participation in the process because this is seen in the early twenty-first century as a demonstrable public good[18], and they cannot specifically list or delimit the scope on such requests because the issues associated with applications will vary with geography, topography, local economics and a host of other potential variables.

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[18] Though neither NSW or Queensland has seen fit to expand public access to the level of the UK following the 1986 amendments to the *Local Government(Access to Information) Act, 1985.* For a short summary of these rights see; Heap, Sir Desmond *An Outline of Planning Law,* 9th ed.(London, Sweet and Maxwell, 1987) pp 187-188.

In response, some jurisdictions have set out to create a statutory and regulatory structure which, in theory, should operate to place such time constraints on the those compiling the information requests that, it is hoped, most of the problems will be obviated. In practical terms, the assessor faced with a hundred or so files each with short time frames within which an information request is required to be drafted and submitted to the applicant, may not be able to devote the degree of meticulous examination which, it is argued, has often led to excess.[19]

The IPA is the leading example of this 'structural' approach, creating a demanding (if not bewildering) series of overlapping time limits within which the IDAS stages must be conducted by the assessment manager.[20]

Before the structure of the information and referral processes established by the respective Acts are examined a brief comment should be made concerning the involvement of concurrence agencies in both jurisdictions. Because the Queensland government has sought to create a conceptually integrated assessment process it follows that the extent of participation by concurrence or referral agencies in any specific category of application should be described in detail.[21] Whereas in NSW, the various State, regional or local planning instruments or the regulations designate which are the applicable concurrence

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19 Whether the approach has been as cynical as this tends to suggest is, of course, open to debate. In any event if such a hope exists it is almost certainly naïve. Planning administrators have various administrative stratagems which can reduce the pressure on them.

20 See Appendices 6, 7. Note however, as mentioned in the previous chapter, there is no statutory obligation placed on local authorities, in either system, to comply with these procedural requirements.

21 Whether IPA actually has succeeded in creating an 'integrated' system will be discussed subsequently.

agencies given various classes of development[22], the Queensland Act, through its regulations, will over time, attempt to provide an exhaustive list of all applicable concurrence and advice agencies by application type with at least an honest intention of ensuring that all this information is available in one place.[23]

As indicated, this strategic attempt to incorporate the approval or advice functions of non-land use agencies within the context of a development-consent procedure has not been as systematic in NSW (though the 1997 amendments certainly move the process further in the IPA direction)[24] and the nature of the information and referral processes continues to be determined in NSW by the categories of application. These, together with their associated information processes, are now examined.[25]

The principal classes of applications under EPAA are as follows:

- s 78A(3) Applications[26]

These were mentioned in passing in Chapter 3. They are EPAA applications which also require approval under the *Local Government Act 1993* and relate to:

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22 EPAA, s 79B(1).

23 Sch 2 of the IPA Regulations. With over 60 "Approval Processes" to be "rolled-in" this is a mammoth undertaking.(Only four, Fire and Rescue, Workplace Health and Safety, Environment and Heritage and Main Roads have been "integrated" in the first two years of the Act).

24 See (1997) 4 *Australian Environmental Law News* p 13.

25 The 'process' flow for both IPA and EPAA applications, including the information referral process in both instances, are outlined in Appendices 4-7.

i) structures or places of public entertainment

ii) water supply, sewerage and storm water

iii) waste management

iv) public roads

and,

v) other activities (as disparate as; "installing a domestic oil heater", "installing an amusement device" to "operating a mortuary".)

All the information required under s 81 Local Government Act, together with that mandated by local EPIs or other local planning instruments must be attached to the application which is forwarded to the consent authority. In most instances the consent authority will be the local council which is given the authority to apply any of the provisions of the Local Government Act[27] in deciding the matter. Since there is no necessary involvement by outside approval bodies these applications are essentially "local" in terms of the Act though applications in respect of "designated" matters will, in turn, require all the application information, together with the now required EIS, to be forwarded to the Director.[28]

- Applications for Designated Developments[29]

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26 See Appendix 4, Application #2.

27 EPAA, s 78A(4).

28 EPAA Regs, cl 50(6).

29 See Appendix 4, Application #3.

A development can be declared to be designated by either an Environmental Planning Instrument [EPI] or by the regulations[30] and the significance of the designation lies in the fact that such an application must be accompanied by an Environmental Impact Statement [EIS].[31]

Part 1 of the Third Schedule of the Regulations which lists such developments at length is far too extensive to be given here but to indicate the type of application which will be caught under this heading the following are indicative;
aircraft facilities, mariculture, breweries, concrete works, plastics and rubber industry, drum reconditioning and poultry farms. The common denominator is the perception that such industries may produce significant environmental consequences.

As indicated under the previous heading, a copy of all the information tendered with the application, together with the EIS, must be forwarded to the Director or Minister. Given the perception of risk associated with developments under the third schedule such a procedure may well be warranted. Should the Minister form the opinion that the development may have a significant effect on regional environmental matters or, more generally, consider it expedient in the public interest, he/she may direct the council to refer the whole matter to him/her for determination.[32] In effect the matter becomes "state significant".[33]

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30 EPAA, s 77A.

31 EPAA, s 78A(8)(a). The content of an EIS is given in cls 71 & 72. See also s 112.

32 EPAA, s 88A(1)

- Applications for Integrated Developments[34]

Proposed developments which are captured under this heading are those which require development consent and one or more additional approvals[35] under the ten Acts specifically listed ranging from the *Heritage Act,* 1977 to the *Water Act,* 1912. They are the direct equivalent of development applications under IPA which require concurrence agency approval.

The only restriction on concurrence agencies in requesting additional information within the periods mentioned in cl 60(1) is that the authority must consider the additional information to be "necessary to its proper consideration" of the application.[36] No such qualifying phrase is used in the Queensland Act[37] though it is doubtful, even given this absence, whether there remains any substantive difference between the two Acts in respect of the nature, scope or indeed volume of additional information which may be requested by concurrence agencies.

- State Significant Developments.[38]

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33 Exactly the same degree of precautionary power is given to the Minister under IPA, s 3.6.1(b) and for the same reason viz. the perception of 'state interest'.

34 See Appendix 4, Application #4.

35 EPAA, s 91(1).

36 EPAA Reg, cl 60(1).

37 IPA, s 3.3.6(2).

38 All developments which are not 'state significant' are classified as 'local developments' by virtue of EPAA, s 76A(4). Local developments may be 'designated', 'integrated' or both. See Appendix 4, Applications 6 and 7.

Included under this heading are developments which are declared by State or regional environmental planning policies to be State Significant, that are designated as such by the more ad hoc procedure of gazetting, or which become such by virtue of the Minister 'call-in' powers under s 88A.[39]

- Developments Requiring Concurrence [40]

Similar, in principle, to the IPA category of developments requiring concurrence (concurrence is required before a consent authority can determine an application) they are to be found however not in a consolidated form in the regulations but, as is so often the case with EPAA, in the local, regional or State EPIs.[41]

By contrast, in Queensland, such segmentation at the application stage has been replaced by a single development application which may issue from the IDAS process in one of two forms; as a 'preliminary approval' or as a 'development permit'[42] and the nature of the information flow is determined, in principle, not by the class of application as in NSW but almost exclusively by the nature and extent of involvement by referral agencies.

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39 Also EPAA, s 76A(7).

40 See Appendix 5.

41 EPAA Regulations. Definitions.

42 IPA, s 3.1.5(1).

Having said this however, the question does remain whether there is any intrinsic difference between the two approaches. If, for example, the procedure which is relevant to a typical application under IPA (ie. one without Referral or Advice agency involvement)[43] is compared to a similar situation under EPAA[44] it is apparent that the only significant difference between the two jurisdictions (after allowing for the mandatory tendering of information at lodgment under EPAA) lies in the duration of the relevant time periods and the greater specificity of the Queensland Act generally. In the latter case for example, under IPA an applicant is given a clear 12 months in which to respond to an Information Request[45] in contrast to EPAA where the period is variable and at the discretion of the Consent Authority.[46] The IPA statutory approach should be preferred to the creation of yet another area of administrative discretion.

Both Acts however fail however to provide any mechanism by which local authorities or consent and concurrence authorities can be made to comply with the time periods laid down in them. It is indeed extraordinary that while the performance of particular functions within set time periods has been uniformly viewed as central to the efficacy of both legislative schemes, in no instance has the legislature seen fit to enforce compliance to these same time periods. There are, for instance, no specific provisions in either Act or in the respective regulations that provide for the situation where the local or other authority simply chooses to ignore the statutory periods. Both Acts provide for the applicant to treat

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43 See flow chart, Appendix 6.

44 See flow chart, Appendix 7.

45 IPA, s 3.2.12(2)(b).

46 EPAA Regs, cl 54(2)(b) ie. a "reasonable period". See *Australand P/L v Hornsby Shire Council* (1998) 98 LGERA 312.

the failure of an authority to decide a matter within the "relevant period, prescribed by regulations"[47] or "by the end of the decision making period"[48] as a "deemed refusal" sufficient to lodge an appeal but this "right of last-resort" does little to assuage the hard feelings engendered on the part of applicants by the wilful failure or refusal of consent authorities to comply with the terms of their own enabling statute, while insisting on strict compliance by others.

This failure of political will by both legislatures has the potential to seriously damage the integrity of both IDAS systems because the insistence on performance within stipulated times is central to an efficient and fair IDAS process. The question which must be asked then is why, in both jurisdictions, this issue has not been addressed. The answer in both instances is that compliance with the strict requirements can be enforced but in order to achieve this, penalty provisions would need to be incorporated in both Acts and the respective legislatures are loath to do this. However, because there is increasing anecdotal evidence that authorities are ignoring the statutory time periods, urgent attention should be given to drafting such provisions.

Compliance in this area could be effectively procured by requiring that a certain proportion of the application fees paid are to be refunded to applicants if time periods are exceeded. For example, 20% of the application fee could become available for refunding for each day that the authority is in breach and, should the total fee be exhausted by this process, thereafter a set monetary amount could be established by legislation. The same principle

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47 EPAA Regs, cl 113.

48 IPA, Sch 10, definitions.

could apply to concurrence agencies that were similarly in breach. With some application fees being in excess of $50,000 this would represent a very real incentive to comply.[49]

The manner in which additional, non-land use approvals are 'integrated' into the development consent process and the role of concurrence agencies will be returned to later in this chapter. At this point however, having set out the procedural ground rules through which the information flow is processed in both jurisdictions, attention is now given to the essential question which is the constraint ostensibly placed on both sets of administrators to only request information which is 'relevant and reasonable'.

C. WHAT IS A RELEVANT AND REASONABLE INFORMATION REQUEST

It should be made clear initially that neither statute expresses a qualification on the information gathering activity of the consent authority in these terms.
Clause 60 of the EPAA Regulations, for example, expresses it in the following terms:

> A concurrence authority whose concurrence has been sought may request the consent authority to provide it with such additional information about the proposed development as it considers necessary to its proper consideration of the question as to whether concurrence should be granted or refused.[50]

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49 It is conceded that local authorities could respond to such penalty provisions by deciding such matters, in time, and in the negative. This, in turn, would place a premium on the speedy listing and hearing of appeals.

50 This is broader than the previous cl 48(1)A which required the information requested to be "essential". The consent authority's ability to request information is given in cl 54 in the same terms.

The IPA provision is similarly broad in scope:[51]

> The assessment manager and each concurrence agency may ask the applicant... to give further information needed to assess the application.

That such a request should be relevant and reasonable is consequently a judicial test which has been applied by the courts over time. Conceptually it appears to represent a transfer of the 'relevant and reasonable' test for development conditions[52] into the information request area.

However context is important and the courts have been clearly of the view that there remain differences in emphasis between development conditions and information requests which may allow for greater flexibility in the case of the latter.

The leading case is *Silverton Ltd. v Brisbane City Council*[53]. In this instance the developer submitted a proposal for a multi level commercial office project to be constructed in the Brisbane CBD. As a commercial office, the proposed development was an 'as of right' use. The council submitted an information request which asked for an amended layout plan. To understand the applicant's response to this request the particular information request deserves to be outlined in full.

Council requested a new layout which provided for:

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51 s 3.3.6(2).

52 IPA, s 3.5.30(1), EPAA, s 80A(1)(a) , s 80A(4).

53 [1983] QPLR 184.

- The total gross floor area of the building not to exceed 2.5 times the site area.
- The height and number of storeys of the tower part of the development reduced to reflect this lower plot ratio.
- Any part of the development above ground to be set back no less than 6 metres from all property alignments.
- The development to conform with the requirements of the *Building Act* with regard to light courts and cut-off planes.
- The total car parking for the development not to exceed one space for each 100 square metres of nett lettable area.
- The public piazza to be provided at grade without any steps or other major barriers along the majority of the frontage of the site with Queen Street.
- Vehicular access to be only from Macrossan Street, directly opposite Diddams Lane.
- Provision of 3.2 metre high clearance over service vehicle manoeuvring area.
- Provision of pedestrian shelter at the base of the building to both Queen and Adelaide Streets.

In fact council, concerned at the possible traffic effects of the proposed development, had requested a complete revision of the developer's plans which would result in a proposed building around half the size of that in the original application. The work and expense of this, necessitating as it did a completely new architectural brief, would of course be considerable. The critical point however, which was expressed in the applicant's

submission, was that council had requested information in respect of a project which had not even been applied for.

The point at issue here is really one of tactics. The council could have carried out its assessment on the plans and information supplied in the original application and then subsequently have sought to attach the substance of these matters as development conditions.[54] Alternatively, council could simply have rejected the proposal as originally lodged. In acting in the manner in which they did however, council appeared to be stretching the idea of 'relevance' to the breaking point.

Although establishing that the information requested must be capable of leading to reasonable and relevant conditions being imposed, the court felt it was difficult for an applicant to establish this on a construction summons. Presumably, should this situation arise again, the applicant would need to either wait for the development conditions to be imposed and then appeal the matter to the Planning and Environment Court or to seek an interim declaration from the same court under IPA, s 4.1.21(1).

The decision therefore was arrived at on somewhat narrow and technical grounds by a court outside the planning jurisdiction. Consequently, *Silverton* may not be authority for the more general proposition that consent authorities can essentially ignore the substance of an application and request information not on the project the applicant wishes to undertake but on the one council wishes they would undertake.

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54 Though this approach would almost certainly give rise to a question as to the 'relevance and reasonableness' of the development *conditions*.

Admittedly, there will always be 'grey' areas and information is and will continue to be requested by consent authorities which sometimes request major modifications to the proposed development.[55] However, these instances generally arise at the margins eg an increase in the number of car parks, a reduction in the size of typical floors or podium levels, or the establishment of a 'vegetation protection line' and they do not relate to the totality of the project.[56] There seems little doubt that the behaviour of council in this instance can be criticised and that the proper, fair and honest approach would have been to simply reject the proposal. The use of an information request by council in order to pursue their own development agenda is simply not contemplated by statute.

Silverton is the only direct authority in either jurisdiction on this point which is, in one sense, surprising since the issue is central to the integrity of this important aspect of the IDAS process.

There are a number of reasons for this lack of authority. First, the information request procedure occurs relatively early in the IDAS process. Applicants are generally reluctant to risk antagonising assessment managers by vigorously objecting at this stage. In the main it is later in the process after constant inquisition and frequent changes of emphasis that exasperation forces some applicants to take a stand.[57] Second, despite the formal procedure

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55 For a South Australian example see, *Eagle Rise Christian Centre Inc v CC Salisbury* [2000] SAERDC 45.

56 For a case which indicates the court's openness to the practical process of negotiation which often forms the background to information requests see the judgment of Skoien SJDC in *Anthony v Brisbane City Council* [1996] QPLR 171.

57 See, Pickles, Ian. "IDAS: Queensland & NSW Comparisons" (2001) 41/3 *Qld Planner,* p 23 for a practioner's background to these issues.

outlined in the two Acts, frequent informal contact does occur between assessment managers and applicants and in the course of these meetings or telephone conversations issues of relevance and reasonableness often arise and are settled.[58]

Ultimately, of course, questions of relevance and reasonableness are for the courts to decide having regard to all the circumstances of a particular case. As a general statement however the principle outlined in *Silverton* viz. that a reasonable and relevant information request is one which may lead to reasonable and relevant conditions being imposed is appropriate to both jurisdictions and worthy of retention.

D. THE QUESTION OF ADDITIONAL APPROVALS

In an important sense the question of multi-layeds approvals which can emanate from a variety of sources outside the development consent process per se but which are nevertheless condition precedent[59] for a development to proceed is one of the central issues in modern land use planning.

Because the ambit of present regulatory systems has expanded to include the protection of a large, growing and increasingly disparate collection of community and social values, it is inevitable that many areas of specialised or technical oversight will exist outside the established land use system. The incorporation of all relevant approval processes into one

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58 Indeed it is often the informal practices which underlie the statutory processes that enable the IDAS system to operate with anything approaching success. Research into the dynamics of these informal processes is almost entirely lacking.

59 Or indeed conditions *subsequent.*

'seamless' process which, at its heart, is a development consent process (rather than an environmental, heritage, or licensing process) is the essence of the task undertaken in Queensland by IPA and in NSW to a more limited extent as a result of the *Environmental Planning and Assessment Amendment Act,* 1997.[60]

The extent of this task in Queensland can readily be gauged by the following list of approval processes contained within other statutes which must, in due course, be integrated into the IPA system.

- Beach Protection Act
- Canals Act
- Child Care Act
- Coastal Protection and Management Act
- Deer Farming Act
- Fisheries Act
- Forestry Act
- Harbours Act
- Land Act
- Liquor Act
- Marine Parks Act
- Meat Industry Act
- Nature Conservation Act
- Pastoral Workers Accommodation Act
- Petroleum Act
- Queensland Heritage Act
- Soil Conservation Act.
- Stock Act
- Transport Infrastructure Act
- Transport operations Act
- Water Resources Act
- Water Resources Act

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60 *Inter alia,* the 1997 Act amends the *Local Government Act* 1993 (NSW) and integrates building approvals and subdivision controls into the development assessment process. There is thus an order of magnitude between the goals of IPA and EPAA.

The attempt to 'integrate' all approval and concurrence processes into one development control system which is commenced by a development application has been forced upon legislatures by an alleged crisis of confidence in the precursor systems.[61]

The fact however, that the development approval process takes place within a larger administrative context which may be characterised by the frequent necessity to obtain numbers of serial[62] approvals and concessions from other reference branches of government has long been recognised by the courts.[63]

This process, which IPA has been designed to replace, is clearly inefficient and expensive, reflecting a historical process by which statutory authorities were piled on other statutory authorities with little thought being given to the transaction costs imposed on applicants or to the fact that these costs were inevitably passed on to the community.

The extent to which this perennial problem of serial approvals has impacted on the development control processes in both jurisdictions can best be illustrated by considering the example of a development application under both IPA and EPAA.

The following hypothetical development application contains the following elements:

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61 Perhaps principally by the development community who naturally maintain an intense interest in a cost effective approval process. Such crises of confidence occur on a regular basis in the planning jurisdiction.

62 Serial in the sense that it is a pre-condition of approval from one agency that prior approval had been obtained from another agency and so on.

63 See *Walker v Noosa Shire Council* (1983) 2 QdR 86, where the ad hoc nature of the process was accepted as an unfortunate inevitability. See also, the judgment of Thomas J in *Makucha v Albert Shire Council* [1994] QPLR 84 at 88.

- A proposal to build 500 M2 of retail space on a site which prior to IPA had been Zoned as Residential A. The site is situated on a main road and ingress and egress is required from this road.
- It is proposed to include within the shopping centre a tavern of 180m2
- The eastern edge of the site borders a gully area which, though substantially overgrown with exotic plants is considered to function as a 'wildlife corridor'.
- The site is otherwise situated in an established area and in fact it adjoins residential dwellings.

1. The process under IPA.[64]

- The applicant will submit a Form 1, 'IDAS Development Application' together with a Form 2, 'Application for a Material Change of Use'.

- The Acknowledgment Notice will advise the applicant that
  - ✓ development approval is required for items (i), (ii), (iii) and (v) in s.3.2.3(2)(a).[65]
  - ✓ that the referral agency for the application is the Queensland Fire and Rescue Authority. [66]

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64 Assumes an 'IPA Compliant Scheme" is in operation.

65 Building work, plumbing and drainage, operational works and making a material change of use respectively.

66 Despite the 'wildlife corridor' issue, the proposed development is not an 'environmentally relevant activity' as listed in Sch 1, Col 1 of the *Environmental Protection Regulations* 1998. See IPA, Sch 8, Pt 1, Item 6. This issue will fall to be considered under local EPPs and the general power conferred by IPA, s 3.3.6(2).

- ✓ that parts of the development require code assessment and the names of the applicable and relevant codes.
- ✓ that the proposal requires impact assessment and that there are certain public notification requirements which must be complied with.

There are two material points at this early stage: first, the issue of the liquor licence cannot be addressed by the assessment manager because, to date, the *Liquor Act* 1992 has not been 'rolled-into' the IPA framework and secondly, IPA did not, until recently, provide an 'integrated' framework within which the assessment manager can deal with the issue of access to a main road from the proposed development.

However these two issues will critically determine whether the development can proceed. Experience suggests the access issue will tend to be addressed in the Information Request. Specifically, the assessment manager will ask for written confirmation from the Transport Department that the ingress and egress design is acceptable to that department. [67]IPA does make provision for this critical consent to be obtained prior to lodgment of the application with the local authority[68] however if this practice has not been adopted the applicant will need at this point to make a separate application to the Transport Department.

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67 All roads in Queensland are designated as either 'local' or 'state controlled' by s 23(1) of the *Transport Infrastructure Act,* 1994. The N.S.W. equivalent is s 7 of the *Roads Act,* 1993.

68 IPA, s 3.3.2(1).

The IDAS timetable stops at this point and, depending upon the speed with which this application is processed it can re-start in anything up to twelve months.[69]

Assuming however that approval is obtained for site access the second issue viz. the question of liquor licence approval still remains to be addressed. Here there are two problems; first, whether there are pre-conditions which must be satisfied for a liquor licence application to be made and secondly and perhaps the more profound question, whether a process which is essentially concerned with licensing individuals can ever be integrated into a development consent paradigm under which approvals and consents relate to land.

In the first case, the experience of practitioners is that the Queensland Licensing Commission is reluctant to accept an application for a licence in respect of a project which has not yet received the en globo approval of the local authority. Alternatively, if the application is accepted[70] it is unlikely to be processed until local authority approval of the development is obtained.

Having traversed the IDAS route under IPA which will involve detailed responses to the information request[71], the 30 day public notification of the application, the submission

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69 IPA, s 3.2.12(2)(b).

70 and, strictly, provided it complies with the requirements of the Act and regulations it must be accepted.

71 The information requested is, given the nature of the proposed project, likely to include the following: a Fauna Report, a Flora Report, an Acoustic Report, a Lighting Report, a Traffic Report in addition to other reports eg. drainage.

process, the decision stage and perhaps an appeal to the Planning and Environment Court[72] the applicant is only now in a position to have his application for a liquor licence formally considered.

This procedure will require the following steps:[73]

- Submission of the application in the approved form
- Advertising the application once in the Gazette and twice in local newspapers
- Display a copy of the notice in the approved form on the premises for at least 28 days[74]
- Await the outcome of any objections received
- If the matter is locally contentious, attend a compulsory conference of 'concerned citizens'[75]
- Await the decision of the Chief Executive
- If the decision is in the negative, within 28 days file an appeal in the Tribunal

Throughout this process an informal system operates which may necessitate the applicant providing a range of additional information to the authority on request. The authority however is not circumscribed by any significant statutory time constraints in making a

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72 The writer is aware of instances where this process under the previous *Planning and Environment Act* has taken two years.

73 Generally, *Liquor Act,* 1992 s 118.

74 The Chief Executive has discretion under s 118(5) to waive publication and display if it has already taken place for another purpose (ie. a development consent application). This waiver however is seldom granted if, as is most often the case, the issue gives rise to even marginal local or sectional concern.

75 *Liquor Act,* 1992 s 121(1).

decision.[76] Indeed this process alone can result in a further 6 months delay after development consent has been extracted from the development consent process proper.

The in-built redundancy of such a system is clearly illustrated by the fact that the licensing procedure will canvas the same issues of community amenity and will respond in essentially the same manner to issues arising from the submission/objection process as the preceding consent application.

The intention of IPA is to put an end to this duplication by 'integrating' all approval processes which in due course will mean that the Liquor act will need to be rolled-into the IPA framework. This, in turn, gives rise to the second of the issues under this heading viz. the tension which appears to exist between an licensing process which, in part, is driven by the characteristics of the particular applicant and a land use approval process in which nature of the applicant is not a relevant consideration at all.

It should be clear from this that, in principle, there may not need to be any conflict between the two processes provided they are kept separate as is currently the case. It is only when an attempt is made to combine the two ie. to convert a personal licence into a condition which attaches to land-use and which binds successors in title that their conceptual disharmony becomes clearly apparent.

The emphasis on the personal nature of the licence is certainly illustrated by the Liquor Act, s 107(1) dealing with restrictions on the grant of a licence:

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[76] Apart from a very notional 'deemed refusal' period. See, *Liquor Act,* s 31(3)

> The chief executive may grant an application for a licence or permit only if the chief executive is satisfied that the applicant is a fit and proper person to hold the licence or permit applied for having regard to—
>
> (a) whether the applicant demonstrates knowledge and understanding of the obligations of a licensee or permittee of the relevant kind under this Act; and
>
> (b) whether the applicant is a person of good repute who does not have a history of behaviour that would render the applicant unsuitable to hold the licence or permit applied for; and
>
> (c) whether the applicant demonstrates a responsible attitude to the management and discharge of the applicant's financial obligations.

The important question at this point is whether the continued existence of 'personal licences' of the kind described above or, for example, those issued under Ch 3, Pt 4 of the *Environmental Protection Act,* 1994, can ever sit comfortably in a development and planning system of 'once only' approvals.

Though some debate and indeed concern has been expressed regarding this issue,[77] the IPA system does not, at least in principle, render the oversight functions of bodies such as the Environmental Protection Agency redundant nor remove from the ambit of those authorities the right to insist on subsequent modification or improvement in environmental management practices.

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77 See, Homel, B "Just a Process Change? The Impact of IDAS on Environmental Protection in Queensland" (1999) 16 *EPLJ,* p 75 and.Bowie, L "Teething problems with the integration of the environmental licensing system into the development assessment process in Queensland" (1998) *AELN,* p 29.

In this sense the Minister's assertion in his second reading speech that standards and approvals will remain unchanged is quite correct.[78] Implicit in IPA is the fact that the jurisprudential system which will now review decisions of concurrence authorities has now become the Planning and Environment Court because ultimately, the conditions imposed by them are now assessable against the requirement that such conditions must be 'relevant to, but not an unreasonable imposition on the development'[79] To object to this outcome is, IPA's proponents argue, to object to the intellectual proposition which underlies IPA. It is precisely the intent of the Act that bodies charged with the authority to grant essential operating approvals should have their activity potentially reviewed by the jurisprudence of the planning system. This is close to the heart of the IPA reforms.

Similarly it is highly unlikely that the Planning and Environment Court would seek to intervene in a process by which a referral authority may or may not grant a necessary licence to an individual. At a practical level it would not be an easy task to draft pleadings and to subsequently argue in a planning court that the refusal by such an authority, taken after due process and in accordance with its enabling statute, was irrelevant or was an unreasonable imposition on the proposed development.

However, notwithstanding that the issue of a licence may be able to be accommodated within the jurisprudential framework of the planning system an additional and potentially serious incompatibility remains in respect of the perceived need to make provision for a

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78 The Hon. D.E. McCauley, Minister for Local Government and Planning, *Integrated Planning Bill,* second reading speech, Hansard, 30 October 1997, p 4089.

79 IPA, 3.5.30.

regular and ex post facto review of licensing standards which, in reality, can only be secured by an appropriate condition being imposed on the development at the approval stage.

This concern reflects the long-standing rule of planning law which insists on finality in the conditions which are to attach to a development approval.[80] The principle, which is referred to in both NSW and Queensland planning jurisdictions as 'The Finality Principle' has a strong, though hardly ever articulated, basis in a fundamental economic reality which underpins much of planning law.

Developers, investors and financiers are called upon to make sometimes very large decisions on the basis of known facts and their preference for certainty is no less understandable than a court's preference in a commercial litigation for written evidence over oral. A large portion of the cost of any proposed project may often lie in necessary compliance with development conditions but provided the cost of these conditions can be quantified ie. they are capable of being objectively measured before development funding is committed, the risks associated with the development can be adequately assessed.[81]

If however a development condition were to allow for subsequent review of the status of a project against categories of building, environmental or amenity standards which are not yet in existence then investment certainty is difficult to achieve. The effect of a move away

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80 This issue could also be considered under the heading "The Decision Process". It seems appropriate however to discuss it at this point.

81 Which is why the decision of the Qld. Court of Appeal in *Mt.Marrow Blue Metal Quarries P/L v Moreton Shire Council* (1996) 1Qd.R 347 is essentially correct.

from the finality principle could be to create a serious constraint on the calculation of investment risk with a corresponding decline in investment activity.[82]

The courts, to date in both jurisdictions, have shown no indication that they are willing to contemplate such a change.

In the leading decision of the Queensland Court of Appeal, *McBain v Clifton Shire Council*[83] the Court was called upon to consider a development condition imposed on a piggery development which purported to permit an increase in the size of the project in stages from 20,000 to 80,000 pigs with such expansion being dependant on a prospective assessment of the project's environmental impact at each future stage.

The court had no difficulty in ruling the condition invalid:

> In our opinion, the postponement of such decisions from the issue of the conditional approval until unspecified future dates clearly offends the finality principle.

The Court cited a long list of past authorities[84] for this proposition including the NSW decisions, *Mison v Randwick Municipal Council*[85] and *Scott v Woollongong City Council.*[86]

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82 Nevertheless, the IPOLAA 2001 amendments entrench the move away from finality. Regulations to be made in respect of the compliance stage in IPOLAA 2001 are intended to allow for retrospective monitoring.

83 [1996] QPELR 170.

84 At p 374 of the judgment.

85 (1991) 23 NSWLR 734.

The matter rose again for consideration, and again in the Queensland Court of Appeal, in *Mt Marrow Blue Metal Quarries P/L v Moreton Shire Council.*[87] The issue concerned a proposed residential subdivision adjoining an existing quarry operation and the relevant condition which was sought to be attached to the approval was as follows:

> [That a]... building restriction line be amended... where necessary to ensure that residential building sites are not subject to noise levels due to the operation of the quarry in excess of 40dBA under 2.8 m/s (max) downward (sic) conditions.

The distinction between this condition and the condition which was imposed in *McBain* is the presence of criteria by which performance can subsequently be measured, the acoustic standard and the conditions under which it is to measured being clearly stated. This, according to the court, took the issue beyond a strict application of the finality principle as exemplified by *McBain.* Provided therefore the performance standard is certain the issue becomes one which is not subject to unconstrained administrative discretion but rather to an objective analysis. In reaching this decision the court accepted the reasoning of Dixon J. in *King Gee Clothing Co P/L v Commonwealth.*[88] As to the broader principle applicable to the interpretation of subordinate legislation Dixon had felt that though there was no general proposition of law that subordinate or delegated legislation is invalid if uncertain[89] if:

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86 (1992) 75 LGRA 112.

87 (1996) 1 Qd.R 347.

88 (1945) 71 CLR 184.

89 Dixon's conclusion does not however sit completely comfortably with Craies conclusion that local authority planning by-laws must, to be valid, evidence five characteristics one of which is 'certainty'. See Craies, William F. *Craies on Statute Law,* 7th ed.,(London, Sweet and Maxwell, 1971) pp 325-326.

> [I]t deserts clear objective standards capable of producing a result about which every man must agree if he knows the facts and figures and has made his calculations correctly, [the regulation, condition or decision of the approval authority will be invalid.]

In this regard the law in both NSW and Queensland is the similar and in both jurisdictions the basis for such a judicial approach, for the finality principle itself, is capable of being established around the statutory prohibition against unreasonable or irrelevant impositions on the development. Additional support for the general principle of finality, though never canvassed in detail to date by the courts, could presumably also come from the administrative law proposition that unreasonable and uncertain terms may render a matter ultra vires or perhaps, at admittedly a rather esoteric level, that the "width and extent" of such a delegation represented an abrogation of the legislative function.[90]

Some space has been devoted to this discussion to illustrate the jurisprudential complexity which attends any attempt to entrench development conditions which contain within them the right of regulatory or concurrence authorities to determine the rights of proprietors by reference to standards or principles which are to be put in place after the project has been completed. The contention being that the establishment of certain development conditions is a condition precedent to investment and equally that it is verging on unreality to suggest that an environmentally problematical project should not be able to be assessed on a regular basis against environmental criteria which may emerge in future years.[91] In the

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90 It is admitted that this argument would be more difficult to sustain under a State constitution without an explicit, constitutional separation of powers.

91 W.H.O. standards, for example, for exposure to certain toxins and insecticides has been reduced progressively over the last twenty years as knowledge of their effects has increased. For an examination of the contrast between "command and control" environmental permits and "continuous assessment" licences see, Wylynko, B "Beyond command and control: environmental

latter case, of course, it would be impossible to express such an assessment regime in objective terms sufficient to satisfy the *Mt Marrow* test.

The task facing IPA consequently is difficult in the extreme. Either the IPA statute will need to be amended to allow for the abridgment of the finality principle in certain instances (ie. environmental) with unknown effects on developers and financiers or the present system of personal licences will need to be continued and any attempt to 'integrate' the two processes abandoned.

In NSW this issue does not arise because no formal attempt has been made yet to bring issues such as this under the single authority of a planning law jurisdiction.

Returning to our original example the EPAA approach can be contrasted as follows:

2. The process under EPAA

The first task to be undertaken by the applicant is to assess which of five classes of development the proposed project will fall into as these classes will determine the nature of the information which must be tendered with the application, Form 1. These classes have been discussed elsewhere.[92]

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licencing strategies." (1999)16 *EPLJ* p 277. One solution may be to establish an environment/remediation trust fund which all developers could contribute to. Remediation, using funds from this source, could be oversighted by the developer and a private, certified assessor.

92 See Appendix 4, 5.

On examination it seems reasonably clear that the small shopping centre falls, in principle, within the statutory definition of a designated development because such a development is defined as one which requires development consent "and one or more additional approvals"[93] and the section goes on to specifically include additional approvals under the *Roads Act* 1993.[94] However, EPAA, s 91(1) is not conclusive of the issue because certain developments which would otherwise fall within the definition are excluded. A development, for example, which requires approval under s 138 of the *Roads Act* is not an integrated development if it requires development consent from a council and approval under the *Roads Act* from the same council. Applicants (or council officers to whom the query is addressed) must therefor determine whether or not the development falls into this category.

Whether the council is the appropriate roads authority in each instance can be determined by examining s 7 of the *Roads Act* which lists the appropriate authorities for certain roads. If, for example, the development involves a freeway, the Road Transport Authority will be responsible. If it involves a crown road however the Minister is the appropriate authority. To add to the potential for confusion, under the *Roads Act*, s 7(3) the Minister is given power, by regulation, to declare a specified public authority as the roads authority for a particular road or for all public roads within a given geographical area.[95] In general terms however the local authority is the roads authority for most of the roads in its locality, though, in the example being considered, the RTA will be the appropriate approval

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93 EPAA, s 91(1).

94 *Roads Act,* 1993, s 138.

95 Clause 79(b) of the *Roads (General) Regulations, 1994* itemises the roads for which the Road Transport Authority is responsible. These roads are detailed on RTA Plan No. 6005 386 SS 0357 which is held at the Sydney Operations Directorate of the RTA at Blacktown.

authority. In this instance all plans which detail the impact of the development of the main road together with ingress and egress information are required to be forwarded directly to the RTA.

The second issue which arises is the question of the wildlife corridor. There are three categories of strategic environmental plan in NSW, known collectively as Environmental Planning Instruments (E.P.Is) which operate at local, regional and state levels. Similarly, though in a less direct environmental sense, this tri-partite division of responsibility is now, theoretically, a part of the IPA framework as a consequence of the provision in the Act for Regional Planning Advisory Committees[96] which are charged with the task of gathering information on a regional basis and making reports to the Minister.[97] Presumably, recommendations contained within such reports may, in time, become incorporated in local or state environmental planning policies. Regional environmental planning instruments in the NSW sense do not exist in Qld. However though IPA makes no formal provision for them as regional environmental instruments, regional policy making does occur in the form of broad strategic plans such as FNQ – 2010. [98]

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96 IPA, s 2.5.2(1).

97 IPA, s 2.5.6.

98 For *State Planning Policies* see IPA, s 2.4.2. For *Local Plans* see IPA, s 2.1.16(1). It seems strange that having set 'ecological sustainablity' as the centre point of the statutory purpose of the statute in s 1.2.1 should elect not to incorporate formal environmental planning at the regional level if only to demonstrate a certain consistency of approach. Its absence in Queensland is even more striking in that the central feature of emerging new administrative arrangements between the Commonwealth and the States (See Commonwealth of Australia, *National Strategy for Ecologically Sustainable Development, Dec. 1992)* is the proposed enhanced role for strategic regional planning. See also: Gardner, Alex "The administrative framework of land and water management in Australia", (1999) 16 *EPLJ* p 1.

With the exception of Designated Developments where the interplay of State and regional EPIs is relatively clear, there are no specific guidelines which, in effect, determine the application of a particular EPI to a particular development proposal. Though an application for a local development[99] will necessitate an examination of the Local Environmental Plan[100] it is also conceivable that regional or even State environmental policies could come into play.

In reality therefore, initial discussions must take place between the applicant and the local consent authority in order to 'shortlist' the environmental policies against which the proposal will be considered.[101] The outcome of these discussions will determine the nature of the information required to be tendered with the application and given the more or less standard content of local environmental policies in both states, reports on fauna and flora will be required as a matter of course.[102]

Even though a large part of the information supporting a development proposal under EPAA is tendered initially, the 'consent authority' in the case of local developments and the 'approval body' in the case of integrated developments still, as in Qld, retains the right to request additional information. In the case of a local development application, the local authority may request this information at any time.[103] The third issue which the applicant

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99 EPAA, s 76(A)(4).

100 EPAA, s 70. See also, *Regional Plans,* s 51 and *State Environmental Planning Policies,* s 39.

101 The *PlanFirst* programme currently underway in NSW should obviate this problem.

102 This requirement is confirmed by EPAA, s 78A(8), and by IPA, Sch 8 s 6 in environmentally sensitive areas.

103 EPAA reg, cl 54. See also cl 60 in cases involving concurrence agencies.

needs to address in NSW is the question of *Liquor Act* consent for the incorporation of a small tavern within the proposed centre. As in Qld at the present time, the requirements of the *Liquor Act*, 1982 (NSW) play no part in the unfolding IDAS process under EPAA which is to say that, as an administrative and quasi-judicial process, it stands alone and is not bounded by the jurisprudence of planning law.[104] Consequently, the applicant in this instance will need to apply for approval under the *Liquor Act* subsequent to the granting of local authority approval under EPAA. Generally this application will take place subsequent to the granting of an en globo planning consent under EPAA since s 44 of the *Liquor Act* specifically allows for objections to be taken from the relevant local authority to an application for a licence and no applicant would wish to preempt the perhaps more important planning application by precipitating a response from the local authority before the application and supporting information had been submitted.[105]

Having said this, the comments above concerning the essential redundancy of the process in Queensland[106] apply equally to NSW where the entire notification, objection and appeal process must commence again though traversing, with the exception of those issues which concern the personal integrity of the applicant, the same issues and the same substantive or indeed non-substantive points which have already been assessed, considered, rejected or adjudicated in the planning jurisdiction.[107] That two public bodies could potentially decide

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104 As in Qld, the NSW Act grants a personal licence (see, *Liquor Act, 1982,* s 42C) rather than a land use consent.

105 The same tactical consideration, of course, applies in Qld.

106 See p 87 above.

107 See *Liquor Act, 1982*, ss 44, 2A, 104, 17A for representative provisions.

the same issue in diametrically opposed manners has an obvious potential to undermine public confidence in an administrative system and is to be regretted.

3. Summary

As can be seen from the example considered above, the present situation in Queensland with respect to information requests can be said to roughly parallel that in NSW and this observation will continue to be able to be made until such time as all the multifarious approval processes of a modern, interventionist government apparatus are 'rolled' into the integrated system contemplated by IPA.[108] Currently the nature and the volume of information is similar as are the time periods required to be met under the acts and the interrelation of approval or concurrence bodies outside the immediate consent authority with both the applicant and the local authority proceeds, broadly, on a similar statutory basis.

For these reasons it is difficult, if not unfair, to rate issues such as relative equity and efficiency at this stage. Nevertheless two additional points which are relevant to both jurisdictions should be made. These relate to (i) the nature of the informal processes which underlie the statutory ones and (ii) to the growth of regional planning policy instruments.

- Any planning statute, and EPAA and IPA are no exceptions, can only attempt to establish the broad parameters which will seek to determine the nature of the relationship between an applicant and a consent authority over time. In reality however no

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[108] See p 82, above, for a list of the planned 'roll-ins'.

set of provisions will ever possess sufficient flexibility to enable either party to confidently predict events other than in very general terms. If a week is a long time in politics than the same observation applies with equal force in planning jurisdictions.

In reality, the formal information request procedure is underpinned by constant recourse to an informal network particularly by applicants or their consultants. Contact at this level will take the form of telephone conversations, informal meetings, faxes and e-mails which assist both parties to narrow down the essential points of agreement and difference. Nothing, of course, is contained in either Act which specifically attempts to manage these contacts and indeed such an attempt could seriously impair the operation of the entire system. It is almost certainly this system which enables the process of local authority planning to proceed at all.

Little, if any, research has been undertaken into how these informal networks operate even though they constitute the 'grease' which finally allows the IDAS wheels to turn. The following general observations however, can be made.

First, access to these informal networks is not shared equally. For example, consultants with long experience in a particular area such as traffic management and who have often in the past acted for the local authority in other matters have almost unrestricted access to planning administrators at all levels including the most senior levels. In fact often their authority is so great that junior and less confident planners may avoid decisions which they know such a consultant will object to strongly and attempt to pass responsibility for such a decision to those further up the hierarchy. In contrast a member of the public with no

experience in such matters will generally find his contact with the system limited to the enquiries desk.

Second, by operating in the interstices of the statute ie. before a time period begins to run, applicants can often, with senior consultants at their side, have some considerable influence on the nature and scope of the information which may ultimately be set down in the formal information request.[109] This is particularly the case in Queensland for two reasons: because no information is necessarily required to be submitted with the application and because the objection or submission period occurs after the information request has been drafted, submitted and complied with by the applicant.

Third, the informal network is frequently utilised by local authorities to 'flag' emerging issues such as a consistent pattern of objections being received even before the notification period has commenced. In the face of this advice the applicant may often elect to unilaterally submit further information or an additional consultant's report which covers these issues. This submission occurs, of course, quite outside the statutory framework but will be incorporated into the common material available to the decision maker[110].

In many cases then a large part of the information process in both jurisdictions may occur beneath the surface of the formal framework. That this can lead to inequities as well as efficiencies is acknowledged though such inequities are no doubt no greater in degree than those which operate in many other areas of social and economic activity.

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109 Within the limits, of course, of a local authority's ability to 'amend' local planning policies. See the judgment of Quirk DCJ in *Telfrid Corporation P/L v Logan City Council* [1999] QPEC 14.

110 IPA, Sch 10, definitions and EPAA, s 79C(1)(b).

- In regards to the second issue viz. regional planning, it may be incorrect to suggest, at least absolutely, that the growing Commonwealth involvement in many areas which impinge on traditional land use planning arises solely out of an ever expanding set of international obligations flowing from the federal government's enthusiastic ratification of international conventions, though a large part of the impetus for the intervention certainly arises in the international arena.[111] Of equal importance however has been the gradual adoption of an opinion that the interests of efficiency and effectiveness in policy terms would be best served by the development of an overlapping set of regional environmental, heritage, biodiversity and resource management standards.

In this view, [112]

> There is little likelihood of a coherent policy emerging from the traditional compartmentalised approach in which different departments or different levels of government each handle different, small parts of the problem.

It is quite beyond the scope of this work to examine the correctness or otherwise of such an assertion beyond remarking, in passing, that it may be an inevitable consequence of the scope of international agreements which still tend to view the nation state (which, of course, is the ratifying party) as the smallest efficient administrative unit together with the

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111 These international agreements currently include; *the Ramsar Convention on Wetlands of International Importance (1971), the United Nations Convention on Biological diversity (1992), The Vienna Convention for the Protection of the Ozone Layer(1985), the Paris Convention for the Protection of the World Cultural and Natural Heritage (1974)* together with five conventions on migratory and endangered species and many others.

112 *Australia: State of the Environment,* 1996, p11. (An independent report prepared by the State of the Environment Advisory Committee for the Commonwealth Minister of the Environment).

domestic preoccupation since the early 1970s with national planning and the expansion of federal government power at the expense of the States throughout the same period. Of significance for both jurisdictions is the likelihood that policies designed to create a national planning and policy framework for the achievement of biodiversity conservation and sustainable agriculture amongst other goals are likely to be increasingly imposed on the existing land use planning systems.

Gardner in fact has already suggested the following as an appropriate three step "integration process."[113]

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- all state agencies with natural resource management functions to be merged into one Natural Resources Management Commission (NRMC) which will have responsibility for all matters relating to water, flora and fauna.
- Regional Councils to be established which will comprise the constituent councils and which will have strategic planning functions
- the NRMC to be given the authority to prepare amendments to local and regional land use planning schemes.

It should be clear from the above that the new, elite focus is on planning at the regional level and this focus should, in principle, have a more direct impact in Queensland than in NSW. As indicated earlier the IPA merely provides a nodding acceptance of regional

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113 Gardner, Alex. "The Administrative Framework of Land and Water Management in Australia" (1999) 16 *EPLJ* 212. at p 255.

planning strategies and policies.[114] Presumably more of these policies will emerge over time out of the activities of the Regional Planning Committees however the administrative and legal questions relating to either their incorporation in local planning policies or alternatively their relationship to these policies have yet to be worked out in detail. It is clear however that a national programme has the potential to undercut even the vestigial references to a regional planning paradigm currently in the Act and that this will, in all probability, necessitate a partial review of the Act in due course.[115]

Fewer problems would be anticipated under EPAA simply because of the longer standing regional focus in that state. The debate in both states will probably take place in terms of the content of such nationally-inspired policies and it could be acrimonious indeed given the extension of strategic planning to cover issues raised in either the conventions on climate change or the ozone layer and the expressed intention by some groups to push for direct controls over agriculture and grazing.[116]

Despite a degree of intellectual infatuation with strategic planning and the move to harmonise and consolidate planning policies across broader geographical areas driven by issues such as biodiversity, species protection and water quality, which, it is argued, can hardly be constrained by local authority boundaries, little or no attention has been paid to

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114 Regional planning under IPA is specifically mentioned in ss 1.2.1, 1.3.3, 2.1.3(1), 2.1.4(1).

115 IPA, Ch 2 would require considerable revision.

116 See Tribe, J "The Law of the Jungle: regional forest agreements", (1998) 15 *EPLJ* p 136. The author of this article is of the opinion that comprehensive management plans are required also for arable farming on marginal land, grazing in semi-arid zones and irrigation. One wonders whether ploughing a field will necessitate a planning permit in due course. Since federal government funding, either through the NHT (soon to be renamed the National Heritage Council) or the NCC, is likely to be substantial the move to strategic regional planning which will incorporate in a more direct manner the content of international agreements may be unstoppable.

the effect of another level of planning (or a substantial expansion of the subject-matter of regional planning) on the information requirements which will attend a development application in the future.

The essential question, given the almost certainly ineluctable progression towards regional, federal government sponsored planning is whether the information requirements of the total development approval process are likely to be reduced or expanded. The most probable result, as indicated in Chapter 2, is that the volume of information required to support an application will increase and, on occasion, substantially increase.

This will not solely reflect a concern with new environmental issues and standards arising out of the new regional focus but also at a deeper, perhaps ideological level, the gradual shift towards the 'participatory' planning model combined with the increasing tendency of modern western societies to become 'risk-averse' as the causal connection between economic activity and environmental consequence becomes, seemingly, ever more complex and diffuse.[117]

Both jurisdictions will be required to come to terms with a much more activist federal involvement in broad environmental and heritage issues which will need, in due course, to

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117 The latter observation is reflected in the EPAA "precautionary principle" in Sch 2, cl 8(a) viz.; the "lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation". Often, of course, there is scientific uncertainty on both sides of the issue. See Pearlman CJ's comments in *Greenpeace Australia Ltd v Redbank Power Co. P/L* (1994) 86 LGERA 143 at 154.

be expressed in the regional Development Control Plans which exist already under EPAA[118] or in a similar format emerging in Queensland.[119]

The obvious necessity which will (or should) be a consequence of this general expansion in the scope of information which can be legitimately required by local authorities, is to manage the process in a more efficient and equitable manner.

There are two essential reforms required.

- In the first instance EPAA should adopt the IPA principle which, in theory, places the onus on the local authority or concurrence body to determine the nature and scope of the information which is required in any given instance.[120]

- Second, if standards and data are to expand as a result of new scientific knowledge, as a consequence of the 'precautionary principle' in operation, or because international agreements presuppose a different planning paradigm then, as far as possible, planning standards should be as objective as possible.[121]

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118 EPAA, s 51(A).

119 Queensland examples, either completed or underway, include; *Wide Bay 2020, South-East Queensland – 2001, Far North Queensland – 2010, Central Queensland – a New Millennium* and *The Townsville-Thuringowa Strategic Plan.*

120 It goes without saying that accuracy on the part of the local authority is essential since strict compliance will be likely to be treated as a 'jurisdictional' issue. See: *Timbarra Protection Coalition Inc. v Rose Mining N.L.* (1999) 102 LGERA 52.

121 It is admitted that a tension will always continue to exist between "objectivity" and the "precautionary principle". Indeed the precautionary principle is an expression of this tension.

In both jurisdictions very many local planning policies, development control plans and similar instruments contain detailed and objective standards which an applicant can appraise prior to making an application.[122] Should we see an expansion in the items which will come under review in the future it is essential that this benchmarking process keep pace. It is not sufficient that policy should inevitably expand to fill any apparent void created by even a degree of incipient concern, it is essential that such policies be reflected in standards which are predicated realistically on the principle that environmental issues can, in many instances, be managed.

E. Conclusions

It should be clear from the above that a direct comparison of the jurisdictions is extremely difficult. Both systems, driven by a political exigency which is, in turn, enervated by the reality of public participation will tend to magnify the scope of information requests. This is, it seems, an inevitable consequence of the increasingly 'risk-averse' and litigious environment in which local authorities and other approval bodies are called upon to perform their functions.

Nevertheless, the following concluding comments may be made;

- In view of the continuing increase in the scope of information requests the onus of establishing the framework for them should, as in Queensland, rest on the local or other approval authority. As indicated earlier in this chapter, equity would seem to rest

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122 Specific standards are laid down in a multitude of areas from particulate concentration in sewerage effluent, to the required angle of inclination of roofs in certain heritage areas and so on.

more in a situation where those who require information are similarly obliged to delineate what information is required. It is admitted that this places a substantial onus on the local authority to accurately perform such a task as the consequences of forgetting to include a specific item required by statute or regulations could be both costly and dramatic.[123] This, in turn, could lead to a claim by the applicant for negligence under the relevant sections of the *Local Government Act* 1993 (eg. s 1114).

The applicant is hardly prejudiced by the existence of such an onus since the jurisdictional consequences of his oversight are the same viz. a voidable decision and the obligation on the local authority to pay damages in such a circumstance can be seen as simply an equitable concomitant to their duty to accurately assess the nature of the information required in the first place. In this respect the current IPA approach is clearly in advance of that currently existing under EPAA.

- Compliance with statutory time periods is essential if either jurisdiction is to lay claim to being efficient and as has indicated neither Act contains a procedure to force local authorities to in fact comply beyond the lapse of time becoming a justification for a deemed refusal appeal to the planning court.

Since there seems little point in establishing such a statutory regime if the essential elements are routinely ignored (or even occasionally ignored) an enforcement procedure is needed in both jurisdictions.

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123 Particularly if a planning court found the mistake went to jurisdiction. A recent Brisbane City Council out of court settlement recently resulted in compensation of $400,000 being paid to one disaffected applicant.

The suggestion, which has now been supported by the Property Council, is to provide for a refund of fees to the applicant at a fixed percentage of the total fee paid for each day the authority exceeds the statutory limit. In the context of N.C.P. and the stated intention in both jurisdictions to improve efficiency such a provision could, in theory, be justified though the political difficulties in the way of such an enactment could never, of course, be underestimated.[124]

- A growing problem is likely to be the probability of significant overlap arising between the three planning policy documents ie local, regional and State planning instruments. Combined with this will be difficulties created for applicants in the event of conflict between planning policies and the criteria adopted by the various instruments. It is conceivable that an application for a local development may have no immediate local environmental consequences but be perceived by those further up in the planning hierarchy as potentially contributing to a regional planning problem.[125] For this reason concurrence agency requirements are increasingly being integrated into an IDAS process which commences at the local level.

However the mere fact of integration does not in itself solve the problem of a growing body of information able to be requested by an ever-growing number of concurrence bodies. There is not a simple answer to this problem which has its genesis in the increasing

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[124] An alternative proposal would be to automatically refer all such delinquent matters to the Minister whose department would assume responsibility for processing them with costs invoiced against the Local Authority.

[125] The downstream effect of irrigation for example.

information demands of an increasingly interventionist state, though its effects are probably more keenly felt by applicants with smaller projects and smaller resources than by those who can command specific legislation or who are the subject of a Ministerial 'call-in'.

Consequently, the provision in IPA for "Referral Assistance"[126], assuming it works as intended, may represent a very useful mechanism to circumvent some of the problems indicated above and could well be emulated by EPAA. in due course.[127]

- There is a growing trend in both jurisdictions, driven one suspects by the court's approach to the question of 'finality', to incorporate more specific, objective criteria within planning policies. This is to be encouraged in lieu of vague pronouncements regarding 'international best practice' or a 'mission statement' attitude to compliance on the part of the local authority or concurrence agency. An objective standard should indeed be taken as an essential ingredient in any policy which requires performance to be measured in an attempt to reduce as far as possible the exercise of administrative discretion in critical areas.

- Similarly, the scope and content of reports which are required to be submitted should be detailed in the regulations. Under the EPAA regulations the scope of an environmental impact statement and the specific issues which need to be addressed is

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126 IPA, s 3.3.10.

127 A de facto system of coordination in NSW however could be said to exist as a consequence of the *Regional Coordination Program* which operates throughout regional NSW and has recently been expanded to included the South-West and Eastern suburbs of Sydney.

given in some detail.[128] However in Queensland such specificity is not present and the *Environmental Protection Act*, 1994 and the 1998 Regulations offer very little assistance in concrete terms in determining the scope of either an 'environmental evaluation' under s 71 or of an 'environmental management programme' under s 81.

In general terms the Queensland approach, based in part on the New Zealand and UK models, represents a decent attempt to create a new planning paradigm which, it is hoped, will be better able to assist applicants to navigate through the information demands of an increasingly interventionist state and an increasingly polarised community.

Although both models are clearly workable, seek to achieve the same ends and attempt to establish an equitable basis for development control the Queensland approach must be preferred if only because the statute reflects a current political commitment to enhancing the very qualities of efficiency and equity which are the subject matter of this thesis.

Despite the rather wide ranging amendments to EPAA in 1997 which resulted in a more 'integrated' Act than its predecessor it remains essentially the end product of incremental change since its inception and it is showing its age. Whether, in due course, the Queensland Act will be taken as a model for a future thoroughgoing review of the NSW Act remains to be seen.

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128 EPAA Regs, Sch 2.

Information and Referral: Summary of Equity and Efficiency Issues.

In the case of Applications questions of equity and efficiency overlap with an inequity often fostering an inefficiency and an inefficiency often resulting in an inequity. For this reason, in the following table, both issues are considered together.

Attribute	**Equity/Efficiency**
Expansion in the scope of the information request beyond that necessarily required by the proposed development.	Both NSW and Qld suffer from the same administrative strategy. There is a clear need to delineate information requirements more accurately in both jurisdictions. ***Best Practice:*** Neither.
Overarching political control of the process.	Both systems remain susceptible to political involvement. A development control ombudsman together with a flexible FIO procedure is needed in both jurisdictions. ***Best Practice:*** Neither.
Tension exists in the "private rights" and "public rights" debate.	Both systems are at the centre of a largely environmentally instigated concern with "public rights". Both are experiencing difficulties in integrating such a concept into traditional development control processes. ***Best Practice:*** Neither.
Compliance with statutory time periods.	Neither system provides a mechanism through which administrators are obliged to comply with the statutory time periods. ***Best Practice:*** Neither.
Integrated concurrence agencies.	Both systems provide for systemic referral under designated circumstances. The Qld system addresses this matter more directly. ***Best Practice:*** Qld.

Serial Applications.	Until all roll-ins have been completed in Qld, both systems subject some applications to serial and duplicate applications. ***Best Practice*:** Neither
Information and advice onus on the consent agency.	In Qld this is currently the approach. Foreshadowed amendments will remove this requirement and the situation should parallel that in NSW by mid 2002. ***Best Practice:*** Neither.
The content of the information reports submitted is detailed.	Report contents are vaguely defined in Qld. Contents are more precisely defined under the EPAA regulations. ***Best Practice:*** NSW.

Standardised application fees.	Although being addressed, application fees vary widely across 125 local authorities. In contrast, fees are standardise by the State in NSW. ***Best Practice:*** NSW.
Number of application classes.	Including exempt and complying developments, Qld possesses four classes of application. This is under half the number in NSW. ***Best Practice:*** Qld.

FIVE

NOTIFICATION AND PARTICIPATION

> The current fiction is that any overnight ersatz bagel and lox boardwalk merchant, any down to earth commentator or barfly, any busy housewife who gets her expertise from newspapers, T.V., radio and telephone, is ipso facto endowed to plan in detail a huge metropolitan complex good for a century. In the absence of prompt decisions by experts, no work, no payrolls, no parks, no nothing will move.
>
> Robert Moses (Chief Planner, New York City)[1]

> The belief in the worth and possibility of the rational participation in policy-making by citizens is very much an enlightenment view – that decisions can be influenced by bringing the message of social utility to those in power. Underlying this view are certain fundamental conceptions about men and societies – the reasonableness of men and the natural harmony of their interests, an optimistic view of human nature that rejects the conservative proposition that people always act out of self-interest.
>
> L. Sandercock.[2]

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1 Quoted in *Ramparts.* March, 1975.

2 Sandercock, L *Public Participation in Planning; report prepared for the Monarto Development Commission.* (Adelaide, Government Printer, 1975) p13.

A. INTRODUCTION

Of the three levels of government only at the local level is a degree of direct public participation enjoined as a positive public good. The fact that such a process exists, and in such relative isolation from the almost exclusively representative forms at the State and Federal level, reflects an amalgam of factors, but in particular the intellectual assumptions of a educated class which can only infrequently be identified with any broad consensus about the desirability of such a process amongst the mass base of citizens.

The idea of participation is broader than the confines of planning law and traverses the fields of sociology, politics and democratic theory. In each of these fields a significant body of academic research exists which either seeks to promote the idea, denigrate the idea or to use the idea of participation as a platform from which to draw more generalised conclusions about the nature of man in society.[3] The bulk of such detailed work however remains outside the ambit of planning law *per se.*

Nevertheless since both jurisdictions allow for a significant public involvement in the IDAS process in terms of the right to lodge objections or submissions or to file an appeal some consideration should be given to the problematic nature of this process and to question whether, in totality, it contributes to the overall efficiency and equity of the

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3 In broad terms a major part of the debate is carried on between 'centralists" and "de-centralists".

system or indeed whether efficiency and equity have any relevance at all at this the third stage of IDAS.

In the following therefore an attempt has been made to briefly outline and to comment on the benefits and the perceived deficiencies of direct citizen participation as suggested by writers in the field.

B. PARTICIPATION: THE BENEFITS

1. Participation is able to reveal the collective conscience of the citizenry

This principle is expressed in these terms because beneath the specific benefits which are touched upon below there appears to be a more subliminal level where the nature of man, the nature of community and the reality of power are intermixed in what could, perhaps uncharitably, be described as a cocktail of wish-fulfilment. At this level of debate for a society to be functionally adaptive it should provide a context within which the expression of individual human potential can find its widest expression. This is hardly a political proposition but rather a sociological, philosophical or indeed a theological one.[4] This is perhaps the core idea for those who see de-centralisation of the political process as invariably conferring a range of benefits for society as a whole; a greater sense of

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[4] Which brings to mind Aaron Wildavsky's terse comment that, "planning is not so much a subject for the social scientist as for the theologian." Wildavsky, Aaron "If Planning is Everything, Maybe its Nothing" (1973) 4 *Policy Sciences* p 153.

community, greater concern for the rights and welfare of others and, over time, the emergence of a greater sense of human and cultural value. Emotionally it often hearkens back to a quite erroneous view of the Greek *Ecclesia* as the finest and highest expression of the democratic ideal. In fact such a view of direct democracy merely reflects a careless disregard for the reality which was often expressed in the proceedings of the Assembly where calumny, avarice, jealousy, envy and spite were often given full scope to operate (as in Aeschines' infamous denunciation of Timarchus) and where the welfare of the state (though, in numerical terms, hardly more than a 'community') often became subservient to the right to use the public processes of democracy for no other purpose than to settle private scores.[5] The Athenian experience of direct democracy is equivocal and, apart from its obvious success in restraining the growth of tyranny over extended periods, some of its more flamboyant examples of collective paranoia are similar in underlying motivation and raw emotion, if not in significance, to the local amenity or local environmental debates that now resound throughout most local authorities.[6]

The challenge which has to be taken up by those propounding a 'collective conscience of the citizenry" idea is to define "collective conscience" and "citizenry" and this is not easy to do once the issues are taken out of the arena of a philosophical idyll and we enter the real world of conflicting interests, conflicting claims and colliding prejudices.[7]

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5 There are many examples; the disasterous Sicilian campaign of 415 BC following the Assembly's recall of Alcibiades, the persecution and execution of Socrates and the improper use of the *ostraka* generally.

6 "Whatever vicarious participation they may enjoy is a far remove from the model of Athenian democracy which underlies much of the rhetoric of public interest representation". R. Stewart, "The Reformation of American Administrative Law." (1975) 88 *Harvard Law Review* 1669 at p 1767.

7 This debate takes place under a number of rubrics. Essentially the same proposition is treated by

Only then at the most rarefied and abstract level could the notion of a collective conscience be even contemplated – though it is possible to do so.[8] Arguably, for example, such a collective understanding could be said to exist in respect of the fundamental principles of moral conduct or in respect of Finnis' principles of 'practical reasonableness" – that human life should be respected or that promises should be kept[9]. However beyond such broad principles the concept must break down, and does, in the face of a constant round of competing self-interests. In the real world altruism may be a laudable conception but it rarely comes to dominate the agenda at an "objectors meeting".

Arguably, such a collective facility is more likely to represent an articulation of the hopes, fears and insecurities of a group struggling for attention amongst many other competing claimants and even if such a consensus could emerge on a specific planning issue[10] it is unhelpful to depict it in such Durkheimian terms when, in reality, it represents an expression of generalised concern based upon aggregated, individual perceptions of land value and general amenity.

Albrecht under the heading of 'Advocacy Planning' which he sees as an attempt to "draw weak social groups into the planning process by way of participation and *social guidance* [my italics]" in order to 'activate all society". Albrecht, G *Planning as a Social Process: Towards a Normative Definition of Planning.* (Ann Arbor, University Microfilms International. 1981) Ph.D Thesis. p 155.

8 In this fashion Boer can state that "...social ecology would seem to require that citizens develop a consciousness of their inherent interconnectedness with the natural realm..." Boer,B "Social Ecology and Environmental Law." 1984. 1 *E.P.L.J.* 233 at p 253. This is no doubt correct however such a consciousness is unlikely to evolve in the absence of a demonstrable threat to lifestyle, wealth or health.

9 Finnis, J.*Natural law and natural rights.*(Oxford, Clarendon Press, 1980).

2. Participation as a means to redistribute power

Implicit in this proposition is that power and influence tend not to be evenly distributed throughout society. This can be readily accepted as one of life's more or less eternal verities. It is, after all, such inequality which is at the heart of attempts by Fair Trading and Trade Practices legislation to create a 'level playing-field'. However though the underlying assumption is clearly correct the acceptance of this rather bald thesis necessitates the simultaneous acceptance of two other propositions; first, that higher levels of 'participation' can redistribute power and second, that the field of planning is an appropriate arena in which to attempt such a task.

The concern which arises in respect of the first of these propositions is whether the fact of participation really represents a valid transfer of power and influence or whether, in reality, such an outcome is often illusory, merely representing yet another means by which an elite can manipulate the system to its benefit.[11] In fact experience, since the early enthusiasm of the sixties, has resulted in generally sanguine conclusions. Rather than empowering communities or minority or disadvantaged groups the statutory ability to 'participate' in the planning process has produced rates of participation which tend to directly reflect

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10 Such as the construction of a crematorium in a residential area.

11 See Skeffington Committee Report., *People and Planning.* (London, Report of the Committee on Public Participation in Planning, H.M.S.O., 1969).

levels of education, the ability to organise and the rate of home ownership rather than real economic need.[12] Paradoxically, the adoption of a generally grandiose and value-laden group name has often masked the essentially economic goals of such participants at the expense of those disadvantaged or politically disenfranchised groups which the concept was meant to benefit. In short, often the political and economic beneficiaries of the process are those who already possess a disproportionate share of political access and influence.[13]

The figure of the lone citizen in bitter contest with City Hall or a rapacious corporation is largely a myth. One notable consequence of statutory empowerment has been to replace the individual with a much smaller number of organised activists and interest groups. The broad generality which is implicit in the positive view of participation (and indeed in the pluralist view of the democratic process) is thus often non-existent.[14]

The second proposition is that the planning process is the appropriate arena for the participatory principle to be acted out. On the face of it, there would appear to be no intrinsic reason why, if participation *per se* is to be accorded a high cultural value, that it should begin and essentially end, at the lowest level of government. An argument based round the assertion that planning decisions affect the rights of citizens in a more direct and immediate manner than decisions of State and Federal governments must certainly fail in

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12 Which is reflected in the higher rates of participation in major cities than in smaller communities. Alford, R *Bureaucracy and Participation.* (Chicago. Rand McNally, 1969) p 160.

13 See Pain, N "Third Party Rights. Public Participation Under the Environmental Planning and Assessment Act 1979. Do the Floodgates Need Opening or Closing?" (March, 1989) *EPLJ* pp 26-35 at p 27.

14 .Schultze, William A *Urban and Community Politics.* (Belmont, Wadsworth, 1974) p 32.

the face of many conflicting examples.[15] In fact very often the opposite is correct and the citizen will be much more affected by legislation enacted at the higher levels than by the impositions of a local law. And yet "representation" not "participation" remains entrenched at these levels.

A clear example of this dichotomy occurred with the enactment of IPA. One quite profound effect of the new Act was the incidental abolition of the legal status of property zonings.[16] Arguably, the net effect of this paradigm shift has been to substantially diminish the certainty that a given property will attract a capital value within a particular range associated with its legally entrenched zoning as was the case under the previous Act. However despite such a significant change and the potential for large capital losses to be passed on to citizens, and despite the effective abrogation of the right to compensation in these instances[17]no legal avenue was ever made available to citizens to enable them to challenge these provisions prior to the Act's passing. The contradiction is obvious. The process which gave rise to IPA did not allow the public to halt the administrative or legislative process in respect of it, though the Act specifically grants this right in respect of local authority decisions.

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15 Taxation, for example.

16 IPA, s 2.1.23(1) and (4). Achieved by specifying that a local planning instrument (which has the force of law under the *Statutory Instruments Act,* 1992) cannot regulate development, or the use of, premises. Similarly IPA, s 6.1.2(3) bans zoning prohibitions under transitional IDAS.

17 The right to compensation only marginally exists in respect of interim applications made under a superseded planning scheme and even then with numerous caveats. See IPA, ss 5.4.2. to 5.4.4.

One could argue that if direct participation of the type enshrined in IPA and EPAA is such an evident cultural value then, if only to avoid the charge of manifest hypocrisy, the State and Federal governments should permit citizen initiated referenda. There is however no indication that such a step would be even marginally contemplated by political parties at these levels.

Yet there are no obvious reasons why, if the exercise of a statutory right to participate is beneficial to the body politic for any number of alleged reasons at the local level, the same benefits should not accrue at higher levels. Alternatively, if the 'representative' ethos is believed able to provide sufficient safeguard for the public in respect of matters of major public policy why should representation be an insufficient guarantee in respect of matters of much more minor significance.[18]

In reality the arguments adduced in support of participation as a mechanism to secure greater involvement by the citizenry in the democratic process, though the quest is laudable, are thin indeed. Equally, there is no convincing argument why if the process were to be so beneficial, it should be restricted to the lowest level of government operations.

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[18] In conventional language if a member of the public dislikes a particular action of the government he may elect to not vote for that party at the next election. (Admittedly this would have been difficult in respect of IPA since it was supported by both parties.)

3. Local Authorities may perform their functions more sensitively

Towards the end of her report for the Monarto Development Commission, Sandercock states;

> [I]f it [participation] can sometimes pressure or persuade public authorities to perform their duties more sensitively, it is worth a certain amount of expense and delay.[19]

We have now, at this point, come quite a distance from a grand principle of participative democracy or even an earnest hope "that every human being, no matter how supposedly uneducated he/she might be was capable of making a positive contribution to his community."[20] Absent from Sandercock's conclusion are all the factors which supposedly work together to create, through participation, a better man or a functionally more efficient society. These are to be replaced, it seems, by a new role for participation; to secure openness and accountability within the system. Participation's role, in short, is now a more subtle, prudential one; to maintain honesty, integrity and (perhaps) transparency within the planning regime and to act as some sort of bulwark against the arrogance of elected and non-elected officialdom.

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19 Note 2, Ch 5.

20 O'Brien, T *Planning-Becoming-Development; an Australian Assistance Plan Experience.* (Canberra, Centre for Continuing Education, A.N.U., 1977) p 19.

Such aims, of course, can hardly be criticised. The issue which remains is the question of cost. How much cost is a community prepared to absorb (because most planning costs are passed on to the community) to ensure that their local authority performs their tasks in a 'sensitive' manner? This is the real focus of the debate which will gather momentum in coming years under both IPA and EPAA.

4. Higher levels of participation lead to increased innovation and adaptiveness[21]

On the face of it this suggestion appears to possess a degree of cogency based around the simple proposition that a greater involvement by the public should result in an expansion of the data context within which a matter is to be decided and that this, in turn, should increase the likelihood that the end result viz. the decision should be 'rational'.[22] The perspective from which this principle arises is a sociological one though essentially it is another expression of Friedrich Hayek's more general proposition known as the 'synoptic delusion'. What Hayek calls a 'delusion' is the belief that in any situation calling for a conclusion or decision, all the relevant facts can be known to one mind and that it is possible to construct from this knowledge all the particulars of a desirable social order.[23] Consequently, it should be simple to argue that the more individuals and interested groups contribute to the information gathering process, the more disparate the data context

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21 Smith, R.W., *Public Participation in Planning and Design.* (Ann Arbor, University Microfilms International. 1978. Ph.D Thesis.) p 22.

22 In terms of this argument (as distinct from the previous one) the stated benefit can be expressed in terms of rationality with 'rationality' variously defined as increasing efficiency, competence, fairness or equity.

23 Hayek, F *Law, Legislation and Liberty.* Vol 1 (London.,Routledge and Kegan Paul, 1973) p 8.

becomes, the more potentially 'rational' the ultimate decision should be.[24] However even the proponents of this principle do not suggest causation in a straight line and indeed they cannot in the face of the fact that much of the relevant information is necessarily derived from various expert sources such as planners themselves together with architects, engineers and so on. In this context the mere addition of more inputs which are based upon perceptions which may be self-serving, biased, strangely idiosyncratic or simply wrong-headed may do little to solve the delusion alluded to by Hayek. In fact it would be at least open to argue the converse in many situations.

In an attempt to get round this problem proponents must, of course, suggest that the information which is available from non-expert sources viz. the lay public in fact possesses a quality distinct from that of the expert or the scientist and that somehow because of this distinctiveness it can become a valid and indeed very worthwhile addition to the data-context. This they do by postulating, in various forms and using differing terminologies, a qualitative differentiation between the various spheres of knowledge. To Coenen[25] there are three kinds of knowledge; 'scientific' which is tested and where the results are repeatable, 'ordinary' which relates to our common sense perceptions of reality and causation and 'interactive' which is knowledge which arises as a consequence of the act of

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[24] Which is a re-statement in effect of *Coase's Theorem* (1960) viz. that, given a set of standard economic assumptions, 'bargaining' tends to produce socially optimal results.
Boer takes the issue to the point where he can conclude that "... community participation is not just a strategy for the implementation of the [environmental] ethic, but quite possibly the strategy for implementation." (Authors italics). Boer, B "Social Ecology and Environmental Law" (1984) 1 *E.P.L.J.* 233 at p 249.

[25] Coenen, F, Huitema, D and O'Toole, L.J. (eds). *Participation and the Quality of Environmental Decision making.* (Dordrecht, Kluwer, 1998).

participation itself. Friedman[26] suggests two forms of knowledge which are relevant to the planning process; 'processed knowledge' which, again, is abstracted from the external world and which utilises scientific theory and logic and "client' or personal knowledge which flows directly from the personal experience of the participants. With the exception of the third class of so-called 'interactive knowledge' the categories listed clearly cross over and the only point of difference is in the terminology employed.

The core of the argument nevertheless is that in some way all three (or two) forms can represent legitimate inputs into an increasingly pluralistic decision making system. Stripped of the terminology, the point both of these writers and others appear to be making is that apart from specific scientific knowledge (such as, for example, the angle at which sound propagates from motorvehicles) the planning process should also be able to be informed by the common sense responses of non-expert participants. Beyond this simple point Coenen's third category of knowledge is no doubt quite legitimate. It is certainly conceivable that, out of the interaction of experts and lay participants or between lay participants *inter se*, previously uncontemplated factors and issues may arise by a process of synthesis and ultimately emerge as qualitatively different perspectives on the problem. This is even more conceivable if the action is translated to a plane which presupposes a very high level of citizen involvement and an exceptionally interactive and functionally adaptive community.

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26 Friedman, J "The Public Interest and Community Participation: Toward a Reconstruction of Public Philosophy. (1973) 39/1 *Journal of the American Institute of Planners* pp 2-12.

Three caveats however are worthy of mention: first, it is doubtful if in the vast majority of cases much 'interactive' knowledge ever emerges from a process where the participants tend to see themselves as adversaries and where there is often little movement from initially stated positions, second, it still remains an open question whether the innovation and adaptability of the system is enhanced by the supposed incorporation and application of these postulated different categories of knowledge and finally, even if innovation is increased at the margins of an issue the question remains whether the putative benefits of such a process (which are admittedly qualitative) outweigh the costs (which have the benefit of being quantifiable in terms of time and money). A fourth issue, the question of transaction cost, is taken up subsequently.

5. Participation produces higher levels of competence

Although one of the principal assumptions of this thesis is that the planning process can be assessed on the twin bases of efficiency and equity, universal agreement does not exist that such criteria are, in reality, appropriate or that they are useful tools for categorising any decision which issues from a formal planning process. The starting point for this proposition is that since a given planning issue can encompass such a melange of diverse factors, and from conceptually disparate areas, to suggest an end decision can accurately balance all of them, arriving at a conclusion which, cognitively, can be described as efficient and equitable in societal, cultural, normative, economic, environmental and now, inter-generational terms really amounts to an exercise in wishful thinking. This is the basis

for Rittel and Webber's[27] categorisation of planning issues as a "wicked problems". By a "wicked problem" they mean an issue to be resolved in which the multiple elements of the data set are of the types mentioned above. Here normative factors may represent serious and valid elements of the total equation and the weight to be applied to such factors is problematical and inherently variable from case to case. Set against these factors and operating in the same environment specific transaction costs may, in contrast, be readily reducible to their component parts.[28]

Rittel and Webber accordingly conclude that since most of the issues which are dealt with by planning systems are "wicked" the attribution of terms such as 'efficient' and 'equitable' to the end product is misleading and inappropriate. It is this argument which leads Renn and others to abandon the efficiency/equity dichotomy and to suggest it be replaced by 'competence' and 'fairness'.[29] These writers have difficulty with the suggestion of 'optimisation' which they believe is inherent in such terms as 'efficiency' and 'equity' and which appears to not sit well with the inherently sub-optimal outcomes which one would expect from a process which is called upon to balance, weigh or juggle scientific data on the one hand and the intuitive, emotional or normative orientations of participants on the other.

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27 Rittel, H.W.T. and Webber, M.W. "Dilemmas in a general theory of planning" (1973) 4/3 *Policy Sciences.*

28 This is, as mentioned in Chapter 1, a perennial issue confronted by the N.C.C.

29 Renn, O., Webler T. and Wiedermann P. *Fairness and Competence in Citizen Participation.* (Dordrecht, Kluwer, 1995) pp 17-34.

One difficulty with this perception is the necessary identification of, say, 'efficiency' with an optimal end-state which is the perfect outcome of the application of perfect knowledge. No such state has ever been known to exist in the social sciences, including, of course, law and economics. In reality, terms such as 'efficiency' are always relativistic and as such are as capable of expressing the 'wicked' nature of the problem as the alternative. Indeed they may be rather better terms to use because their use at least points to the embedded problem (perfect knowledge/ perfect outcome). The alternative, which is to replace them with euphemisms is very much the worse course of action. Such an approach may be arguable if the suggested replacement word leads to an increase in clarity overall however this is open to doubt in this instance. 'Competence' may well imply a sub-optimal condition but it also carries with it the implication that the search for excellence in planning is such a fruitless quest that it can (and should) be replaced by a mere journeyman inclination to 'muddle through'.

In summary the use of such alternative terminology adds little to the analysis of the issues and indeed may further confound them. The proposition contained under this sub-heading can therefore be simply restated as "increased participation may lead to an increase in the (relative) efficiency of the planning process." This rather more significant assertion has been touched on under the previous heading of 'innovation and adaptation' and will be considered further in the following discussion of the problems which are perceived to flow from the right to participate.

C. PARTICIPATION: THE PROBLEMS

Although, for the reasons given, their terminology has not been adopted Renn, Webler and Wiedemann, in passing, arrive at a good summary of the difficulties associated with citizen participation.[30] Their compilation together with some additional issues raised by Alford[31] is broadly utilised in the following discussion.

If participation was universally perceived to be a public good then obviously little debate would need to occur concerning its failings. In fact however the benefits which the society or the planning process derives from the encouragement of high levels of citizen involvement are equivocal. If the participation ethic is not viewed in somewhat abstract sociological or socio-political terms but rather as merely one component of the total *planning* process which *may* lead to more functionally adaptive decisions then ultimately the debate should be about costs and benefits. If the total cost of maintaining the statutory edifice of participation becomes excessive in terms of cost to the individual applicant, the community, the environment or the planning process itself then, rather than accepting it as an unchallengeable, sacrosanct principle, the inherited system should be modified to reduce its dysfunctional affects. In this context the problems and difficulties outlined below, together with the perceived benefits, create a conceptual framework within which, it is to be hoped, a new balance can be achieved.

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30 Note 29.

31 Note 11.

1. Participation both facilitates and enlarges the scope of conflict

It is a common enough experience in life that conflict often expands in a direct ratio to the number of people who wish to opt into the process.[32] The potential therefore in the IPA or EPAA planning processes for rather high levels of conflict (in both scope and intensity) to exist would appear to be immanent in the statutory provisions which outline who can object (or, in the current terms, 'submit') to an application,[33] the net effect of which is to not exclude anyone from the process. The principle is essentially one of global inclusion.

The concern which is expressed under this heading does not have its genesis in an impossible desire to remove all conflict from the system. Conflict and the processes by which conflict is resolved are necessary and essential aspects of any rational decision making model. Rather, the issue concerns first, the question of the scale (and perhaps the intensity) of conflict which is often the consequence of an open-ended policy of inclusion and second, whether, at the end of the day, the majority of development applications emerge from the IDAS process enhanced in some particular aspect or alternatively degraded in terms of their overall conception. In regards to the first issue there can be little doubt that much of the antagonism or even outright aggression sometimes displayed in response to a development proposal is misplaced or based on fallacious assumptions

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32 For an insightful analysis of the role of small and large groups in such processes see, Olson, M *The Rise and Decline of Nations.* (New Haven, Yale University Press, 1982).

33 IPA, s 3.4.9(1) allows 'any person' to make a submission. EPAA, s 79(5) in respect of 'Designated Developments' and EPAA. Regulation cl 64(2)(f)(i), in respect of the generic category of 'advertised developments' (EPAA, s 4(1)) similarly permits 'any person' to make a submission.

concerning the proposal or is simply mischievous. However certainly not all responses to all proposals can be considered in these terms. In some cases submissions from the public do address the planning issues specifically and represent a valid information input into the system. In some cases, though perhaps rarely, they may even in fact address an issue which had not previously been considered either by the planners or in the various expert reports compiled for and submitted by the applicant. However in the very large majority of routine cases virtually the totality of issues which arise will already be the subject of a planning policy, a D.C.P., or E.P.I.[34] and these policies will structure both the preparation of the application by the applicant and the initial and subsequent review of the proposal by the planner. In other words, in respect of the majority of applications which are routine, the opening up of a broad debate which results in the receipt of large numbers of submissions on vague amenity grounds or which are based on almost pathological assumptions concerning the intentions of the applicant may add little to the quality of the end decision (and may even detract from its quality) but will certainly and demonstrably add to cost and create delay.

Any observer of the process may sometimes be left with the impression that 'after the captains and the kings have departed' and after the tumult has died down very little (and sometimes nothing) has been the outcome of a costly and vitriolic public participation process. One could even suggest in such instances that if the participation process is achieving anything it is doing so in areas quite outside planning or even of the project supposedly being reviewed; that the notification may result in neighbour meeting

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[34] Which, themselves, have already gone through a notification and submission process.

neighbour for the first or second time, that an embryonic though ultimately, evanescent sense of community may spontaneously arise and that into some lives an immediacy and an exciting astringency may exists for a time. In this sense the applicant may be contributing to some form of fleeting public good. However if this is often the only outcome then it is demonstrably not a planning outcome and the two matters should not be confused, though they often are by local politicians.

Concern with respect to the second issue should now be obvious. If one extracts from the IDAS equation a relatively small number of integrated applications or state significant applications, in short the ones which tends to attract significant media attention, and address the vast bulk of local development applications it is doubtful whether the often febrile process of public participation genuinely results in a qualitatively better outcomes.[35]

Although the evidence, to date, is anecdotal discussions which the writer has had planners in a number of local authorities would indicate that the largest portion (up to 75%) of routine applications can and are assessed rather quickly on their merits and that relevant development conditions can similarly be agreed to promptly. Furthermore there seems to be broad agreement that, in these cases, the supervening notification and submission process has a marginal influence on whether the application will be approved and a marginal effect on the nature of the development conditions imposed. They agree however that the administrative costs associated with the review of the submissions and preparing subsequent written advises to submitters can be very high.

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35 That is, the outcome is demonstrably better than would have been the case had the application been

One conclusion from the above could be that the IDAS process in both jurisdictions could be substantially improved if by some means the bulk of these routine matters could be made exempt from the public submission process. There appear to be moves underway in this regard in NSW and these will be discussed elsewhere in this chapter.[36]

2. The Tryanny of Expectations

Throughout the nineties one recurring theme in what could be loosely called the national or 'public conversation' has been 'ownership'... as in 'ownership of the process', 'ownership of the "outcome"', "ownership of the problem' and so on. In turn, 'ownership' has become associated in many instances with the similarly proprietary-sounding term, 'stakeholder'. These are frequently combined in the public conversation as ... "the stakeholder should have ownership of the process... the problem... the solution".[37] Stripped of their sociological gloss these statements are attempting to express a simple normative proposition viz. that those individuals who are affected by a decision, or 'outcome' ought, to be able to view the process which produces that result as morally legitimate. They will perceive it to be legitimate, so the theory goes, if the process is able to demonstrably take account of (or at least, consider) their views and their interests and the most obvious

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categorisable as "exempt" (IPA) or 'complying' or "local" (EPAA).

36 Briefly, the 1999 amendments to EPAA, (ss 72 and 96), enlarge the matters in respect of which notification and advertising is not required.

37 'Public Conversation" is, it seems to me, an appropriate phrase for a number of reasons one of which (incidentally) is that such terms gained initial currency in the area of public administration. (Though there a signs that H.R. departments in some corporations are now starting to be ape their public sector colleagues.)

operational means of conveying this impression is to include all such parties within the ambit of the negotiating process.[38]

The philosophy which underlies this general policy of inclusion has been adopted by both jurisdictions in the absence of any readily acceptable means by which those who are adversely affected by a proposal can be separated out at the application stage from those who are not.[39]Consequently, and as previously noted, both jurisdictions permit "any person" to make a submission in respect of a notifiable proposal and at a sociological level such a policy generates a degree of support for the reasons touched on above. Citizens, ostensibly at least, become transformed into participants, an internal administrative process may become more transparent, an increased variety of ideas may be canvassed and, presumably, out of this new vitality decisions should be more rational or more efficient (or to use Renn's phrase, "more competent").

While conceding some of the benefits (though not necessarily the *cost*-benefits) adduced by the proponents[40] it sometimes appears that in their enthusiasm for the idea they lose sight of the central intent of IDAS which is to formulate a *planning* process first and foremost and certainly not, historically at least, to create a socio-political, activist milieu.

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38 All these ideas were expressed as positive goals by the 1996 *NSW Social Justice Directions Statement.* This is available at: <www.treasury.nsw.gov.au>

39 It is ultimately left to the court to apply different 'weights' to submissions. A submission based on adverse effect to general amenity will be given more weight if received from a nearby resident than from someone in the next suburb. The administrative load associated with processing the submissions at the local authority level may however be the same.

40 Planners will occasionally concede that sometimes (though it is apparently rare) a novel suggestion will be contained in a submission.

Though this latter intent is clearly implicit in the drafting of the notification and submission provisions of both Acts, currently the ongoing history of public participation in both jurisdictions illustrates well that it is indeed a "two-edged sword". At a pragmatic level, one of the aims of 'planning' is to produce decisions which can be reasonably justified in terms of established policies and difficulties and dissonances will continue to recur if, as a process, it can be easily coopted by theorists whose only common starting point is often a disenchantment with what they perceive to be the inequities and limitations of representative government.

With these broad comments in mind the dysfunctional aspects of rising community expectations fall into three categories. First, the operation of a general policy of inclusion, together with an unqualified right to object and the co-existence of general appeal rights has undeniably created a sense of empowerment in and amongst certain sections of local and particularly middle-class, communities. The outworking of this sense of power has been a tendency by both planners and local politicians to pay almost ritual obeisance to local complaints[41] which has, over time, acted to increase the size of the geographical area over which such groups believe it is legitimate to sustain objections or claims. In short, it has become a common-place observation that, over time, many such groups - as a natural extension of this sense of empowerment - eventually appear to lay claim to virtual veto-rights over any development occurring in their expanded area of local interest. Such a claim, either expressed overtly or implicit in underlying community attitudes, is always

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41 The word 'ritual' is used because in fact there may be little "content" in the response of politicians and planners to the objections when they are forthcoming.

going to be unsustainable but is a direct consequence of the interstitial insertion of a socio-political aspiration into the traditional assessment process.

Second, this participatory ethos at the local level may compromise efficient regulation even in the short term. This may occur through the unwillingness of local participants to acknowledge the total cost of compliance with an aroused community expectation concerning a matter of perhaps marginal local utility. For example, an increase in the size of a "vegetation protection zone" [V.P.L.] or the imposition of a more severe "development restriction line" may be the outcome not of a valid or rational concern on environmental or amenity grounds but rather represent an emotional response to the sudden perception that some item, previously happily ignored, now requires preservation or protection. This may be as single-minded as a tree. In such a circumstance, though a satisfactory result could have been achieved in terms of the relevant statutory purposes, by not imposing such a condition the local authority may see it, from their point of view, as a matter of marginal cost and in fact impose the condition. Often this will be depicted by participants and local authorities as a "win-win" situation and often it is nothing of the sort. It appears to be "win-win" simply because the costs are imposed on the applicant and local politicians sense they have avoided an unfavourable electoral consequence. The hidden cost of this exercise, to impose an unnecessary condition, are often unguessed at by local planners who, in the main, are unfamiliar with the cumulative effect of changes to site area on the end capitalised value of a development. A small change in the boundary of a V.P.L. will reduce site area which may directly reduce the area available for car parking. This, in turn, (unless dispensation is granted) will reduce the gross floor area, nett lettable area and nett income. Further since investment value is calculated on a capitalised return basis the

final expense and capital cost of this supposedly small change can be large indeed. This consequential increase in cost will, in the normal course of events, be passed on in the form of a rental increase.

Local participation in such an instance as this, where it is manifested as local environmental action, tends to make each case a special case with its own idiosyncratic blend of wishful thinking and special pleading. It is accepted that at one level all cases are special cases however the difficulty of maintaining and articulating consistent local policy and creating a reasonable level of certainty in such a milieu cannot be overestimated.

Third, the existence of a vociferous group who object strongly to a proposal on environmental or amenity grounds is no guarantee that in the longer term the acceptance by an approval body of the objection will improve either of these matters. On the contrary, such an acceptance could worsen these conditions over time. For example, the failure to approve a small neighbourhood retail centre in an expanding residential area in the face of strenuous objections from nearby residents may lead directly to a greater use of cars as residents drive out of the area for convenience shopping, to higher traffic density in local streets, to a higher accident rate and so on. While these potential, adverse consequences will be put forward by the applicant in its representations to council it is hard to avoid the conclusion that the preoccupation of most resident action groups and such like is with very short term and sectarian issues and that this sits uncomfortably with the manifest need for consistent policy and reasonable certainty throughout a local authority area.

3. Duplication and Redundancy

Most developed planning jurisdictions in the western world provide, at a statutory level, for an extensive public, consultative process prior to the formal introduction of a new planning scheme or other planning instrument and in many instances this consultative process is further reinforced by an extensive round of public hearings. The public, through these consultative arrangements, are able to bring their opinions and concerns to bear on the planning process at the important level of policy formulation. This right could be described as "Level One Participation".

A supplementary right to object to specific proposals in terms of the policy positions already adopted by a local authority, or "Level Two Participation", which now co-exists in most jurisdictions, could be said, in terms of this argument, to be either redundant because the policy reflects the substance of the objection or spurious since the objection enshrines a proposition, principle or claim previously rejected in the policy formulation process and which involved perhaps high levels of Level One Participation.

The counter-argument, of course, is that policy-is-policy and reflects a broad level of generality whereas a development application possesses a certain immediate and often individualistic specificity. Consequently, in this argument, it is entirely appropriate for this quality to find expression in a further administrative process which permits the expression of more individual concerns.

Bridging the gap between these two propositions has proven to be difficult. Supporters of the participatory ethic see any increase in consultation as a positive good for many or all of the reasons touched on above, while supporters of the redundancy argument, who tend to look at planning 'outcomes' in terms of timely and balanced decision making, can justifiably point to the objection/submission process as one of the principal causes of expense and delay.

Although both of the jurisdictions being reviewed here have adopted a traditional, indeed fulsome, participatory ethic which permits the public to intervene at both Level 1 and Level 2, it is perhaps salutary to note that by no means all planning jurisdictions, even today, have adopted such an approach.[42]

It is, in any event, difficult to avoid the impression that the short history of the participation provisions has sometimes generated a deal of sensitivity to the issue at the political level. Though politicians are sometimes prepared to acknowledge the difficulties created by an often unwieldily and time-consuming process and the absence of any discernible benefit flowing to any party in particular instances, the process has virtually become sacrosanct in most jurisdictions. Having therefore inherited a commitment to the *idea* (though not always an enthusiastic commitment) legislators have, under pressure from planners and applicants in both jurisdictions, commenced a slow process by which the ambit of

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42 Of the 15 current members of the European Community only three, Ireland, Luxembourg and the U.K. operate an open-access objection system. All other systems place statutory restrictions on the right to object. In the cases of Denmark, Spain, Italy and Portugal there is no right to object to specific applications. See; *The European compendium of spatial planning systems and policies.* Vol 28. (E.U, 1997) p 84.

participation will be narrowed and its impact diluted. The means employed to achieve this are various but they include the categorisation of applications as exempt, complying, self assessable, code assessable or local. This issue will be taken up further after an examination and comparison of the notification and participation models in both jurisdictions.

D. NOTIFICATION AND PARTICIPATION: THE IPA AND EPAA FRAMEWORKS

As has been mentioned previously in the discussion under 'Applications' much of the statutory and regulatory framework of EPAA is determined by the categories of development established by the Act. This leads to unnecessary duplication and complication even with respect to an ostensibly simple matter such as indicating to applicants the nature and extent of their notification requirements. EPAA does not establish anything like an overarching principle such as the impact and code assessment dichotomy under IPA which would allow it to avoid some of these difficulties. The EPAA framework must therefore be treated in some detail even though it is essentially procedural, often duplicative and, at the 'lower' levels of local development applications is blurred by the idiosyncratic requirements of local EPIs and DCPs.

1. EPAA

It is only with a certain insensitivity then that the EPAA requirements can be seduced into something resembling a dichotomy for the purpose of illustration and comparison with IPA.[43] However, with that reservation in mind, the Act can be seen to create two broad classes of developments which are notifiable. These are "advertised developments" and "designated developments".

(a) Advertised Developments

These are defined in the definition s 4.1 as:

> a development...other than designated developments, that is identified as advertised development by the regulations, an environmental planning instrument or a development control plan.

The Regulations[44] in turn, divide 'advertised developments', initially, into two classes.

These are;

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43 This appears to be the scheme of the Act. The format of the Act however is regrettably obscure in this area.

44 EPAA, Regs cls 82-91.

- State Significant developments which are not 'designated developments' and which are referred to in s 76A(7)(b) and (d)[45]These are known as State Significant advertised developments.

and,

- 'Integrated developments'[46] which are not State Sensitive or designated developments but which require approval under the *Heritage Act* 1977, the *Water Act* 1912, or the *Pollution Control Act* 1970.[47] These are known as nominated integrated developments.

Although the first category is self explanatory and does not depart from the definition of a state significant development in s 76A(7), the second category, in nominating only three of the ten Acts which are used by s 91 to categorise a development as 'integrated' essentially divides integrated developments into two categories viz. those which are notifiable and those which are not. However even this cannot be said with certainty in respect of those applications requiring an approval under one or other of the remaining seven Acts because such a development could still be required to be notified under the terms of a local or

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45 These are developments that can be carried out under an EPI but which the Minister has gazetted as having a state or regional planning significance or which the Minister has exercised his discretion to prohibit under s 89.

46 See EPAA, s 91.

47 Now repealed.

regional EPI or DCP.[48] This group then constitutes a third category of advertised development under the section viz.

- ***Other advertised developments.***[49]

(b) Designated Developments.[50]

A development may be defined as designated by either the regulations or by an Environmental Planning Instrument[51] and they are extensively listed in Sch 3 of the regulations[52] All such applications must be notified in accordance with the Act and regulations.[53] Adding to the potential complexity, and in addition, any consent authority may declare an application in respect of an existing use or a previously approved project seeking a modification of conditions to be a Designated Development for the purposes (including notification purposes) of the Act.[54]

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48 Foreshadowed amendments to EPAA will result in the abolition of DCPs which will be incorporated inheocal plans. Similarly, the rules contained in SEPPs will be incorporated into the state plan and issue-specific REPs into broader regional plans for 14 or 15 proposed regions.

49 The principal statutory provision which gives enabling effect to public participation, (s 79A) is curious. The second sub-section seemingly creates a fourth residual category which must be advertised if required by a DCP. It is almost certainly meant to be a catch-all provision though the exclusion of EPIs as a trigger is strange.

50 It will be remembered that 'designated developments' are those which must be accompanied by an Environmental Impact Statement. See EPAA, s 78A(8)(a).

51 EPAA, s 77A and EPAA Regs, cls 77-81.

52 The Sch 3 listing is not exhaustive however. A consent authority may declare an application in respect of an existing use or a previously approved project to be a 'designated development' for the purposes of the Act. See EPAA Regs, Sch 3 Pt 2.

53 EPAA, s 79(1).

54 See EPAA, Regs Sch 3, Pt 2.

Advertised and Designated developments thus constitute the two broad, and as indicated, flexible, categories which require public notification.

In keeping with the 'layered cake' approach of EPAA the formal mechanics of notification share a common thread but differ in some strangely minor aspects. Since an overview is necessary if only to provide a basis of comparison with the situation under IPA, and a long qualitative description of each category would exhaust the writer and no doubt the reader most, though not all, of the salient features have been discussed in the following summary which stresses the variations between each category rather than their common elements.

(c) Public Display

(i) Designated Developments[55]

- The Consent Authority is required to place the application and all supporting material (such as the E.I.S in the case of a 'Designated Development') on public display for a period not less than 30 days. The 30 day period runs from the day after the newspaper notice appears pursuant to s 79(1)(d).

(ii) State Significant Advertised Development[56]

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55 EPAA, s 79(1).

56 EPAA, Regs cl 64(1).

- Section 79 of the Act also applies to State Significant Developments. In this case the Minister, as the appropriate Consent Authority[57] has responsibility for compiling the notice of application and performing the other functions required by the section.

(iii) Advertised Developments and other Notifiable Developments[58]

Notice in these instances is to be given in accordance with the Act, the Regulations, an EPI or a relevant DCP.[59]

(d) The Written Notice

(i) Designated developments

- s 79(1) requires that a detailed written notice must be provided to the following persons:

    a) to owners and occupiers of adjoining land.[60]

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57 EPAA, s 76A(9).

58 EPAA, s 79A.

59 EPAA, s 79A(1) and (2).

b) to owners and occupiers of land which in the opinion of the consent authority may be detrimentally affected by the proposed development.

and,

c) to any other persons who may be required to be notified by the regulations.

(ii) State Significant developments

- s 79 of the Act applies equally to this class of development with the above three classes of persons receiving a written notice.[61]

(iii) Nominated Integrated Developments and other advertised developments

- The regulations, cl 88 restrict the notification requirement to;

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60 The contentious issue concerning the meaning of 'adjoining land' has, in both jurisdictions been left to the respective planning courts and will be dealt with subsequently.

61 EPAA, Regs cl 83.

a) owners and occupiers of land adjoining the site which is the subject of the application,

and,

b) to such public authorities (other than concurrence or approval authorities) who, in the opinion of the consent authority, may have an interest in the application.

One would have thought that if owners of land which may be detrimentally affected by a development involving three of the Acts under s 91 should be advised then at least a similar situation should prevail in respect of the other seven Acts. However this is not the case.

(e) The Content of the Notice

(i) Designated Developments

- The list of matters which are required to be detailed in the Consent Authority's notice and on the 'site board' is extensive[62] and include the following:

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62 See. EPAA, s 79(1) and Regs. cl 77-81.

- the land description
- the name of the applicant and the approval authority
- a description of the proposed development
- a statement that the development is a 'designated development'
- That the application, other documents and the Environmental Impact Study are available for inspection
- That 'any person' may make a submission during the notice period and that if the submission is by way of an objection that the objection must specify the grounds of objection
- If the Designated Development is also "Integrated" a statement to this effect including a list of the appropriate approval bodies and the approvals sought
- A statement that a person who makes an objection may appeal to the Land and Environment court[63]

(ii) State Significant Developments

The information content for both the written notice and site advertisements for this class of development is detailed in the regulations[64]. They provide for three exceptions to the information requirements of the previous category viz:

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63 For appeals to the L&E Court see EPAA, s 98.

64 EPAA, s 79(1)(b) and Reg cls 82-85

- the notice must now contain a statement that the development is not a designated development
- as indicated by the nature of the category, submissions in respect of the development are to be directed to the Minister and,
- that if the proposed development is a "Prohibited Development" under EPAA, s 89, the local council can request a Commission of Enquiry be held in respect of the matter[65]

(iii) Nominated Integrated and Other advertised Developments

In this instance the content of the notice[66] varies only in respect of those essential qualities which make up the class. Accordingly, it is considered essential that the lay public be advised that this is, in fact, an integrated development.

At this point it is appropriate to pause ie prior to briefly considering the site notice and advertising requirements, and to consider the IPA notice requirements by way of direct comparison.

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65 See EPAA, s 119 and s 89(3).

66 Detailed in EPAA, Reg cl 89.

2. IPA

For the purposes of public notice and public participation generally, the *Integrated Planning Act,* 1997 establishes only two main classes of development applications viz. those which are "impact assessable" and hence "notifiable" and those which are "code assessable" and "non-notifiable".[67]By this simple expediency IPA avoids the variable standards dictated under EPAA which reflect the varying classes of development created by that Act.

It can consequently be stated with reasonable certainty in Queensland that the four activities enjoined under the general heading of "public participation" in both jurisdictions, viz.public display and inspection, the written notice to nominated parties, the 'site board' notice and the advertising requirements are the same across the State and operate irrespective of local planning scheme policies or the type of development proposed.[68]

(a) Public Display

Though IPA has made the Impact/Code Assessability dichotomy central to the development assessment process, all applications of either category must be made

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67 IPA, s 3.4.2(1). Exempt and Self-Assessable categories are minor in scope and application.

68 IPA, s 6.1.28(1).

available to the public for inspection[69] until, generally, the end of the appeal period. Some material can be excluded from the ambit of this requirement such as sensitive security information however the intent of the Act is clearly to provide all relevant material to the public.[70]

(b) The Written Notice

One of the Actions required to be completed within the 'notification period'[71] is to supply a notice to all owners of adjoining land.[72] This notice must be in the form approved by the Chief Executive Officer[73]. IPA is silent, as is EPAA, on the issue of what constitutes 'adjoining land' for this purpose preferring to leave the issue to the appropriate court to determine on a case by case basis. However in sharp contrast to EPAA, the Queensland Act is also silent on the content of this written notice. It would seem that the content of the owners notice under part (c) of this section is the same as that required under the preceding sub-section which refers to the notice on the land. This effectively limits the notice to a short description of the subject land and the proposed project together with a short précis of their rights under the Act to make a submission and to inspect the application and supporting documents.

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69 IPA, s 3.2.8(1).

70 The requirement includes all "supporting material" which is extensively defined in IPA, s 3.2.8(3).

71 'Notification period' is defined in IPA, s 3.4.5. and is 15 days (or 30 days in the case of 'referral coordination') from the day after the last action required to be performed by s 3.4.4(1). See also IPA, s 3.4.6(2) and (3).

72 IPA, s 3.4.4(1)(a).

73 IPA, s 5.8.1. Currently this is Form 7.

(c) Summary

It is appropriate at this stage to compare and contrast the two systems as the additional requirements viz. the site notices and the newspaper advertising follow the same principles outlined for public display and the owners notice. [74]

It should now be clear from the above treatment that the inherent simplicity of the IPA notification regime is nowhere matched by EPAA. IPA, of course, has been able to accomplish this because it has abandoned a history of categories and other constraints and adopted a totally new IDAS paradigm. EPAA is still constrained by a legislative and regulative structure of increasing age. Even given the category issue however little attention seems to have been given in NSW to the reasons which should motivate a notification process or to the outcomes which are expected of such a process. Consequently it becomes a firm requirement under EPAA that the notice for a state significant development must indicate to the adjoining owner that the development is not a designated development, or if it is also a prohibited development that certain other events may occur. Similarly, of what real and direct significance is it likely to be to a lay owner of an adjoining property that the proposed development next door is designated and could also be integrated?

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[74] They are, accordingly, not considered further. The requirements in these regards are however detailed in EPAA, Regs Pt 6 and IPA, s 3.4.4(1)(a) and (b).

Under these circumstances the question which needs to be asked is who, in reality, is benefiting from the notice requirements and what level of understanding of the Act is casually assumed to exist in and amongst ordinary members of the community?

The EPAA process is needlessly complex and could doubtlessly be abbreviated without necessarily abolishing the overarching development classes created under the Act should it be considered essential to retain them. The Queensland system certainly provides for a much more efficient over-all system which is easily explained to and understood by those affected by a development.[75] There are essentially only two things a notification system need set out to do; to advise that a particular type of development is proposed and to indicate where the application and supporting material can be inspected. IPA manages to achieve this efficiently and fairly within the ambit of a framework established by three consecutive and relatively short sections. [76]This is in sharp contrast to EPAA which manages to achieve considerably less while attempting considerably more.

Running parallel with the formal statutory requirements detailed above are a range of associated legal issues which have inevitably arisen under subsidiary provisions or as a consequence of the evolution of various principles of interpretation by the relevant courts. Each of these areas will now be discussed in turn and the similarities and dissimilarities of approach in each jurisdiction contrasted with the overall intention of extracting principles

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75 Applicants are included in this category.

76 IPA, ss 3.4.4(1) to 3.4.7.

which would seem to best secure an increase in the efficiency or equity of a planning regime.

This discussion will take place under the following headings:

- Notification and Participation as a jurisdictional requirement. The obligations of the applicant

- What is a properly made submission. The obligations of the submitter

- The administrative and judicial capacity to forgive errors

- The reception of environmental submissions

- Fraudulent or deceitful submissions

E. NOTIFICATION AND PARTICIPATION AS A JURISDICTIONAL REQUIREMENT

IPA lays out the framework Notification Stage in Ch 3, Pt 1 which as well as establishing the various forms of notice, their content and other procedural matters specifically sets out

to describe the purpose of the stage.[77] Accordingly it is the purpose of notification to give a person;

a) the opportunity to make submissions, including objections, that must be taken into account before an application is decided; and

b) the opportunity to secure the right of appeal to the court about the assessment manager's decision.

In the context of some of the cases which are to be considered under this heading this represents an serious attempt to formally describe the statutory purpose of the stage which is important since the description of any specific requirement or set of requirements as mandatory or directory may turn on the court's prior construction of the Act having regard to the intention of the legislature.[78]

In contrast neither EPAA nor its regulations contain any similar statement of principle, once again reflecting the older structure of the Act, and it has been left to the courts to infer a statutory purpose more or less in line with the Queensland Act.

The point at issue here is whether strict compliance with all the notification requirements and with all their procedural specificity is an essential prerequisite or condition precedent

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77 IPA, s 3.4.1.

78 See *McRae v Coulter* (1986) 7 NSWLR. 644. It is conceded however that the recent decision of the

to both the jurisdiction of the court to hear a matter on appeal and the authority of a council to decide the matter in the first place. In short, to what extent are these requirements 'mandatory' or 'directory' or if the interpretative principle is now statutory intent, what factors will bear upon the issue? Until recently, the highest authority on point arises out of earlier Queensland legislation, *Scurr v Brisbane City Council*[79] which concerned the sufficiency or otherwise of the advertised notice of a development application under s 22 of the then *City of Brisbane Town Planning Act*.

The appellants contention was that the reference in the notice to the construction of a 'shop' was an altogether insufficient and inadequate description of a proposal which, in reality, involved the construction of an 11,000 m2 Discount Department Store with parking for 1100 cars.

The following principles are derivable from the judgments in this case:

- the adequacy of a notice is properly a matter for the court to decide on appeal[80]

HCA in *Project Blue Sky v ABC* (1998) 72 ALJR 841 largely torpedoed this distinction with the emphasis now rather firmly placed on the intention of the legislature.

79 (1973) 133 CLR 242.

80 Gibbs J at p 243.

- it is not sufficient for a notice, given a provision which requires certain particulars to be provided, to merely refer to another source from whom those particulars can be obtained[81]

- a reference to 'particulars of the application' given the obvious policy goals of such provision, should not be given a narrow meaning[82]

- that since the same section required objectors to state the facts and circumstances upon which they were relying in support of specific grounds of objection it would be unfair if the applicant could validly provide a bare minimum of perhaps even misleading information[83]and,

- that ultimately a court may be called upon to categorise such provisions as either mandatory or directory respectively requiring either strict or substantial compliance with the terms of the provision. In this instance however Stephen J could conclude:

> I doubt, however, whether, in the present case, a distinction of any substance exists between a mandatory and directory interpretation of the

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81 Gibbs J at p 243.

82 Stephen J at p 252.

83 Stephen J at p 254.

> requirement that the public notice contain particulars of the application. It is well established that a directory interpretation of a statutory requirement still necessitates, as a condition of validity, that there should be substantial compliance with the requirement... When the requirement is that "particulars of the application" should be given by public advertisement and when once it is accepted that there must be an advertisement which gives some particulars, it is difficult to discern any distinction between a strict observance of this requirement, such as a mandatory interpretation would call for, and the substantial observance of it, as called for by a directory interpretation.[84]

It is important to note however that the court did not rule that all procedural aspects need necessarily be strictly complied with in all instances and in his judgment Stephen J clearly leaves open future claims for relief based upon substantial but not strict compliance with "some formality of time or procedure".[85]

The central issue at this point is what standard can exist against which an act or series of actions can be inferred to be strictly or substantially compliant and in a subsequent decision in *Victoria v The Commonwealth and Connor,*[86] the same judge took the opportunity to elaborate on this point. In Stephen J's words the standard is "the general object at which the statutory provision aims" or in other words the purpose of the provision

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84 Stephen J at p 255.

85 at p 256.

86 (1975) 134 CLR 81.

or division or chapter of the Act. This proposition has now been adopted by the High Court in *Project Blue Sky P/l v ABC* [87] which has, accordingly, effectively abolished the old dichotomy. The origin of the IPA "Purpose Provision" in s 3.4.1. should now be clear.

The ongoing significance of the decision in *Scurr* lies certainly not in a contention that it established a 'mandatory' rule of interpretation in respect of 'notice' provisions which is good for all time but rather in the simple proposition that the question of the sufficiency or adequacy of a legally required action should be weighed in the balance of the policy intentions of the provision or indeed the whole statute.[88] Accordingly, *Scurr* has been followed in many subsequent cases and yet has been distinguished in others[89] and since the policy intention which motivates the notice provisions in both acts is the same, it is not surprising that the juridical outcomes in both States have also been similar.

The courts in both jurisdictions have a power to remedy or overlook defects which do not go to the substance of the notification procedure. In *Proprietors of SP 13318 and 13555 v Lavender View Regency P/L v North Sydney Council*[90] Talbot J concluded that:

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87 (1998) 72 ALJR 841.

88 See *Kent v Parramatta City Council* (1984) 51 LGRA 399.

89 'Distinguish' is really an inappropriate description since *Scurr* certainly allows for the mandatory/directory dichotomy to continue.

90 (1997) 97 LGERA 337.

> A notice which omits a critical part of the description of the property cannot be regarded as a notice which gives the recipient a reasonable opportunity to participate in the process of consideration and determination of a development application.

The same principle has been followed in the Queensland decision of Daly DCJ in *Nashvying P/L v Mulgrave Shire Council*[91] and is essentially incorporated in IPA, s 4.1.53 which allows the court to decide an appeal if the court is satisfied that non-compliance with some aspect of the IDAS procedure has not (a) adversely affected the awareness of the public of the existence and nature of the application or (b) restricted the rights of the public to exercise the rights conferred by the requirements.[92] Faced with a list of notice deficiencies in *Curac v Shoalhaven City Council*[93] Stein J pointed to the broader requirements of the notice sections in that though it may be possible to show that no prejudice has occurred to the party before the court it cannot be demonstrated that some members of the public may not have been disadvantaged.[94]

There is thus a general cautionary principle operating where the sufficiency of the actions taken by the applicant will be weighed in the balance of the statutory purpose of the notice

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91 [1994] QPLR 392.

92 The same discretion is given to the assessment manager to be exercised on the same basis. See IPA, s 3.4.8. For a practical example of the operation of this principle under the precursor act see, *Quetel P/L v Gladstone City Council* [1991] QPLR 24.

93 (1993) 81 LGERA 124, 130.

94 See also: *Warren v Electricty Commission (NSW)* (unreported , L&E Court, October 1990) at 8 & 34; *Willoughby City Council v Minister Administering the National Parks and Wildlife Act.* [1992] LGERA 19; *Broomham v Tallaganda Shire Council* (unreported, L&E Court, October, 1986) *Cambridge Credit Corporation Ltd. v Parkes Developments P/L* (1974) 2 NSWLR 590; *Auburn Municipal Council v Eckold P/L* (1974) 34 LGRA 101.

and participation sections as a whole. Where there is clearly no compliance then it is of no consequence to determine whether substantial compliance is legally sufficient[95] however, notwithstanding the fact that in both jurisdictions a rather strict, if not mandatory, approach has been adopted to procedural breaches by applicants[96] the possibility still exists for some procedural defects to be found to be not fatal to the applicants standing. In *Anderson v Mareeba Shire Council*[97] Daly DCJ finding that an indoor pistol range could properly be described for notice purposes as an "indoor recreation centre" went on to comment that it was undesirable and unnecessary for the court to read into the legislation a further requirement that the notice should assist in the identification of the likely impact of the proposal.[98]

In both jurisdictions the legal issues and concerns which have arisen to be decided by the courts have done so in the context of predictably similar statutory provisions and have led to predictably similar conclusions. Queensland benefits from a specific statement of purpose which appears at s 3.4.1. and by a clear statement of guidelines for the court in exercising any residual discretion to infer a 'directory' status to aspects of procedure in s 4.1.53. In the absence of an efficient statutory regime in this respect however the NSW courts have evolved similar rules which achieve the same ends.

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95 See judgment of Bignold J in *Bell v Minister For Urban Affairs.* (1997) 95 LGERA 86,106 and the decision of Quirk DCJ in *Thiess Contractors P/L v Brisbane City Council and Collex Waste Management P/L* (Planning and Environment Court Appeal No 3786 of 1999) The strict principle in the latter case may have effectively replaced the more discretionary standard applied in *Crest Projects P/L v Cooloola Shire Council* [1995] QPLR 323.

96 See *J.J.Richards and Sons P/L v Ipswich City Council* (1995) 86 LGERA 417.

97 [1998] QPELR 255, 257.

98 See also; *Rhonwood P/L v Cairns City Council* [P&E Court, Qld, No 19 of 1999] on sufficiency of description.

On balance however the IPA system is certainly better ordered and structured, and more concise and clearer. EPAA, as has been remarked often in this treatment, continues to suffer from the inevitable consequences of a common law evolution that has not been not paralleled by ongoing statutory amendment.

The same contrast is evident when we turn from an examination of the applicants to the bi-polar responsibilities of submitters or objectors.

F. WHAT IS A PROPERLY MADE SUBMISSION

As suggested above this portion of perhaps any development assessment process is bi-polar requiring a series of formal and legal compliant actions by the applicant to notify and participation, however defined, by the party making a submission. If, as has been shown, the courts have adopted, on balance, a strict approach to the procedural requirements surrounding the Act of notification what has been their response to similar issues in respect of the legally appropriate forms of participation in both jurisdictions?[99]

The two Acts diverge rather sharply at this point with IPA going to considerable lengths in an attempt to characterise and define and EPAA leaving many matters in a very open and

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99 See Ireland, C "The Recognition of Jurisdictional Facts in Planning Law." (1999) *4 Local Government Law Journal.* pp 164-168.

undefined state indeed. The respective approaches are a product of the differing statutory and regulatory modalities which will now be considered in turn.

1. Who may submit

The principal of global inclusion remarked upon earlier operates in both jurisdictions with "any person" being entitled to make a submission.[100]

2. What are the characteristics of a valid submission

On the face on it there should only be two requirements for a valid submission: 1) that it should be lodged 'in time' and 2) if it is in the form of an objection that it should state the relevant grounds of that objection. Both Acts in fact do adopt these two criteria. However, where EPAA leaves much material, and one could suggest too much material, undefined IPA goes to elaborate (and perhaps over-elaborate) lengths to create a statutory framework which attempts to define everything but which, in the course of so doing, has unfortunately left some important matters in a current state of confusion.

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100 IPA, s 3.4.9(1) and EPAA, s 79(5). The only exception under IPA relates to 'concurrence agencies' who have the right to refuse the application outright. (IPA, s 3.3.18(2)(b)) and who are specifically excluded therfore from making a submission. (IPA, s 3.4.9(1). A similar power to refuse an application is granted to 'concurrence' agencies under EPAA, s 79B(8) though neither the Act or regulations go on to exclude such an agency from either making a submission or, presumably, filing an appeal. (See EPAA, s 98(1)) 'Advice Agencies" under IPA, do however possess the right to both submit and to appeal. (IPA, ss 3.4.9(1) and 4.1.28(1))

Taking these issues in turn, once again the EPAA categories of development resulted, prior to the recent amendments to the regulations, in varying temporal requirements. This situation has now been rationalised. In the case of a designated development the submission period (which is noted in bold type in s 79(1)(a) but otherwise undefined in the Act or regulations) is a period of 30 days.[101] State Significant developments provide for a similar time period, as do Nominated Integrated developments and other advertised or local developments.

In some contrast under IPA a serious attempt is made to define all terms and to create a clear and manageable structure. A submission, under IPA, must be received "during the notification period" [102]The notification period, in turn, is defined in s 3.4.5. as not less than; (a) where there is no referral coordination, 15 business days after the applicant performs the last of the notification actions mentioned in s. 3.4.4.(1) or where the application is the subject of referral coordination, 30 business days after the performance of the last of the notification actions. Interestingly, in calculating the period, IPA specifically excludes any business days between December 20 and January 5 in each year. [103]

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101 See EPAA, s 79(1)(a).

102 IPA, s 3.4.9(1).

103 This should finally put an end to the hoary old tradition of erecting site boards and inserting newspaper advertisments while Australia is on holidays or otherwise at the beach. No such prohibition exists under EPAA where, presumably, Christmas-eve erections are still commonplace.

Since both Acts specifically require a submission to be lodged with the relevant consent authority,[104] and within a specific time frame, inevitably circumstances have arisen where for a variety of reasons this requirement has not been met.

Underlying the statutory provisions and judicial decisions on point there exists a broad issue of principle. If the policy behind the type of participation ethos which is reflected in both Acts is "that administrators take account of each of the wide variety of relevant interests differentially affected by possible policy alternatives"[105] or of any number of similar rationales acting in concert then, arguably, the imposition of strict mandatory requirements for submissions, either by the statute or by a court, may run counter to the intellectual propositions which supposedly justify such participation in the first place. There is a clear tension here between the creation of a flexible administrative process and the application of prescriptive rules concerning that process.

Given that submissions, essentially, merely enlarge the data context within which a decision can be made then, in one sense, it should not matter if a submission is received 'in time' or 'out of time' and if it fails to address a ground for objection then clearly it possesses no weight even at the administrative level. In these circumstances, to insist on compliance with strict mandatory requirements and even further to making these requirements a jurisdictional foundation for the making of an administrative decision, quite

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104 These are exhaustively listed under IPA in the Sch 10 definition of a 'properly made submission', pt (e).

105 See Stewart, R. "Reform of U.S. Administrative Law." (1975) *85 Harvard Law Review.* p 1669 at 1759.

apart from an appellate one, may be misguided. Perhaps it could be argued that an issue of equity is involved and that if a submission, received considerably out of time, can be used as a foundation for an appeal then an applicant could be materially disadvantaged. If this were the case then presumably applicants would be severely disadvantaged by the existence of a very open-ended access to the declaratory jurisdictions of the respective courts.[106] There seems however to have been no obvious prejudice to the rights of applicants by the existence of such an extensive jurisdiction.

With this in mind therefore there seems to be no readily apparent set of circumstances which should preclude the acceptance of 'any' submission and 'at any time' and no genuine reason why such a submission should not form a valid part of the common material for assessment or indeed constitute a jurisdictional foundation for a subsequent appeal.

The jurisdiction which comes closest to correctly understanding this tension between information and jurisdiction is IPA which attempts, although in a manner which has caused some interim concern, to balance the policy requirements of the broad participatory process against a potential inequity to the applicant. IPA sets out to achieve some sort of balance in this area by, on the one hand, permitting submissions, say, which are 'out of time', to be received by the assessment manager and to become part of the common material but to prevent such a submission from establishing standing for an appeal. That is,

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106 IPA, s 4.1.21(1).. "Any person may bring proceedings for a declaration..." These are designated in NSW as "Class 4" proceedings under the *Land and Environment Court Act.* 1979„s 20.

the material can be used for assessment only. This is achieved by an overlapping set of provisions which;

- define a properly made submission in some detail[107]

- allows the assessment manager to receive a submission even if it is not properly made,[108]

and,

- permits such a submission to form part of the common material for assessment purposes;[109]

It seems relatively clear however that such a submission cannot found an appeal. Section 4.1.28(1) permits a 'submitter' to appeal but 'submitter' is defined in Sch 10 as "a person who makes a properly made submission". Consequently, the question resolves itself to whether the exercise of an administrative discretion to receive under s 3.4.9(3) can convert an improperly made submission into a properly made one for the purpose of s 4.1.28(1).[110] It will left to the Planning and Environment Court to decide the issue in due course though

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107 IPA, Sch 10 definition of "properly made submission." Amongst the criteria listed are that it must be received during the notification period and state the grounds, facts and circumstances relied upon.

108 IPA, s 3.4.9(3).

109 IPA, Sch 10 definition of "common material".

110 Note that IPA, s 4.1.53 which deals with the power of the court to forgive notification errors does not bear upon the issue since the statutory criteria in subsection (a) and (b) clearly relate to the notification requirements imposed on *applicants*.

it is doubtful whether the court will adopt a liberal approach for two reasons: first, the dichotomy which appears to be created under the Act does possess a particular, if peculiar, rationality and second, previous decisions of the court under the precursor Act have emphasised the courts opinion that such statutory criteria are mandatory and indeed jurisdictional.[111]

If this interpretation is correct the IPA effectively allows for the reception of procedurally inept submissions as part of the common material for assessment purposes but prevents their being used to establish a jurisdictional basis for an appeal. This can only be called a compromise position. It would seem more in keeping with the underlying ideology of the Act that totally open access should be given to appeal rights as is the case with applications for declarations which currently are not subject to any such restriction.

The second of the substantive qualities which a submission must possess in both jurisdictions is that it must specifically address the grounds of the objection. In NSW this requirement is contained in s 79(5) viz:

> During the submission period, any person may make written submissions to the consent authority with respect to the development application. A submission by way of objection must set out the grounds of the objection.

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111 *State of Queensland v Nanango Shire Council* [1999] QPLR 116.

The equivalent definition in IPA is contained in Sch 10, Part (d) which states that a "properly made submission" is, *inter alia,* one which "states the grounds of the submission and the facts and circumstances relied on in support of the grounds".

The, in-principle, issue here is whether in both jurisdictions the courts have tended to adopt the old mandatory/directory dichotomy in respect of this second requirement. Two decisions, one in NSW and the other in Queensland together confirm that what could be called the "content requirement" will be viewed by the courts in both jurisdictions on a sympathetic and flexible basis in sharp contrast to the ridged standard imposed on the temporal aspect of a submission.

In *Ballina Environmental Society v Ballina Shire Council*[112] Bignold J of the Land and Environment Court was asked to decide whether a letter received from the society constituted a 'submission' for the purposes of founding an appeal. The letter, which was received in time, simply contained the statement that;

> This society objects most strongly to the proposals shown in the environmental impact statement for DA 1991/270.

The following two paragraphs went on to castigate the local authority for placing the application to public notice over the Christmas period.

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112 [1992] LGERA 232.

In an extensive judgment Bignold J took the opportunity to review the issues of law and policy which bore upon the issue. In his opinion the requirement that an objection need state the grounds of the objection had its origin in two things;

- an attempt to distinguish between submissions in support of a proposal and submissions which constitute an objection to a proposal.

- to ensure that the developer, the consent authority and in the case of a designated development, the Minister all have the benefit of knowing the specific grounds of the objection.

The Judge went on to quote Stephen J in *Spurling*[113] with approval;

> [T]he restriction of the right to appeal to those who feel aggrieved does emphasise the desirability of an objection, which the legislature requires a responsible authority to consider before arriving at any determination of an application, setting out with some clarity the grounds upon which a particular objector conceives himself to be adversely affected.

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113 *Spurling v Development Underwriting (Vic) P/L* 1 (1973) VR 38.

One can accept Stephen J's statement at face value as does the judge in this case as an accurate summary of the policy position. However the contention in this case by the respondent goes further than the facilitation of an administrative process viz. that specificity is a pre-condition to jurisdiction.

Bignold J in this instance, and one suspects his principle is rather broad, rejects this suggestion[114]:

> The requirement" he concludes, "for the objector to specify in the written objection the grounds of objection is clearly a *procedural* matter and is not a *matter of substance*... (The judges' italics).

Nevertheless even a procedural matter requires a requisite degree of substantial compliance and this the judge felt had been satisfied by the subsequent submission of a detailed response, though some six weeks after the closing date for submissions. The limiting factor here presumably is that the material which contains the detail of the objection needs to be provided to the consent authority in sufficient time to allow the authority to have the benefit of the objection in formulating their administrative response to the application.

Ballina Environmental Society is consequently not absolute authority for the proposition that the issue of content is merely directory and that the specific grounds of the objection

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114 Note 112.

may be passed over in a submission. Substantial compliance in this instance requires two factors, the submission of specific grounds and in a relevant time frame.

A qualitatively different approach to the same issue was adopted in Queensland in *State of Queensland v Nanango Shire Council.*[115] In this instance Rowe DCJ concluded that all 'objections' should be construed sympathetically. At issue was whether a letter which expressed concerns but which did not specifically categorise those concerns as objections could be considered a sufficient jurisdictional foundation for a subsequent appeal.

> On the face of it it is a letter which expresses concerns in relation to the application. In considering the letter, a Court should look at the whole of the document and ascertain whether, on a construction of the whole of the document, there is evidence of an intent to object to the application. The document is not to be construed strictly as a statute, but it is to be given a wide construction in order to arrive at its proper meaning.

Both decisions essentially arrive at the same end point and a transition has been made from a mandatory approach in respect of time periods to a much more flexible one in the case of *content* in both jurisdictions.

The question that remains however is why this piece of legerdemain is even required and one is left with the impression that it is only the language of the statutes which, in the case

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115 (1999) 1 QPELR 116.

of time periods, is necessarily mandatory and imperative which precludes the courts from adopting a more flexible approach even in those cases. A larger issue, however, still remains. Despite the legislatures policy intention to allow a consent manager the benefit of an objection at the administrative level there is no inherent reason why an administrative preference should in any event be converted into a substantive question of legal standing. Even the judge in *Ballina Environmental Society* was prepared to dispense with the idea that specificity was necessary to avoid an unfair interference with the proprietary rights of an applicant for a development consent. [116]

It should be questioned why both Acts need to specify such requirements as pre-conditions for an appeal right and this confusion of means and ends is exemplified by the simple fact that once a matter is appealed, *submitters in both jurisdictions are not limited to the grounds stated in their objections.* An alternative framework would place no such restrictions on the right to appeal which, since public participation is enshrined in both Acts as a preeminent good, should be open to all as it is in cases of declaratory relief and subject only to the normal court rules concerning the filing of an appeal. [117]

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116 at p 241.

117 Unlimited third-party appeal rights were canvassed and then rejected in the new Northern Territory *Planning Act,* 1999. In his second reading speech the Minister gave no reason for their rejection beyond the fact that "they didn't work".

G. FRAUDULENT AND KNOWINGLY FALSE OBJECTIONS DURING PUBLIC SUBMISSION PROCESSES.

One of the intentions of all good planning legislation is to establish a reasonable basis of fairness and equity between competing sides of often contentious issues. This purpose however may be defeated or at the very least threatened if one party attempts to abuse or subvert a statutory process for its own benefit.

Although one could point to a number of areas where such subversion may occur such as the 'purchase' of compliant expert evidence by applicant appellants, this discussion is directed to the abuse of process which occurs when a submitter/objector makes a submission which is fraudulent, that is, knowingly false.

No Australian planning jurisdiction attempts specifically, or indeed by implication, to address the consequences of an objection which the objector knows to be false and which is calculated to mislead the consent authority and the applicant.[118] This lack of attention reflects either an absence of awareness that such a problem exists which is doubtful in view of the prevalence of the practice, or a perception by the legislature that should an applicant feel aggrieved enough to seek redress then it should do so outside the specific planning jurisdictions and in the general jurisdiction of the courts. Whatever the reason for the absence of a statutory remedy the problem of fraudulent submissions continues and

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121 Qld: *Integrated Planning Act* 1997, s 3.4.9(1); NSW*: Environmental Planning and Assessment Act* 1979,s 79(5); Vic: *Planning and Environment Act* 1987, s 57; Tas: *Land Use Planning and Approvals Act* 1993, s 43F(5); S.A.: *Development Act* 1993 s 38; W.A.: Various Local Planning instruments pursuant to the *Town Planning and Development Act* 1928; N.T.: *Planning Act* 1999, s 19; A.C.T: *Land(Planning and Environment)Act* 1991, s 237.

anecdotal evidence is not difficult to find. The problem however is not confined to planning law; it may arise in any statutory context which allows for a public submission process. Since no Australian planning legislation provides a mechanism for a remedy and since the law traditionally abhors a wrong without a remedy, the purpose here is to examine what, if any, options may be available to an applicant seeking to recover wasted costs from such a submitter.[119]

In the planning jurisdiction the following examples will illustrate the practice:

- a submission which asserted that an endangered species was present on the proposed development site. The submitter was a university academic and, as it transpired, the leading Australian authority on this particular species. In subsequent conversations within the Neighbourhood Action Group he confirmed that the species was not present and indeed could never have been present given the littoral scrub which covered the site. In his opinion however, which was borne out by events, he had successfully held up a decision on the matter by at least three months. In this instance two persons were prepared to confirm this statement and the subsequent fauna study carried out by another university confirmed in emphatic terms that the animal had never inhabited the site.

- a submission that a rare native vine existed on site. The submitter was an amateur botanist of mature years. The facts are similar to the first example. In subsequent

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119 Since no privity exists between submitter and applicant the treatment is limited to remedies in tort.

conversations he admitted that the vine had never existed on site and that he had made the statement purely to annoy the applicant and to delay the project.

- a submission that a large site for a proposed major retail project contained areas of significant aboriginal heritage value. The principal submitters were a husband and wife who both had an association with the local clan. In an obviously unguarded moment while in conversation with the applicant's project manager, the wife conceded that neither she, her husband or the clan, "had a clue" whether the site contained such areas but that since it was in the traditional clan area it could have. An expensive study which was requested by the assessment manager failed to locate any traces on site, and interviews with members of the local clan were ambiguous and inconclusive.

In the first two instances, independent evidence is available on the critical issue of intent and it is acknowledged that, in a majority of cases such direct evidence may not be available. However even in its absence the persuasiveness of an expert statement which is found to be at complete variance to the truth should not be underestimated. It is also conceded that in most instances the majority of applicants will be content with an eventual, if delayed, approval. The applicant will absorb the resultant costs of the fraud and will suffer the injustice in silence. Developers are, after all, interested in profit not in pursuing interesting legal points or indeed in seeking revenge after the battle has been won, though they may well be if the battle has been *lost.* Nevertheless an awareness that redress is

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See Crane, W "Fraudulent Objections in Public Submission Processes" (2001-2002) 7 (31) *QEPR* 59.

possible in these situations *could* restrain some of the more egregious examples of submitter fraud.

The examples given above contain the following elements:

- a statement which the submitter knows to be false
- made with the knowledge and intention that the consent authority should rely upon it and, as a function of that authority's statutory responsibilities, that in all probability the applicant may be called upon to act upon it
- the consent authority does act upon it
- the applicant is, in turn, obliged to conduct detail surveys and other studies to refute the false statement(s) and thereby suffers immediate and consequential loss

Given these facts two torts are analogous or adaptable.

1. Deceit[120]

120 See Fleming, J.G. *The Law of Torts.* 9th ed. (Sydney, Law Book Co, 1998) pp 694-704.

With the exception of the third example, which could charitably be described as evidencing a degree of carelessness or negligence sufficient to take it outside the bounds of an action for deceit[121], the first two examples seem to satisfy, with two caveats, the requirements for such an action. They exemplify a knowingly false statement which has intentionally induced another to act upon it to its detriment.[122]

The two caveats referred are as follows:

- the submitter's fraudulent representation is in fact made to the consent authority and not to the applicant directly. The latter has relied and acted upon the transmission of the representation by the consent authority as an intermediary. This third party factor will not be an obstacle to the applicant's claim. *Peek v Gurney*[123] long ago established that such a misrepresentation need not be made directly to the party who has suffered the loss. The aggrieved party in other words can be separated from the representor by an intermediary.

- the second caveat concerns the issue of reliance. Despite the applicants third party status it is necessary in terms of the historical limits of the Action that it rely on the representation to its detriment. In the cases given as illustrations it may be difficult to argue that the applicant relied upon the submitters statements to any extent at all.

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121 This is a charitable interpretation since the third leg of Herschell L.J's classic statement viz. "reckless, careless whether it be true or false" could well bring it within a claim for deceit. *Derry v Peek.* (1889) 14 App Cas 337, 374.

122 *Pasley v Freeman* (1789) 100 ER 450.

123 (1873) LR. 6 H.L. 377. See also, *Lesley Leithead v Barber* (1965) 65 SR. NSW and *T.J.Larkins and Sons v Chelmer Holdings P/L/ and Van deb Broek* [1965] Qd.R. 68.

> Clearly the reliance, if again that is an appropriate description of what has occurred, lies with the consent authority. The fact that the applicant may be in a position vis a vis the consent authority which is conditioned by various statutory consequences if it does not act on the request[124] may not constitute the necessary or sufficient connection to enable a claim to be successfully brought.

Consequently, if the traditional boundaries of an action for deceit are strictly adhered to by a court an applicant may not succeed. Part of my purpose here is to suggest that these boundaries should not be so closely applied that such an action would be closed off.

There are a number of reasons why I believe this should be the case. The law of tort as we know it today is an evolutionary construct which has shown an amazing ability over time to adapt an existing remedy or to create an entirely new one which could effectively address emerging problems, changing social concerns, new technology and a host of other similar factors. That judges have been able to manage such a process, incrementally and over long periods of time is obviously one of the cRoweeening achievements of the common law. In general terms the courts have sought and found appropriate remedies for wrongs which sometimes were unimaginable to earlier judges. With the insertion of public participation and submission processes in much of the recent Federal and state legislation we are seeing the rise of a wrong for which the statutes themselves do not contemplate a remedy. In such a circumstance or until a statutory remedy becomes available, it is clearly

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124 In Queensland , for example, this may involve a costs award under s 4.1.23(2)(g) of the *Integrated Planning Act.* 1997 for not providing information reasonably requested by an assessment manager.

open to the courts to extend the Action for deceit to cover the circumstances outlined above or indeed to create a new tort.

The Action for deceit could be extended to cover these situations by including within its ambit situations where the instigator of the fraud knew or had a reasonably expectation that the applicant (who bears the onus of proof in both decision and appeal stages) may be called upon by a relevant authority to disprove the allegation and in so doing incur costs. Alternatively, in cases where a statute does not contemplate a potential wrong, a court could elect to create a new tort to cover a fraudulent abuse of a statutory process where the abuse is calculated or is reasonably expected to cause another party a pecuniary loss. In view of the prevalence of public submission processes and to avoid damaging an otherwise laudable legislative intention such a tort would need to be limited to fraudulent or grossly negligent submissions.

In either instance however the plaintiff should be, as he is in the traditional form of action, entitled to immediate and consequential damages, and at the option of the court, reflecting the community's condemnation of fraud, to aggravated damages as well.

2. Injurious Falsehood

The elements of this tort have been reasonably well established since the turn of the last century.

> In order to support an action based upon the by deceiving of other persons so that

> their mistaken acts they cause harm to the plaintiff it is necessary for him to prove that the statement complained of was false, that it was made maliciously- ie. without just cause or excuse and that the plaintiff has suffered special damage there from.[125]

A point to note here is that although *Royal Baking Powder* concerned an allegation of trade libel, Lord Davey does not make the existence of a trade relationship between the parties an element of the definition. This effectively opens up the Action to encompass the instances given earlier as. A contextual argument based around the fact that the statements in the case were more clearly designed to cause direct pecuniary loss and therefor that the decision should be limited by this fact alone should fail. The anticipated consequence of a fraudulent submission in the mind of a submitter is certainly to cause direct and consequential financial loss to the third party applicant of equal or greater significance to that which was the case in *Royal Baking Powder.*

Historically the difficulty with the action as a response to an alleged trade libel has been the necessity of establishing special damage. This requirement has been modified somewhat by later decisions however even as a strict requirement it is unlikely to become an impediment in the case of a fraudulent submission since the loss will be invariably quantifiable ie. anthropological and fauna survey costs etc. Similarly, holding costs associated with delay are again quite readily quantifiable.

A claim either framed in deceit or for injurious falsehood and based on a fraudulent submission tendered under a statutory process has yet to be decided. However, with the

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125 Davey LJ in *The Royal Baking Powder Co. v Wright, Crossley and Co.*(1901) 18 RPC 95, 99. Also *Taylor v Hyde* [1918] NZLR 279.

increasing prevalence of public submission processes the conduct described here is likely to increase.

In the absence of a specific statutory duty not to supply false information maliciously or recklessly which is almost certainly the most effective way of addressing the problem, and the fact that the costs powers of the specialist courts can only address submitters *qua* appellants or respondents, aggrieved parties must have a recourse to the general law of tort and in particular to the two actions briefly described above.

Whether the knowledge that such a claim could be made will prove sufficient over time to restrain the more malicious and dishonest category of objector and, importantly, can do so without affecting those genuine objectors who are merely inaccurate remains to be seen.

H. PUBLIC ENQUIRIES

If public participation at the time of plan or scheme formulation could be called Level One participation and the submission process in respect of applications a Level Two process then the availability of a further public enquiry procedure in respect of some applications constitutes a further third level of participation. Elsewhere the Australian approach to public participation as "fulsome" and indeed it is.

It is however important, initially, to distinguish this third level from the informal processes which occur frequently in both jurisdictions. Given an application which raises a set of contentious local issues some form of public gathering or meeting will be convened, generally by the local councillor. Frequently called “objectors meetings” they bring

together the applicant or its representatives, perhaps a number of persons claiming specialised knowledge and, of course, members of the general public. Neither Act however makes any formal provision for this type of meeting. They occur as part of the sub-text of the planning legislation, and are part of the informal processes which are, in reality, essential to the functioning of the formal statutory framework.

The two jurisdictions differ markedly at this level. Under IPA no specific provision exists which clearly permits the establishment of a further level of public enquiry at the application stage.[126] This is not however to suggest that such an enquiry could not be held, merely that the committee or commission would need to be established under another Act.[127] The last observation is made with one caveat which relates to the insertion in the Act of the problematical s 3.2.7 subsection 3 which states that the assessment manager may ask any person for advice or comment on the application, and, there is no particular way [such] advice or comment may be asked for. Arguably this opens up the possibility that a local authority could convene a formal public enquiry although it would need to be done quickly if the prohibition against extending an IDAS stage is to be complied with.[128]

By contrast EPAA, ss 119 to 120A makes extensive provision for a third level of participation by way of formal public enquiry. In summary, the Minister may direct at any time that such an enquiry be held, *inter alia,* into:

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126 Indeed no formal provision for public enquiries exists for the making or amending of planning scheme policies either. See IPA, Sch 3.

127 See *State Development and Public Works Act* 1971.s 15. or for broader ranging enquiries under Ch 3, Div 6 of the *Local Government Act* 1993.

128 IPA, s 3.2.7(2) The contrary opinion is that s 3.2.7 stands outside this prohibition.

- any matter relating to the provision of the Act.
- any environmental planning instrument
- any or all of the environmental aspects of a proposed development

This procedure is in addition to the Ministers power to "call-in" a development application under s 88A.[129]

The question which arises is why one jurisdiction perceives there to be no need for a public enquiry process at all and yet the other is prepared to devote such detail to making provision for one. There is no clear answer to the question apart perhaps from the differing histories and experiences of the two jurisdictions. Nevertheless, the question remains whether such a third level of participation should be imposed in principle.

Admittedly, it is hoped, such a third level procedure would tend only to be used in special cases however it is subject to doubt whether yet another information process, superimposed on an extensive process at the application level, could add much to the end result. Additionally, if an issue is of such sensitivity that it merits such treatment then there is at least probable, if only on environmental grounds, that the matter will trigger the new

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129 The equivalent power exists under IPA, s 3.6.5.

enquiry powers of the Federal government under the *Environmental Protection and Biodiversity Conservation Act* 1999.[130]

In the end the matter is one of policy and principle which should, as indicated earlier, reflect a considered balance between the transaction costs which result from such overlapping procedures and the premium a society is prepared to place on broad social and environmental considerations. In the final result it is not at all convincing that such a State level procedure should exist at all.

I. PARTICIPATION AS AN ADMINISTRATIVE PROBLEM

There exists a reasonable consensus amongst local authority planners that approximately 75% of all development applications will obtain an approval without difficulty and most often this is obvious from the initial reading of the application.

In the absence of a suitable administrative mechanism[131] all of these uncontentious applications would be required to comply with the rigorous notification provisions in both Acts. Yet having created a public expectation that planning and development matters generally should come under the oversight of the public at large rather than merely their elected representatives, a direct or frontal attack on the existing participation rights was

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130 *Inter alia,* ss 70, 503, 511.

131 Which does exist in NSW.

clearly out of the question. Both jurisdictions,(along with many others) have responded to this administrative and political problem by creating two other classes of development which will attract minimal local authority involvement, no submission or objection rights and which, perhaps cynically, it is hoped will attract minimal public attention. In Queensland the two classes are "exempt" and "self-assessable" developments and in NSW, "exempt" and "complying" and, more significantly, some "local developments".

The stated policy aim in both instances is the same though couched in different terms namely, to allow development with minimal environmental impact to proceed without the need for a development permit or being made subject to an intensive notification and appeal process and to allow small and low impact development to proceed efficiently.[132]However, although the intent of both Acts is certainly to provide a mechanism to reduce an otherwise intolerable pressure on the approval system the statutory frameworks established by the respective Acts, once again, differ markedly.

As a general statement of principle, if an authority has determined to establish general rules of conduct or even more importantly specific rules of conduct then, in the interests of fairness, equity and efficiency[133]those rules should, as far as practicable, be consolidated in one readily available and accessible form. There are three ways of making such rules accessible:

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132 *Outline of a proposed State policy for exempt and complying development* (Policy Document, NSW Department of Urban Affairs and Planning,1997) p 2.

133 The Act of finding a relevant rule may add significantly to transaction costs.

by,

- incorporating the rules in the statute itself
- consolidating the rules in subordinate legislation, or
- allowing the rules to be subsequently contained in other miscellaneous statutory instruments such as local laws and environmental planning instruments

Within, again, the bounds of practicality, the form to be preferred in terms of fairness and efficiency is to provide the rules in the statute and this is, in the main, the approach adopted by IPA. The least attractive alternative is certainly the third one and it is this approach which has been adopted in NSW.

J. EXEMPT, SELF-ASSESSABLE AND COMPLYING DEVELOPMENTS

EPAA, ss 76(1) to (3) authorise the designation of specified developments as "exempt" and for this to occur through State, regional or local environmental planning instruments.[134] This ability is limited to areas which are not "critical habitats",[135] part of a "wilderness area" as defined by the *Wilderness Act* 1987 or more importantly to developments to which Pt 5 of the Act does not apply.[136]

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134 EPAA, definition of "environmental planning instrument".

135 "Critical Habitats" are defined in s 37 of the *Threatened Species Act* 1995.

136 Pt 5 deals with environmental assessment requirements. In the event of conflict with an E.P.I. the general duty to consider environmental protection in EPAA, s 111. would override the E.P.I. In

This approach as well as being contrary to general principles of good and efficient governance can only compound the perennial problem of a multiplicity of differing policies spread across a multiplicity of local authority areas.[137]When the differences relate to matters of significance such as the description of a development as "exempt" or not and when no State wide, statutory authority is provided to decide the issue beyond bare statements of general principle or SEPP 60, Pt 2, then the opportunity for confusion and the incurring of cost is clearly present.[138]

By contrast, the exempt category is clearly set out under IPA[139] and consequently the potential for local variations should be very much reduced. This approach generates a degree of administrative certainty (or at least, confidence), enables all parties to identify the applicable developments on a State-wide basis and is certainly to be preferred. The issue which remains however is whether in either jurisdiction there is any real substance to the category and since the intent of the classification, as indicated, is to reduce the

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addition the Minister is able to provide formal directions to councils on the structure, format and content of their LEPs. (EPAA, ss 117 and 71)

137 NSW currently has over 300 principal local planning instruments and over 5300 amendments. See: *Plan Making in NSW.* (1999, Dept. of Urban Affairs. NSW.) p ix. It is doubtful if the situation in Qld is any better. Though at least NSW has begun to deal with the problem in an organized and consolidated fashion.

138 NSW categorizes policies as SEPPs, REPs and LEPs. In addition there exist DCPs and s 94 "Contribution Plans". The most extreme example of this "dispersive" approach is in W.A. where matters which are considered quite fundamental in other jurisdictions eg. the submission process, are contained in local policies with little direction from the principal statute.

139 In Pt 3 of Sch 8. Though it is sparse in content with, with exception of State development issues, the only substantive exemption being given to "women's shelters."

administrative load on the approval system and to improve efficiency whether there is, in reality, a potential for this to occur.

1. Exempt Developments under IPA

Given the set of expectations which this category shares with "self-assessable" developments the content of the category is lacking in substance. In broad terms the schedule exempts:

- activities in designated large scale mining operations. (ss 10(a) to (d))
- whole categories of developmental works carried on by or on behalf of the state (ss 15(c) to (d), and ss 16 to 22)

and,

- a small range of agricultural management practices (s 13)

The residue, which consists of what could be described as the substantive categories of exempt development consists merely of the following:[140]

- all building work declared under the Standard Building Regulation to be exempt development. These works are given in Pt 2 of Sch 5 of the regulations and are anything but extensive. The entire category comprises:
    - the erection of sheds on land used for agricultural purposes

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140 The three categories could all have been made exempt by amendments to other acts. There is no paramount reason why the exemption should be provided for under IPA.

- the affixing of minor attachments (such as basketball hoops) to existing buildings
- playground equipment or garden furniture no higher than 3m
- repairs to existing buildings
- the establishment of certain types of housing for persons escaping domestic violence [s 12][141]
- a limited class of lot reconfigurations

The schedule in fact merely amount to a statutory recognition of existing practice. Local Authorities have hardly been inundated in the past by applications to erect garden furniture or by farmers seeking to erect a shed. Its contribution therefore to reducing the approval load or to overall efficiency could confidently be expected to be minimal.

2. Exempt developments under EPAA

Since the categories of development, as indicated earlier, are determined by the local authorities[142] and included in local environmental plans it is difficult to accurately describe the scope of the category under EPAA. The Policy Outline however lists the following as indicative:

- non-structural alterations

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141 Arguably, this strange inclusion represents the only genuine contribution to the category.

142 Within the broad outline established by SEPP 60.

- home businesses which do not affect amenity
- ancillary or incidental developments (with strict provisos)
- some boundary fences
- a flagpole
- certain demolitions within strict guidelines.

Conditioning these exemptions are seven other mandatory requirements.[143]

The observation here is similar to that made concerning the same category under IPA. The content of the class is probably more a function of the unwillingness of some and the inability of others to seriously review other potential development types for potential inclusion in the class. This, in turn, may well reflect a traditional mind-set which is more disposed to control than it is to efficiency.

In regard to both jurisdictions it is difficult to avoid the conclusion therefore that, if a real attempt were to be made to seriously reduce the administrative load on the approval system, and to at least incidentally improve the efficient processing of the balance of applications, a much more thoroughgoing examination of this category is warranted.

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143 In theory the necessary removal of a tree would be sufficient to remove the development from the exempt category. The ensuing controversy has resulted in the inclusion of cl 11 in Pt 3 of SEPP 60.

The other category of development which is designed to achieve the same ends as exempt development is known in Queensland as "Self-Assessable" development and in NSW as "Complying".

3. Self-Assessable Developments under IPA

The essential distinction between self-assessable developments and the exempt category under IPA is that, in the case of the former, all applicable codes must be complied with.[144] Additionally, and in contrast to the other forms of assessable development, there is no requirement under IPA for such works to be subsequently inspected and approved. Compliance is assisted by the existence of a penalty clause which would apply in the event that the codes had not be complied with.[145]

Self-assessable developments are defined in Pt 2 of Sch 8 as:

- all building work declared under the Standard Building Regulation to be self-assessable development

and,

- all building work carried out by or on behalf of the State, a public sector entity or a local government, other than exempt development.

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144 IPA, s 3.1.4.(3). Subject to the exceptions indicated in Sch 8, these codes can be disregarded is the development is exempt.

145 IPA, s 4.3.2.

Once again, the preparedness of the State to remove their own activities from the purview of the Act while enjoining strict mandatory requirements for everyone else is stark, though disappointingly predictable. The real content of the category, if there is to be any, lies in the reference schedule.[146] Little point would be served by listing all the items in the five brief categories contained in the schedule. Some examples however may suffice by way of illustration. Included as self-assessable developments are; unroofed pergolas, tool sheds, some fences, some retaining walls and a limited category of fills and excavations. The category is certainly not extensive.

4. Complying Developments

EPAA, s 76A(5) states that:

> An environmental planning instrument may provide that local development that can be addressed by specified predetermined development standards is complying development.

The ability of local authorities to designate various "local developments" as complying is however circumscribed significantly by the subsequent subsection which sets out seven reservations on the power.[147] Notwithstanding this, and in comparison with IPA, the

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146 *Standard Building Regulations,* Sch 5, Pt 1.

147 EPAA, s 76A(6)(a)-(g).

category appears to be somewhat more extensive.[148] Similar to IPA, inspection (either by the council or private certifier) is required with assessment taking place against the relevant code(s).[149]

The one factor which exempt, self-assessable and complying developments share across the jurisdictions is the avoidance of the public participation requirements contained in EPAA, ss 79 and 79A and IPA, s 3.4.1.

In Queensland however the new Act creates a further and potentially more significant category of development than any of the above. This is the class of development which the Act describes as "Code Assessable" and which was referred to briefly at the beginning of this chapter. The major consequence of the category is to remove subdivisional activity from the notification and submission requirements of the Act. Although such a move had been considered in NSW, in its final form SEPP 60 firmly places subdivision in the category of developments requiring development consent.[150]

Despite the decision of the P & E Court in *Edwards and Jenner v Douglas Shire* [151] which has the effect of making even code assessable elements notifiable is there is an "impact assessable" portion of the total development, there is certainly scope to increase the

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148 Schedule 1 pt 5 includes, for example, some swimming pools and limited changes of use.

149 EPAA, s 85 and Regs, Pt 6A, Div 1 to 3.

150 Pt 4, cl 13. This effectively brings the application under Div 1, Pt 4 of EPAA.

151 [1999] QPELR 335. See also IPA Implementation Note No 20 at p 2 and IPA, s 3.4.2.

category over time. If combined with greater use of private certification, an increase in the use of code assessment could result in a significant reduction in the existing administrative burden placed on local authorities and, accordingly, to an improvement in general efficiency.

K. CONCLUSIONS

Both jurisdictions, for a complex of social and political reasons referred to earlier, actively solicit public participation in the development assessment process and have very similar structures and procedures in place to achieve this aim. However, the public submission process is a two-edged sword. If too many applications for development approval are forced into a statutory program of notification and objection which, by its nature will always be administratively cumbersome, the outcome may be a stagnant, inflexible and ultimately inefficient system which is particularly unfair to applicants. In short the essential balance of fairness and equity will have been lost.

The task, which both jurisdictions acknowledge implicitly, is to remove as many of the relatively routine matters as possible from the ambit of the participation provisions[152] and, to this point, both States have created enough useful categories in respect of which these provisions do not apply. The next step should be to carry out a fundamental reassessment of development types with the intent of expanding the content of these categories.

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152 SEPP 60 and IPA in general clearly evidence this intention.

Legislators are justified in proceeding with caution as the minor debate concerning "home businesses" illustrates. However, their concerns could be ameliorated by the inclusion in both statutes of an appropriate "opt-in" clause. Such a provision would acknowledge the development as exempt, self-assessable or complying *per se* but nevertheless require notification and participation in certain closely defined circumstances.

To avoid the wholesale recourse to such a procedure by local politicians faced with any discernible level of opposition to a development, the power to transfer under the clause should reside solely with the planning courts in both states.[153]

As in the previous chapter an attempt to absolutely differentiate between issues with equitable as distinct from efficiency effects would be an arbitrary undertaking[154].

L. COMPARATIVE ASSESSMENT TABLES

The following comparison in tabular form therefore seeks to assess various issues under this heading on the combined grounds.

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153 Under Pt 4 of the *Land and Environment Court Act* 1979 and IPA, s 4.1.21.

154 Bearing in mind the reservations expressed also by Rittel and Webber. See Note 27.

Attribute	**Equity/Efficiency**
Notification requirements are consolidated and easily ascertainable.	**Qld:** Clear requirement are established in the Act applicable to all Impact Assessable developments. **NSW:** Varying requirements exist dependant upon the categories of development. ***Best Practice:*** QLD.
Are notification requirements complex or simple to comprehend?	**QLD:** Requirements are simple in conception and implementation. **NSW:** The overall scheme is unduly complex and lacking in a consistent rationale. ***Best Practice:*** QLD.
The Act defined the purpose behind the notification provisions as a guide to the courts.	**Qld:** Yes. IPA, s 3.4.1. **NSW:** No. ***Best Practice:*** Qld.

Notice requirements are relaxed in respect of simpler applications.	**QlD:** No, a full notification and submission process must be undertaken if the application is Impact Assessable, irrespective of the scale of the proposed development.[155] **NSW:** Many local developments are exempt from notification requirements. ***Best Practice:*** NSW.
Statutory redress is available for damage suffered as a result of a fraudulent submission.	**Qld:** No. **NSW: No.** ***Best Practice:*** Neither.
An additional Public Enquiry requirement may be imposed in addition to the standard notification and submission processes.	**Qld:** Not under IPA though processes exist under other Acts. **NSW:** Available under EPAA. ***Best Practice:*** Qld.
Categories of development which are exempt from notification requirements are clearly designated.	**Qld:** Clearly set out in IPA, Part 3, Schedule 8. **NSW:** The categories can vary dependant upon LEPPs, REPPs and SEPP 60. ***Best Practice:*** Qld.

155 Though Code Assessable developments are, in principle, exempt.

SIX

THE DECISION

A. INTRODUCTION

The penultimate result of all the processes described to this point (the appeal process remains in both jurisdictions) is a planning decision arrived at by the local authority or, as will be indicated later, by the responsible minister.

Considerations of equity and efficiency exist at the margins of the statutory procedures and, as is always the case when large numbers of consent and concurrence authorities exist in any jurisdiction, the knowledge, training and commitment of the staff who are making or participating in making the decision is of critical importance. It is this human dimension that is so often an essential factor in the equation and, to date, it has received little attention beyond sometimes acerbic observations by planning court judges.[1]

This section will deal with the following principle issues on a comparative basis:

- what timing constraints exist on consent authorities in which to reach a decision and accordingly what rights accrue to applicants should these statutory time periods be exceeded
- what material is available to the consent authority for use in assessing an application

1 See *BOMA v Sydney City Council* (1984) 53 LGRA 54 and *Jesberg v Hervey Bay Council* [1989] QPLR 190.

- what rights are possessed by applicants to stop the decision process and to make representations concerning anticipated conditions
- what conditions can validly be incorporated in a decision
- the "Finality Principle"
- can local authorities make decisions, which are contrary to LEPPs, REPPs, SEPPs in NSW or their equivalents in Queensland
- what is the effect, if any, of a decision taken outside the statutory time periods
- what are the currency periods for development approvals or permits
- ministerial "call-ins"
- appeal rights

B. STATUTORY TIMING CONSTRAINTS

As mentioned previously, there are no statutory penalties applicable to local authorities who exceed the decision periods contained in either Act. This effectively places the onus on the applicant in both jurisdictions to treat the matter as a "deemed refusal" and to appeal to the relevant court.

Nevertheless, statutory time periods do exist. In the case of NSW, an application is taken to be refused under cl 70B (and for the purposes of s 82(1))[2];

a) in the case of "local developments" after 40 days

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2 EPAA, s 82(1) details the factors which are to be taken into account concerning the impact of an activity on the environment under Pt 5 of the Act.

or,

b) in the case of designated, integrated or any other application requiring concurrence agency approval, 60 days.

As is often the case under EPAA however, the above can only be said to be a guide to the general propositions.[3] It is beyond the scope of this thesis to provide a detailed commentary on every section in the Act or clause in the Regulations which bear upon this issue. Suffice it to say however that the NSW statute and regulations appear to be unnecessarily complex and abstruse.

In contrast, the position under IPA is at least comparatively simpler. The assessment manager must decide the application within 20 business days after the decision stage starts.[4] Also, in Qld, the assessment manager may unilaterally extend the decision period by a further 20 days[5] with further extensions being available should the applicant agree.[6] Importantly, the applicant may stop the decision making process at any time for up to three months to enable him or her to make representations to a referral agency on conditions.[7]

If a decision has not been forthcoming during the statutory periods then in both jurisdictions the onus is placed on the applicant to move the matter to the relevant

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3 Exceptions to the general propositions are contained in EPAA, Regs, Pt 6 Div 11.

4 For when the decision stage starts under IPA see ss 3.5.1(1), (2).
cf. EPAA Regs cl 107.

5 IPA, s 3.5.7(1).

6 IPA s 3.3.5.7(4).

7 IPA, s 3.5.9(1).

court by appealing on a "deemed refusal' basis.[8] Local authorities in both jurisdictions often respond to a contentious application i.e. one which either has or is likely to result in a significant number of objections, by agreeing, across party lines often, to defer a decision until after the next election. Sometimes such deferrals start occurring up to 12 months prior to the election date. The inequity here is obvious, though it is one shared equally by NSW and Qld. Under such circumstances, (which reflect the reality of local government politics), the applicant who may be incurring significant holding costs or who may be reaching the end of a conditional contract period, is forced to begin incurring legal costs in order to move the matter on.[9] It is difficult to conceive of a strategy which could deal effectively with this inherent unfairness. A statutory obligation to decide the matter may simply result in a decision in the negative, which clearly places the applicant in the same position.[10]

C. ASSESSMENT CRITERIA

Not surprisingly there exists a high degree of commonality between the two jurisdictions in regard to the material, which can properly be referred to by the assessment manager on the way to making a decision. This commonality is evident in the comparative table, which appears below.

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8 IPA, s 4.1.27(1)(e) and EPAA, s 113.

9 See Sydney Morning Herald, "*Developers relieved as Debus resists push to strengthen court's powers*" Linda Morris, 27 April, 2001.

10 Similarly, a recent proposal from local authorities in NSW (see Note 9) to limit the right of appeal to *only* those applications which have been deemed to have been refused seems unlikely to be taken up. Such an iconoclastic change would, with little doubt, result in local authorities deciding a matter, in time and in the negative, thus effectively abolishing the right to appeal and ousting the jurisdiction of the court.

Assessment Criteria.
Comparative Table.

Criteria	IPA	EPAA
Reference to Standard Building Regs entrenched?	Yes[11]	Yes (Partially)[12]
Local, regional and state EPIs?	Yes [s 3.5.5(2)(b)]	Yes [s 79C(1)(a)]
Draft EPIs?	Yes [s 3.5.6(2)]	Yes [s 79C(1)(a)(ii)]
DCPs?	Yes [s 3.5.5(2)(b)]	Yes [s 79C(a)(iii)]
DAs on adjacent land?	Yes [s 3.5.5(2)(d)	No.[13]
The regulations?	Yes [s 3.5.5(2)(f)	Yes [s 79(C)(1)(iv) and cl 92]
Submissions/Objections?	Yes [s 3.5.5(2)(a)[14]	Yes [s 79(1)(d)]
The "suitability" of the site for development?	Not specifically	Yes [s 79C]
The environment?	Yes [ss 1.2.1, 1.2.3, 3.5.14(1)]	Yes [s 79C]
Ecological sustainability?	Yes [s 1.2.1]	Yes [s 5(a)(vii)]
The public interest?	No	Yes [s 79(1)(e)]
To Advance or have regard to the Act's purpose?	Yes [ss 1.2.2(1)(a) and 3.5.5(2)]	Not specifically.

With this in mind, consideration is now given to the few areas where differences have emerged and which may impinge on the relative fairness of the assessment process. This also is an appropriate place to consider the applicability of broad statements of principle such as "the effect on the environment" and "ecological sustainability" as effective assessment criteria.[15]

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11 The Standard Building Regulations are entrenched by the *Building and Integrated Planning Act* 1998. There is no power to change these regulations by virtue of IPA, ss 3.1.3(4) and (5).

12 EPAA Regs cl 98(1) requires work to be performed in accordance with the Building Code of Australia. See EPAA, s 80A(11). If the application relates to the refurbishment, alteration of an *existing* building however (cl 94) the obligation on the consent authority is merely to "take into consideration whether it would be appropriate..."

13 Though s 79C(1)(c) which directs the consent authority, in broad terms, to consider "the suitability of the site for the development" could be stretched to cover this ground.

14 The section refers to the definition of "common material" in Sch 10. Briefly, all the material received in the first three stages of IDAS is relevant to the decision making process.

15 For a detailed examination of EPAA assessment criteria see: Stefani White. "Integrated

1. The suitability of the site for development

This criterion does not exist under the Qld legislation though, in broad terms, it could be subsumed under the more general issue of amenity. In NSW, as indicated by the above table, it warrants separate consideration and has given rise to its own body of case law.

The section in question viz. s 79C(1)(b) grants an additional discretion to both the assessment manager and Land and Environment Court which is perhaps regrettable if the whole issue of administrative discretion is viewed suspiciously as it may well be in the absence of specific yardsticks and benchmark standards which operate to qualify that discretion. Nevertheless, it has to be said that such discretions are most unlikely to ever disappear from planning regimes and considerations such as this in actual fact relate to the core issues in any development application. The NSW Court of Appeal has recently adopted a novel approach to "site suitability" as a criterion. In *Zhang v Canterbury City Council,*[16] which concerned the siting of a brothel within the 200 metre radius stipulated by the relevant DCP, the Court held that in order to assess "suitability" it may sometimes be appropriate to grant approval for a "probationary period". In fact this is an interesting way to qualify an otherwise unrestrained exercise of discretion. The Full Court went on to say:

Development Assessment and Certification of Compliance Functions in New South Wales". (Sydney, Law Book Company, 1998), at pp 65-74.

16 [2001] NSWCA 167.

> Where...the nature of the development application is for the 'use' of *existing premises* [my italics] ...a probationary period or trial period may be an appropriate exercise of the statutory discretion.

Admittedly recourse to a probationary period could in reality only apply to the limited situation correctly identified by the court in *Zhang* viz. where an existing premises is intended to be used. Nevertheless it does amount to a creative judicial approach to this particular fact situation.

The question remains whether the Planning and Environment Court in Qld could adopt a similar approach. On the face of it, and accepting that there is no specific reference to such a criterion in Qld, the conceptually similar issue of "amenity" could be handled in a similar way by a Qld court. IPA, in s 4.1.54(2)(c) grants the court the power to "set aside the decision appealed against and make a decision replacing the decision set aside". There are however no cases on point in Qld.

The approach in *Zhang* is certainly one which is best able to generate a high degree of fairness in the short term at least. Where however the issue does not concern the use of an existing premises but rather the erection of a new one the courts in both jurisdictions are, by necessity, forced back on an examination of probabilities and possibilities assisted, it is hoped, by as much expert evidence as may be available.

2. The public interest

It is unfortunate that such an illusive conception as the public interest should find its way into a set of otherwise reasonably specific assessment criteria. It has the potential to generate high degrees of administration, judicial and ministerial discretion that is at odds with a professed desire on the part of legislators to create a fair and equitable system. It is in a very real sense an indefinable concept though one which has historically preoccupied the political wings of state and local government. In one sense it is contentless. As James Buchanan has remarked " The grail-like search for some public interest apart from, and independent of, the separate interests of the individual participants in social choice is a familiar activity to be found among both the theorists and practitioners of modern democracy".[17]

The concept has not found its way into IPA[18] though, once again, it is difficult to delineate a precise boundary between it and the traditional planning concept of amenity.

NSW courts have naturally been faced with the sometime necessity of ascribing some content to the idea of the public interest in an understandable attempt to avoid an

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17 J.Buchanan and Tullock, G. *The Calculus of Consent.* In "The Collected Works of James Buchanan". Vol 3. (Indianapolis, Liberty Fund, 1999) p 12

18 The Minister in Qld is given power under s 3.6.1. to declare that a development involves a "State Interest" but he is constrained somewhat by having to subsequently state specifically the nature of the state interest and his reasons. (IPA, s 3.6.2(2)) It does not therefore equate directly to the rather more amorphous concept of the public interest. The public interest did however exist under the previous Qld Act (s 4.3).

exercise of unfettered and perhaps unjustifiable discretion which was once described by Dixon J in the following terms:

> Indeed, the expression "in the public interest" when used in a statute, classically imports a discretionary value judgment to be made with reference to undefined factual matters, confined only... [By the scope and subject matter of the statutory enactment][19]

A considerable body of case law has developed in NSW just around the relevance and applicability of this concept, a jurisprudential phenomenon that Qld has avoided at least in these specific terms. (The issue of amenity remains). In an obvious endeavour to ascribe content to the "public interest" the NSW courts have adopted two approaches.

First, and in the absence of a definition of the public interest, they have directly equated the concept with the more familiar one of amenity. Consequently, in *Liu, Lonza and Beauty Holdings v Fairfield City Council*[20] the Court held that the public interest cannot simply or directly be equated with a sectional or individual perception of morality. The Court in this instance viewed the public interest as directly equivalent to the more traditional planning conception of amenity.[21] As Ratcliff comments; "It seems unlikely that the change of words [to include the "public

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19 *Water Conservation and Irrigation Commission v Browning* (1947) 74 CLR 492 at 505.

20 (unreported, LEC, 23 December, 1996).

21 The equation with amenity does not guarantee success for an applicant. See *Southside Business Centre P/L v Rochdale City Council* [Unreported, LEC, 2 September, 1998) per Pearlman J. where though submitted on a public interest ground, the development was rejected on the grounds of amenity.

interest"] will impact greatly on the Court's view that a council must prove a significant, detrimental social impact to prevent development consent being granted for a brothel".[22]

Second, when faced with a more homogeneous fact situation the courts have correctly referred to the objective issues without any significant direct reference to the public interest criterion. In *Shoalhaven City Council v Lovell*[23] which concerned an application to subdivide land which was under the flight path of a nearby airbase, the Court of Appeal held that the "public interest" certainly included measures to reduce the risk to the public of aircraft crashes and aircraft noise.[24]

The question must remain whether the incorporation of a public interest test possesses any immediate efficacy whatsoever or whether it is by its very nature and its obvious overlap with the idea of amenity, redundant?[25] A number of situations can be thought of where it may be useful such as in the case of an application to site a bottle shop two doors from an alcohol rehabilitation clinic. Such an application may well not fall within the purview of a DCP and may not directly affect the amenity of an area. In such an instance the public interest test may be relevant. In the absence of such a concept the Qld authorities and the courts would have to fall back upon the use of the

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22 Ian Ratcliff. "NO Sex Please: We're Local Councils" (1999) 4 *Local Government Law Journal,* p 150 at 159.

23 (1996) 137 FLR 58.

24 For a High Court consideration of the public interest test see *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216.

25 There is one clear instance where the concept is not redundant. In *117 York St P/L v Pro.Strata Plan No 1612.*[1999] NSWSC 1045 , Hodgson CJ in Equity remarked that it would be "perverse" of a court not to find an act which is illegal to be against the public interest. This, admittedly, represents a very small sub-set. For further judicial consideration see *Katakourinos v Roufir* [1999] NSWSWC 1045 and *Byron Shire Council. v Greenfields Mountain P/L* [1999] LGERA 445.

IDAS common material (which presumably would include a submission from the operators of the rehabilitation clinic) or even the definition of "ecological sustainability" in s 1.3.3. which in sub-section (c) includes a reference to "...the cultural, economic, physical and social wellbeing of people and communities".

Neither the use of the public interest or amenity in any of the situations illustrated above bear directly upon issues of fairness or equity though it would have to be said that the use, particularly of the public interest test, at a ministerial level could well do so and that it could be abused. There is, in essence, little difference between the Qld and NSW approaches despite the varying terminology and since the issue relates directly to one of the traditional grounds of assessment in any planning system, no change is envisaged.

3. The environment and ecological sustainability

These two related concepts, on the one hand an increasingly holistic perception of the environment and on the other the content and structure of ecological and environmental sustainability as policy determinants, have risen to prominence as Dovers points out largely since the 1987 World Commission on Environment and Development Report, *Our Common Future.*[26] The Commission defined "sustainable Development" as:

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[26] WCED. *Our Common Future.* (Oxford, Oxford University Press, 1987) Quoted in Dovers, S "The Rise and Fall of the NSESD, or not?" (1999) 4 *Australian Environmental Law News.* p 30.

> [d]evelopment that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:
>
> (1) the concept of "needs", in particular the essential needs of the world's poor, to which overriding priority should be given; and
>
> (2) the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.[27]

Both concepts now appear as significant base criteria in both IPA and EPAA and it is appropriate to briefly summarize their scope in both Acts as a basis to subsequently examine their emphasis and their use as overall assessment criteria. By far the clearest exposition of both concepts appears in IPA. "Ecological Sustainability" is defined in s 1.3.3. as a *balance* that integrates-

> (a) protection of ecological processes and natural systems at local, regional, State and wider levels; and
>
> (b) economic development; and
>
> (c) maintainence of the cultural, economic, physical and social wellbeing of people and communities.

In turn, and for the purposes of s 1.3.3, s 1.3.6. provides a descriptive summary of how ecological processes and other natural systems are protected viz. if:

(a)

(i) the life supporting capacities of air ecosystems, soil and water are conserved, enhanced or restored for present and future generations; and

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27 World Commission on Environment and Development, *Our Common Future* (Oxford, Oxford University Press, 1987) at p87.

(ii) biological diversity is protected; and

(b) economic development occurs if there are diverse, efficient, resilient and strong economies (including local, regional and State economies) enabling communities to meet their present needs while not compromising the ability of future generations to meet their needs; and

(c) the cultural, economic, physical and social well being of people and communities is maintained if-

(i) well-serviced communities with affordable, efficient, safe and sustainable development are created and maintained; and

(ii) areas and places of special aesthetic, architectural, cultural, historic, scientific, social or spiritual significance are conserved or enhanced; and

(iii) integrated networks of pleasant and safe public areas for aesthetic enjoyment and cultural, recreational or social interaction are provided.

It is difficult to imagine a more extensive survey of the constituent elements. As Samson suggests[28] there are three broad areas covered by the idea, ecological sustainability, social sustainability and economic sustainability and certainly the extensive IPA definition covers all these grounds. The difficulty, of course, will be to flesh out what are essentially intuitive terms with reasonably precise legal terminology and prescriptions. This task could occupy the P and E Court for many years to come.

Characteristically, EPAA lacks a consolidated treatment of the topic. It does, of course, exist in the Act but is spread throughout a number of sections.

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28 Sampson, P (1995) *The Concept of Sustainable Development* < http://www4.gve.ch/gci/DigitalForum/: Green Cross International>

The environment is defined in the definition section as "all aspects of the surroundings of human beings, whether affecting any human as an individual or in his or her social groupings". Supplementary treatment is also provided in ss 78A,112, 79C (b), 5, 5A and in the regulations Pt 14 Div 2.[29]

It is clear however that the Qld. Parliamentary Counsel went to considerable lengths to provide as exhausting a description of the constituent elements as possible, though Phillipa England can still express reservations about whether planning law in Qld is any "greener" than before.[30]

The risk with such en-globo criteria is that on the one hand they can mean anything and on the other very little. A statement of broad based criteria which in fact canvasses virtually the entire scope of human activity on this planet is of very little relevance or applicability in an assessment process which is designed to generate efficiency, effectiveness and equity if benchmark standards do not exist and the supporting science is either unavailable or equivocal. The core issue here is that environmental matters are management matters, a fact which regrettably appears lost in some darker green quarters.[31]

For this reason the precautionary principle may serve a useful purpose in those situations where, in the face of evidence which can point in both directions, a

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29 Subsidiary definitions which relate to the *Threatened Species Conservation Act, 1995,* define "ecological community", "endangered ecological community", "endangered population", and "endangered species".

30 England, P " Toolbox or Tightrope?" (1999) 16 *EPLJ* at p 139.

31 A principle which is acknowledged specifically in IPA, s 1.2.1(c).

conservative approach should be adopted. As Dryzek suggests[32] "scientific uncertainty is no excuse for inaction on an environmental problem." Nevertheless, as stated in *Begley v Pine Rivers S.C* [33] there are limits to the application of such a principle. As Fogg has quite correctly pointed out with reference to this case, "two tail feathers do not a vital habitat make!"

It is quite beyond the scope of this work to provide a detailed examination of the environment and ecological criteria beyond what has already been mentioned. Suffice it to say, for some time to come courts will continue to avoid precise definitions though using the new terminology throughout their judgments.[34] The essential point however is how these concepts can be applied in an equitable and unemotional manner in individual cases. As Deville and Harding point out with reference to the precautionary principle, how the rhetoric of the principle can be operationalised is one of the challenges of the first decade of the 21st century.[35]

The "rhetoric" however does appear to be becoming more instrumentalised and certainly both planning jurisdictions being considered here have moved considerably since the Brundtland Report of 1987 or even the Earth Summit at Rio which spelt out

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32 Dryzeck J.S. *The Politics of the Earth.* (Oxford, Oxford University Press, 1997) Quoted in McGowan-Jackson, R *Business Response to Sustainable Development.* (Environmental Management Centre, University of Queensland, 2000).

33 [1995] QPLR 134.

34 See for example, *Bannister Quest P/L v A.F.M.A.* (1997) 819 FRA. 14 August, 1997. and *Tuna Boat Owners Ass of S.A. v D.A.C. and Anor.* [2000] SASC 238.

35 Deville, A & Harding, R eds, *Applying the Precautionary Principle.* (Sydney, Federation Press, 1997) at p 21. Also, Stein J " Are decision-makers too cautious with the precautionary principle?" (2000) 17/1 *EPLJ* p 3. See also Crane, W "Merit Review and Sustainability under the *Integrated Planning Act* 1997" (2001-2002) 7 (34) *QEPR* 138 at 154.

a set of internationally agreed principles to promote sustainable development.[36] It seems strange therefore that EPAA does not contain a definition of sustainable development.[37] However, irrespective of the absence of a definition in the principle Act, it has now been clearly established that ecological sustainability[38] is properly considered as an assessment criteria by the courts. Equally, the precautionary principle has been incorporated in the *Intergovernmental Agreement on the Environment* and has been applied consistently by the courts.[39]

The concern of this writer is that the potential exists for such disparate assessment criteria to be used in an unjustified and unfair manner by activists in specific local authorities or by tribunals who lack the depth of experience of the judiciary. The recipient of such treatment, which may include a list of unreasonable requests for reports, impractical development setback lines, and many other items will be the development community. Some local authorities are already quite notorious in this regard. This comment applies equally to both States. However with a good deal of common sense and a perception of balance by both sides an accommodation should be able to be found.

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36 Some courts, in fact, are now viewing such concepts as developing norms of international law. See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 and *Nicholls v Director General of National Parks and Wildlife* (1994) 84 LGERA 397. The Federal EPBC Act is only the latest expression of this trend. For an overview see. Henningham, Bill. "A Question of Balance" *2000 6(2) local Government Law Journal, p 95.*

37 Though it is defined in the *Local Government Act,* 1993.

38 See the judgment of Lloyd J in *Cartens v Pittwater Council.* (unreported, LGEC, No 10093/99).

39 See *Leatch v National Parks and Wildlife Service* (1993) 1 LGERA 270

D. THE APPLICANT'S RIGHTS TO MAKE REPRESENTATIONS DURING THE DECISION PROCESS

In the real world of planning and assessment of development proposals there can never be a straight line IDAS process which runs smoothly and without interruption. The assessment process is exogenous, not endogenous. Issues arise which call for new reports or perhaps merely an explanation by letter or phone.

Clearly the IDAS system needs to make allowance for this reality but, in fact, only the Qld Act does so, though even then with some degree of confusion. The principle section under IPA is s 3.5.9(1) which grants to the applicant the right to stop the decision making process for a period of up to three months in order to make representations to a referral agency. Additionally, the applicant, in the event of a conflict or disagreement between two or more referral agencies can ask the chief executive to mediate or decide the matter. This, in turn, stops the decision process for up to three months. [40] For some reason however a similar right has not been reserved under IPA in the much more usual case where an applicant wishes to suspend the decision period in order to make further representations to the assessment manager.

IPA, s 3.5.7(4) which one would have expected to be drafted to cover this situation grants the right to ask for a further extension to the assessment manager but no similar right is granted directly to the applicant.

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40 IPA, s 3.5.10(1).

This is a paradoxical situation; the applicant can, as of right, request a suspension in the case of referral agencies but not in the case of the authority which may be more directly involved.

In NSW under EPAA s 82A, the applicant is given the right to request a review of the decision, but only after the decision has been made and even then in tightly controlled circumstances. Similarly, the EPAA Regulations cl 54 and cl 60 respectively grant the consent authority or a concurrence agency the right to request additional information in a "reasonable" timeframe but do not grant the applicant the right to stop the process for a period.

Both Acts are defective in this regard, though EPAA rather more so than IPA. The essential question is however whether the applicant should be given such a statutory right at all.[41] In my opinion the applicant should and for the following reasons:

1) In all instances the applicant has paid the statutory fees which are, in some cases, very substantial.
2) A successful application may lead to substantial employment and general economic benefit to the community.
3) Given an ability to stop the process and to make representations to the consent or assessment manager there are three possible outcomes:
    a) The assessment manager rejects the representations.
    b) The representations are accepted; or,

41 The writer concedes that informal processes often take care of such issues particularly where there are no statutory penalties which apply to local authorities who exceed the decision periods under the Act.

c) A more likely outcome, a mediated agreement is reached between the parties which may well result in a better project.

Since both Acts go to great lengths to ensure public notification and participation it is more than a little unfair to deny an applicant a statutory right to stop the decision process in order to make such representations.

E. DEVELOPMENT CONDITIONS

Once again the purpose of this section is not to provide an exhaustive commentary on all aspects of the law relating to development conditions in both States but rather to examine some of the principal issues that commonly occur under this heading and whether, in essence, the two jurisdictions have varying approaches.

With this in mind the following issues will be dealt with:

- do the statutes and regulations in both states specifically authorise or prohibit certain development conditions
- relevance and reasonableness of conditions
- are the *Newsbury and Wednesbury* tests[42] applicable in both states
- the issue of "finality" in both jurisdictions

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42 [1981] AC 578 and (1948) 1KB 123 respectively.

- what remedies are available in the event that a condition was effectively forced upon an applicant by extortion or undue influence

1. General statutory provisions which authorise or prohibit certain conditions

IPA is quite specific in its attempt to outline the general conditions that may and may not be imposed with s 3.5.31(1) laying down three general propositions:[43]

a) a condition may place a limit on how long a lawful use may continue or works remain in place.

b) a development may not start until certain other developments, permits or uses have been completed.

c) to require a development to be completed by a certain time and to require a security deposit in respect of it.

Section 3.5.32(1) deals with the converse situation ie conditions which cannot be imposed. These are:

a) Conditions must be consistent with earlier development approvals still in effect for the development.[44]

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43 Hart, Wendy "Statutory Test for Lawfulness of Conditions in Local Government" 1997 117 *Qld Lawyer*.

44 For a discussion with respect to preliminary approvals see Young, T "How Should Preliminary Approvals be Conditioned-the Legal Test" (1999) 16/6 *EPLJ* at p 514.

b) They must not require a monetary contribution for the establishment or maintenance of community infrastructure.[45]

c) They must not require works to be carried out otherwise than by the applicant.[46]

d) Finally, a development condition may not now impose an access restriction strip.[47]

As indicated earlier, these are very general restrictions and reflect a past history of abuse in Queensland. There are no direct equivalents in NSW though it is doubtful whether similar problems may not have arisen in that State in the past.

On the contrary, in NSW the provisions of the Act and the regulations which relate directly to development conditions are, in the manner of EPAA generally, spread across a large number of areas, are subject to constant and unremitting qualifications and consequently do not lend themselves to many direct comparisons. Nevertheless, and without canvassing the much more general issues of "relevance" and "reasonableness" of development conditions which will be dealt with in the next section, there are some broad concurrences.

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45 There are, however, major limitations on this principle under s 3.5.35(1).

46 IPA, ss 3.5.32(1)(b) and (c) reflect the strenuous objection by the development community over some 30 years to the wholesale imposition of such requirements by some local authorities in Queensland. Those familiar with the history will remember that one local authority and one mayor in particular were notorious in this regard.

47 Such strips were possible under the previous Act and they effectively excluded many development sites from appropriate and reasonable access to adjoining streets. The development community again vehemently opposed them over a long period. They presented a difficulty since the strip became registered on the title after rezoning. To remove it required an entirely new rezoning together with its gazettal.

EPAA deals with the imposition of conditions under s 80A(1)-(11) with the last subsection indicating that a development consent may be made subject to such conditions as are prescribed by the regulations. In reality however, again with the exception of the very specific instance illustrated in EPAA, cl 96, the substantive aspects are contained in the aforementioned s 80A.

Beyond this section, the most relevant is s 94(1) which allows a condition which makes an application subject to:

a) dedication of land, free of cost; and,

b) the payment of a monetary contribution.

These two provisions are not totally in contra-distinction to the IPA provisos detailed in s 3.5.35(1)-(5) and, in fact, in the absence of a judicial decision, the exercise of local administrative discretion under IPA could result in their almost total convergence. IPA, however, at least possesses the rather new procedure of "bench-mark development sequencing" which could establish more or less objective criteria for the consideration of a development proposal (and particularly a residential sub-division) within an overall strategic infrastructure framework detailed in an existing plan. [48]

Although the above is by no means an exhaustive analysis of the propositions, they should suffice to indicate the more specific heads of tentative agreement between the two jurisdictions. Of the two jurisdictions, once again and at the risk of appearing

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48 IPA, s 3.5.35(2A)(b) cf EPAA s 80A(4) and (6).

parochial, the IPA summary is to be preferred. It does contain specific prohibitions which arrest an otherwise unbridled discretion by the executive and places the applicant in a statutory position where the applicant can rest upon a statutory duty imposed upon the local consent authorities at least in respect of some matters which, as indicated, have long been of concern to the development community. EPAA remains imbedded in a more historical tradition which, one suspects, is more concerned with protecting the discretionary rights of the local authorities than necessarily and directly addressing wrongs. In terms, therefore, of equity and fairness to the applicant it must be said to lag behind.

2. Relevance and reasonableness

The two principles to be examined here are the question of "relevance" and the question of "reasonableness". Both overlap to some (but not to every extent) and the question of "reasonableness" or, more particularly, "unreasonableness" can sometimes assume a life of its own. The task here is to examine how both tests are applied in both jurisdictions.

At a purely statutory level both are acknowledged. Under IPA,[49] a condition must:

> (a) be relevant to, but not an unreasonable imposition on, the development or use of premises as a consequence of the development; or
>
> (b) be reasonably required in respect of the development or use of premises as a consequence of the development.

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49 IPA, s 3.5.30(1)

Subsection (2) of s 3.5.30 also stresses, in essence, that these principles override all local laws and policies. The above provisions merely reflect, in summary form, the common law on this issue which has been developed by the planning courts over a long period of time and under the current Act and previous Acts. They provide a framework however under IPA which is not available under EPAA. The latter Act relies directly on the outcome of judicial decisions on the matter which will be discussed next.

Nevertheless a comment should be made concerning the fact that IPA is prepared to outline them as general principles for the obvious benefit of applicants and, to a lesser extent the courts, while NSW passes over them in silence. Once again the matter resolves itself to a question of the rights of stakeholders, particularly applicants. In perhaps 85 percent of cases applicants are not sophisticated practioners in the field. A statement of principle in the Act can only contribute to a general sense of fairness and at least give the appearance of equanimity. To bury the issue, or indeed not to discuss it directly[50] places the onus on the securing of professional advice which contributes to cost and the overall inefficiency of the system.

Both jurisdictions, as indicated, place considerable emphasis in this area on decisions of their respective planning courts and it is these lines of authority that will be considered now.

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50 There are isolated references to "reasonableness" in EPAA but nothing is available as a consolidated principle.

The general propositions contained in IPA,s 3.5.30, referred to above, have been extensively defined and developed by the courts in both jurisdictions. There are however difficulties. Arguably, the two issues fall into three areas of consideration viz.

a) the relevance of the imposed condition to the specific development.

b) the reasonableness of the condition expressed within the parameters of a specific development; and

c) the reasonableness of the condition expressed in terms of an "administrative" act or in Brennan J's terms, "the courts power to cure "administrative injustice".[51]

Unfortunately, the courts have, on occasion, merged to the various factors and the result has been a degree of confusion as to which test is, in fact, being applied in specific instances.

The following will take each of the issues in turn as they have been considered by courts in both jurisdictions.

(a) Relevance

The leading Qld case is *Proctor v Brisbane City Council*[52] which firmly established that "relevance" was a criterion which the courts can address and do so independently

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51 *Attorney General for NSW v Quin* (1990) 170 CLR 1 at 36.

52 (1993) 81 LGERA 398 (Court of Appeal).

of the ancillary question of "reasonableness". Relying on the High Court decision in *Lloyd v Robinson,*[53] *Proctor* defined relevance as "falling within the proper limits of a local government's functions under the Act, as imposed to maintain proper standards in local development or in some other legitimate sense".[54] The *Proctor* decision can and does have a broad application. In *Warradale Holdings P/L v Caloundra City Council*[55] Brabazon DCJ was asked to rule on whether a Development Control Plan gazetted after the lodgement of a development application could be used as a relevant instrument to impose conditions. His Honour held that it was a relevant instrument and could be considered.

The same judge went even further than this in *Ryan v Maroochy Shire Council.*[56] The question here concerned a *draft* plan that, on the evidence given, was so locally controversial that it was not at all certain it would be adopted. Clearly such a state is a long way from a DCP that had been gazetted. Nevertheless, the judge found that even this draft was a relevant instrument upon which development conditions could be based.

In no sense therefore is the issue of relevance one that necessarily or invariably will benefit an applicant merely because it forms part of their submissions. The general rules and the specific instances where they are called into play exist independently in the sense of a dialectical relationship. It is for the courts to provide the necessary

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53 (1962) 107 CLR 142.

54 Note 52 at 404.

55 [1998] QPELR. 503.

56 [1998] QPELR 184.

synthesis. For example in *Hammond v Albert Shire Council*[57], Newton DCJ found that a condition requiring the developer to set aside a portion of his site for the local authority was not a relevant condition since there was no necessary nexus between the site and the condition. Newton DCJ's reference to the concept of "nexus" is illustrative of good and careful thinking, though the idea of nexus is hardly referred to in many other judgments.[58] It adds an additional conceptual framework within which general conditions can and should be considered.[59] In another instance however, in *Laver v Albert Shire Council*[60] the same judge found that a condition requiring the applicant to set aside a portion of his site for a possible railway line was a relevant condition to attach. Similarly the right of a local authority to consider the traffic requirements of an entire neighbourhood and not simply those generated by the proposed development is a relevant consideration which could be reflected in an appropriate condition.[61]

Associated with the idea of relevance in the general sense referred to above is what has become known as the first *Newbury* principle.[62] The difficulty with the *Newbury* test(s) is that, and as will be indicated later, the test(s) overlap between the question of

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57 [1997] QPELR 314.

58 For a NSW example where Cowdroy AJ similarly introduced the concept of "nexus" see: *Greenfields Constructions (NSW) P/L v Byron Shire Council* [1998] NSWLEC 245.

59 For additional instances where conditions were found to be irrelevant see *Pacific Exchange Corporation P/L/ v Gold Coast City Council* [1997] QPLR 129 and *Bargara Park P/L v Burnett Shire Council* [1996] QPELR 133.

60 [1997] QPELR 94.

61 *Patrick and Hansen v Thuringa City Council* [1998] QPELR 307.

62 *Newbury District Council v Secretary of State for the Environment* [1981] AC 578.

relevance and the question of reasonableness and it is often unclear from the judgments in what sense the court is applying the principle.[63]

Newbury is a 1981 decision of the House of Lords however there is earlier authority along similar (though less developed lines) from the High Court of Australia in *Allen Commercial Constructions P/L v North Sydney Municipal Council*[64]. Here the Court held that the power to apply conditions does not grant:

> [a]n unlimited discretion as to the conditions which may be imposed, but as conferring a power to impose conditions which are reasonably capable of being related to the purpose for which the authority is being exercised...

The judgment in *Newbury* admittedly is rather more articulated.[65] In finding that a council requirement to remove certain hangers did not fairly and reasonably relate to the development, Lord Lane (at 627) went on to observe that:

> For conditions attached to the grant of a planning permission to be intra vires and valid the conditions imposed must be for a planning purpose and not for any ulterior one and they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them.

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63 In *Silverwater Estate P/L v Auburn Council* [2001] NSWLEC 60 which dealt with the imposition of 74 separate conditions, the judge, Talbot J merely referred to *Newbury* and it does not appear in his reasons for judgment.

64 (1970) 123 CLR 490 at 499.

65 Though two of the *Newbury* principles had already been enunciated by Lord Denning MR in an earlier decision, *PYX Granite Co v Minister of Housing and Local Government* [1958] QB 554 at 572.

In summary three principles are derivable and all three have found application in NSW and QLD planning courts. Conditions must:

1) be for a planning purpose and for no ulterior motive
2) fairly and reasonably relate to the development; and
3) be reasonable and issue from a reasonable authority

The second of the general principles of interpretation of development conditions is the question of their specific reasonableness.[66]

(b) Specific Reasonableness of a given condition

Both jurisdictions at the judicial level have accepted that a specific condition, to be *intra vires* and hence valid, must be reasonable having regard to the nature of the proposed development. Whether a condition meets or does not meet this requirement is thus totally a matter for judicial discretion.

In a recent decision in NSW, *Carr v Minister for Land and Water Conservation* [67] Pearlman J held that it was not unreasonable to impose conditions on a project even though the project was unlikely to proceed. It is hard to argue against this proposition since one wonders why the matter was taken to appeal or the application not withdrawn if it was unlikely to proceed.

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66 "Reasonableness" here is not to be confused with "reasonableness" in the *Wednesbury* sense.

67 [2000] NSWLEC 89.

Similarly, in *Markasis v Mosman Municipal Council*[68] Lloyd J in dealing with the reasonableness of a condition which required the applicant to install a system to convey water not simply from his site but from a nearby street, and after reciting essentially Lord Lane's judgment in *Newbury* found that the condition did fairly relate to the development. Interestingly, his Honour went on to remark that the three *Newbury* test were cumulative and that to establish a valid claim under the heading of *Newbury* all three grounds must be satisfied. In this instance the judge found the appellant had failed on the last two grounds though he had, presumably, established the first ground. There is no indication in the *Newbury* decision itself of an intention to make the grounds cumulative and it is difficult to discover other authority for such a proposition in NSW or in Qld. Certainly it seems to run counter to the intention of the principle itself which is to generate justice, to constrain bureaucratic discretion somewhat and to establish an equitable basis for an approval. It remains to be seen whether other courts will take up this concept.

Two examples, both from NSW should suffice to establish that, on occasion, the second *Newbury* principle does work for the benefit of applicants. In *Greenfields Constructions (NSW) P/L v Byron Shire Council*[69] Cowdroy AJ ruled that it was unreasonable for a council to allocate costs to the entirety of a residential development at the initial stage when the development was to proceed in discrete stages. Similarly, in *McConaghy Developments P/L v Tamworth City Council*[70] it was held that a

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68 [1998] NSWLEC 223.

69 See Note 58.

70 [1996] NSWLEC 44.

council condition requiring the developer to create additional car spaces was unreasonable because the reason behind the condition was the council's own decision to remove its car spaces elsewhere in the city.

Further examples of the principle in operation can obviously be provided but to no real purpose. For a Qld example of the same principles being applied see *Sunseeker Cruises P/L v Cairns City Council.*[71]

(c) Administrative reasonableness

This, the third leg of *Newbury*, in fact pre-dates the decision in that case. It is, in reality, a principle of administrative law that has made a relatively easy transition to planning law. It derives from the oft-quoted words of Lord Greene MR in *Associated Provincial Picture Houses v Wednesbury Corporation:*[72]

> It is true to say that if a decision on a competent matter is so unreasonable that no reasonable authority would ever have come to it, then the courts can interfere.

A High Court authority on point is *Parramatta City Council v Pestrell*[73] where in almost identical words the court concluded:

> [a]n opinion will nevertheless not be valid if it is so unreasonable that no reasonable council could have formed it...[74]

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71 [1996] QPELR 5.

72 (1948) 1KB 123 at 139.

73 (1972) 128 CLR 305 at 327.

Again, the *Wednesbury* principle has found expression in planning decisions in both jurisdictions.[75] It is common ground, as indeed it must be given High Court decisions on point. There are accordingly, two High Court decisions worth considering. First, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd.*[76] In this instance Mason J initially considered the essence of the matter as a "failure to take into account a relevant consideration" At p 41 however his Honour had shifted ground somewhat and described the test as whether the decision was " manifestly unreasonable". At this point it would almost appear that the Australian approach to the doctrine was deviating somewhat from the classic English one.

It remained for Brennan J in *Attorney General for NSW v Quin*[77] to restate the doctrine though with a note of caution to the courts in its application. In his words:

> There is one limitation to the courts power to cure "administrative injustice", *Wednesbury* unreasonableness which may appear to open the gates to judicial review of the merits of a decision or action taken within power. Properly applied *Wednesbury* unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power. Acting on the implied intention of the legislature that a power be exercised reasonably the court holds

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74 The High Court in this decision quoted *Bankstown Municipal Council v Fripp* (1919) 26 CLR 385 at 403. A reading of this case suggests that it is no authority for any such proposition at all.

75 In Qld see *Sabdoran P/L v Hervey Bay Town Council* (1983) 2 QdR 172 and in NSW, *Weal v Bathurst City Council* [1999] NSWLEC 132.

76 [1986] CLR 24 at 34-39.

77 (1990) 170 CLR 1 at 35-38.

> invalid a purported exercise of power which is so unreasonable that no reasonable repository of the power could have taken the impugned decision or action.

Mason J then went on to say that the ability of the courts to exercise the *Wednesbury* power is "extremely confined".[78]

The *Newbury* and *Wednesbury* principles have been considered across both jurisdictions for a number of reasons that are salient. First, the intention of this work is not merely to point out differences between the two jurisdictions but also to illustrate the similarities between them. In the issues raised above, though the statutes are quite different in their degree of specificity concerning questions of relevance and reasonableness, the planning courts in both States have adopted precisely the same judicial interpretations. This, in itself, speaks volumes for the ability of the common law to refine a statutory principle even if that principle is merely expressed at a seminal level. Second, the two principles are of critical importance as they establish a rubric against which the courts can frame a response to local authority imposed conditions. Third, local authority conditions can and do create some of the greatest difficulties for applicants and the ability to have the courts assess such conditions impartially and on the basis of principles that even less sophisticated appellants can understand and articulate is essential.

Finally, some mention should be made concerning the recording of development conditions. Development conditions under IPA do not simply "run" with the

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78 at 36.

development permit they now are "attached" to the land[79] and the conditions bind "the owners, the owners in successors in title and any occupier of the land".[80] Given the sometimes dilatory nature of Local Government follow up to ensure that conditions have been complied with, this is quite an extraordinary proposition.[81] Indeed the only way in which a permanent record could be kept and which would be immediately available to successors in title is if the conditions were noted on the title certificate itself. It is highly improbable that this can be done in many instances, for example in the *Silverwater Estate* case mentioned previously the court had had to deal with 74 separate development conditions.[82] An additional problem may occur if subsequent to the approval an applicant successfully applies to the Planning and Environment Court for a modification of conditions. The situation under EPAA is quite different.

Although local councils are required by the regulations to maintain detailed records of approved developments[83] they are specifically authorised to impose a condition that the approval "is granted only to the applicant and does not attach to or run with the land to which it applies".[84]

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79 IPA, s 3.5.28.

80 This is in addition to a further requirement under s 3.5.27 which places an additional onus on the consent authority to note any conditions inconsistent with a planning scheme on the scheme itself.

81 The Act itself makes no suggestion as to how this will occur.

82 The probable outcome of this requirement will, no doubt, be a degree of concern in the Land Titles Office.

83 See EPAA, Regs, cls 264-267.

84 EPAA, s 78A(6)(a).

The Qld proposition may, over time, be found to be almost impossible to administer and it is worthy of note that already a "Consultation Draft" has been prepared which will totally revamp Pt 4 of the Act.

F. THE FINALITY PRINCIPLE AND THE ISSUE OF UNCERTAINTY

Two points must be made at the outset. First, that these principles, although canvassed for example in *Pioneer,* related to qualitatively different issues that were central to that decision and other decisions previously discussed.[85] Second, no attempt has been made to separate these principles because, in reality, both are sub-sets of each other. That is to say, decisions can be ruled void by the courts in both jurisdictions on the basis that the decision was "uncertain" and in many instances the associated difficulty that the court will find with the decision (or condition) is that because of its inherent uncertainty it could not be reduced to "finality".

In part because of the reasons given in previous chapters viz. the need for certainty on the part of the development community to enable them to assess aggregate risks of given projects and the economic benefits which are assumed to flow from an employment creating project, "finality" has always assumed a respectable, indeed traditional, place in planning law.

In what has been described elsewhere in this work as the "new environmental law" however changes in emphasis are becoming evident. Though both principles continue to be argued in courts and often successfully, the courts appear to be becoming more

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85 Essentially they relate to piecemeal applications.

cognisant of Barwick CJ's words in *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd*[86] where he commented that in its application to a specific instance "no narrow or pedantic approach is warranted".

One broad reason for the courts now having to adopt a less "pedantic" approach is the ineluctable intrusion of environmental monitoring into the approval process and, with this intrusion, the continual problem of "threshold" levels that exist (and, in all probability will always exist) in the environmental sciences. With the incorporation of environmental principles as the central issues within planning law (ESD, precaution, inter-generational equity) it is becoming increasingly problematical how conditions and decisions on development applications which have associated with them any type of environmental issue can possibly ever be "final" in the traditional sense.[87] This, it must be said, is not simply a major issue for the courts but also for industry at the corporate policy and strategic planning level.

Clearly if emission threshold levels are to be substantially reduced in respect of say a chemical plant which had been constructed in line with a pre-existing but now abrogated threshold level for emissions, the cost to that industry in re-engineering major portions of plant may be so substantial that production could be rendered uneconomic. Such instances have already occurred. Similarly, if a decision is taken at a corporate level to construct such a plant under the new law the already difficult issue of what discount rate to choose to assess capital returns over extended time periods

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86 (1968) 118 CLR 429 at 437.

87 See Bowie, Leanne "EPA/IPA- Teething problems with the integration of the environmental licensing system into the development assessment processes in Queensland" 1998 *AELN* vol 3 & 4 at p 29.

becomes even more complex. These then are the broader issues. Consideration is now given to how these common law principles[88] in regard to finality are applied in both jurisdictions.

In many instances a court can deal with the finality/uncertainty issues relatively easily because fundamental aspects of a development may remain unaffected or because the uncertainty relates to rather simple issues such as the construction of a sentence or the meaning of particular words. In *Singleton Shire Council v Errol David Upward* [89] the applicant argued that a condition which required him to "(contribute) towards 50% of the costs" of a certain road was uncertain and lacking in finality. Sheahan J in finding for the applicant concluded that: a) The condition failed to identify who is to be the arbiter of the work required to meet the standard identified in the condition and b) the condition failed to identify who is to be the arbiter of the 50 percent cost which will satisfy the condition. Consequently the condition was void as lacking finality.

Similarly, in *Bradley William Edwards v Dumaresq Shire Council* [90] an application to construct a private airstrip was ruled so uncertain and imprecise in specific details that the local authority was unable to give the matters proper consideration in terms of s 90(1) of EPAA. (as it then was). In *Weal v Bathurst City Council* [91] the court was quickly able to conclude that merely because, in notified form, the consent called for a

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88 There is no direct statutory recognition of them in either Act. (Though it previously did exist in EPAA as s 91(3A)).

89 [1998] NSWLEC 118.

90 [1994] NSWLEC 2.

91 [1999] NSWLEC 132.

deferred commencement date was an insufficient ground to establish a claim that it was lacking in finality.

At a more fundamental level of legal principle the leading authority is *Mison v Randwick Municipal Council*[92] which was quoted extensively in the subsequent decision by Stein J in *Rosemount Estates P/L v The Minister of Urban Affairs and Planning*[93]. Stein J reiterated the essential requirements needed to justify a finality claim by quoting the judgment of Clarke JA (at 354) in *Mison* viz:

> Where a consent has been granted in terms which leave open for later decision a particular aspect of the planned development the question may arise whether consent is final. This will not necessarily be the case. Where, however, the question does arise there may be cases where the answer is clear. In other instances questions of degree may be involved. It is neither possible nor desirable to attempt to lay down a criterion to be applied in every case in determining whether a consent is final. What must be decided is whether the consent finally determines the application.

Importantly, Stein J went on to say:

> Where a consent leaves for later decision an important aspect of the development and the decision on that aspect could alter the proposed development in a fundamental respect it is difficult to see how the consent could be regarded as final.

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92 (1991) 73 LGRA 349.

93 [1996] NSWLEC 59.

> In rejecting the application in *Rosemount Estates* and after considering the nature of the conditions imposed Stein J. was able to conclude that they did not offend the principle established in *Mison.*

Consequently, in *Scott v Wollongong City Council*[94] Samuels JA was able to apply the corollary of the *Mison* principle i.e. that where the conditions complained of are, in reality, "ancillary to the core purpose" of the development then they should be approached with caution, even though they may leave final details to be settled. The principle has by no means gone away since then and it was applied quite strictly by Pearlman J in *Glowpace P/L v South Sydney City Council*[95]

The Queensland authorities on point have previously been canvassed in Chapter 3. Recent Queensland decisions which have adopted the same cognitive approach of the LEC. (and which accept *Mison* as the correct statement of principle) include *Mitchell Ogilvie v Brisbane City Council*[96] and *Queensland Investment Corporation v Toowoomba City Council.*[97]

However, *Mison* will need to be modified in both jurisdictions for the reasons given earlier. With increasing Federal government intervention in the IDAS process generally, with the inevitable application of minimum emission standards and changes

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94 (1992) 75 LGRA 112 at 119

95 [2000] NSWLEC 220. See also, *FAI Property Services v Lake Macquarie City Council* [1993] NSWLEC 30.

96 [2000] QPEC 55 (21 June 2000)

97 [2000] QPEC 36 (2 June 2000)

in threshold levels it will become very difficult indeed to maintain the traditional planning view of finality.

This intervention suggests that grave issues of equity will need to be addressed by both jurisdictions. Is it open to the legislature to demand the right to insist on a continuing future statutory right to change essential conditions of the original approval without, for example, providing compensation to the owner of the land? Is it at all possible in this global system to sustain an extremely tight regulatory regime in one economy that may be adjacent to another with very loose regulatory conditions? Answers, or even partial answers, to these questions will have to be forthcoming shortly but they are certainly not available to the development and financial community at present.

G. CAN CONDITIONS BE IMPOSED WHICH ARE IN CONFLICT WITH EXISTING STRATEGIC, ENVIRONMENTAL PLANS AND OTHER PLANS

At this point in time with no case law available referrable to the new Act and with only four Queensland local authorities so far having made the transition to a full IPA compliant scheme only some general observations can be made. Under the previous Act one would have to agree with David Nicholl's conclusion that the status of planning schemes of various types was heading strongly away from the view that they were essentially formulations of planning *policy* to a highly prescriptive, substantive law approach. [98] The high point of this strict approach occurred in the Court of Appeal

decision in *H.A. Bacharach P/L v Caboolture Shire Council*[99] a case in which this writer was involved. The court in this instance was clearly of the opinion that the highly prescriptive words used in the strategic plan were to be taken not merely as a policy statement but were to be treated, essentially, as strict law despite the Local Authority acknowledging that demographics of the area had so changed over time that the particular clauses in the plan were unworkable. This decision was followed by a further, confirmatory, decision by Kiefel J in *H.A. Bacharach P/L v Minister for Housing*[100] and, as a consequence, by the mid-90s, the development community were beginning to look with dread at strategic plans.

Although it is somewhat difficult to merge the various sections by which IPA has managed to address this situation, it can be now confidently asserted that prescriptive rules has disappeared from the new Act and that policies and plans will now be taken as reflections of policy only, and further, of policy which can be departed from provided certain tests which have been discussed elsewhere in this work are complied with.[101]

These sections are as follows:

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98 Nicholls, David "Case Law and Trends" in *Lost in the Wilderness-Planning Law and Policy Update* (Conference Proceedings, CLE/QELA, 25 October 1994) at 58-65.

99 (1992) 80 LGERA 230.

100 (1994) 85 LGERA 134.

101 A proposition which has been re-confirmed in *Jezreel v Brisbane City Council* [2001] QPELR 92.

i) s 3.5.14 (with reference to "impact assessment") which authorises the assessment manager to make a decision which is in conflict with a planning scheme if there are "sufficient planning grounds to justify the decision[102]

ii) s 3.5.27 which instructs the assessment manager to note approvals which are inconsistent with a planning scheme on the scheme itself.

iii) s 3.5.35 which treats the issue of infrastructure costs in the context of a development which is inconsistent with some aspect of a planning scheme.

iv) s 2.1.23 which confirms that although planning instruments are statutory instruments under the *Statutory Instruments Act* 1992 and have the force of law they are not able to "prohibit development on or the use of premises" and nor can scheme policies " regulate development on or the use of premises". The effect of this provision is not only to abolish the zoning system but also to remove the prescriptive element almost totally.

v) In respect of conditions that the Act will not allow to be imposed, the IPA test for conditions does now not even

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102 The Assessment manager may not however "compromise the achievement of the desired environmental outcomes for the planning scheme area. A similar discretion is given to him in respect of code assessment (s 3.1.13) though the *Building Act,* 1975 is entrenched.

> expressly address the issues of planning schemes and associated policies.[103]

The net effect of these sections operating together is to define the whole question as one of policy, not law.

No such reservations are expressed in respect of State planning policies which by virtue of s 2.4.1 are also statutory instruments. With no reservations however they effectively bind the local authorities as law.

While Qld has abandoned strategic plans, DCPs and other local planning instruments as law and relegated them to a subsidiary though, arguably, no less effective role as policy guides for decisions and conditions, NSW has continued with a more traditional approach and under EPAA they have, in principle, prescriptive legal effect.[104] The role of local, regional and State environmental planning policies (together with D.C.Ps) is detailed in exhaustive fashion in Pt 3, Divs 1-5 of EPAA and less extensively in the regulations. The essential point, in the absence of the definitive statement concerning their status that appears in IPA, is that all such instruments are gazetted and consequently form part of the overall regulatory framework of EPAA.[105]

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103 See Gore, D "Development Conditions" QELA 1997 Seminar at p 87.

104 In principle, because though the "policy" emphasis is certainly not as prominent as in Qld some non-prescriptive flexibility is generated through the operation of EPAA, ss 76A(1), 28, and 34. In addition the State Environmental Planning Policy No. 1- Development Standards, Clause 3 states that "This Policy provides flexibility in the application of planning controls in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in s 5(i) and (ii) of the Act.

105 See particularly, EPAA, ss 24, 28(2), 26(1)(b), 31, 34(2), 35,36(2) and s 80(1)(b)

Additionally, the Act establishes a hierarchy to relate the various instruments in terms of overall compliance provisions.[106]

Given their arguably more prescriptive nature it is not surprising that decisions of the LEC are similarly strict with the Court, at first instance and on appeal, considering compliance with plans a necessary pre-condition to a valid decision.[107] Three recent decisions illustrate this. In *Currey v Sutherland Shire Council*[108] Stein JA held that a clause in a DCP was, in fact, a prohibition which established a legal precondition to the exercise of the council's decision-making powers. The decision in *Currey* followed an earlier 1996 decision by the same judge in *Clifford v Wyong Shire Council*[109] and has been applied by the Court of Appeal in *Franklins Ltd v Penrith City Council*[110] where in a unanimous decision Stein JA again confirmed that "Council failed to appreciate that it had a mandatory obligation to consider and be satisfied of compliance ..." [with clauses in a relevant DCP].

The two jurisdictions have consequently fundamentally different approaches to the issue and, in terms of the criteria being addressed in this work, the Qld position is to be preferred. One does not need to adopt as a starting point a position of principle . that planning should be about "places" to be amenable to the idea that "places" can change, and change quickly. *Bacharach* is a classic example of a strategic plan being

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106 See s 51A(3), s 72. DCPs come under the same umbrella.

107 Though see Note 103.

108 [1998] LGERA 365. (On appeal from Pearlman J)

109 (1996) 89 LGELRA 240.

110 [1999] NSWCA 134

left behind in the midst of a massive expansion of residential activity on the outskirts of Brisbane.

In such situations (and there are an abundance of examples in both states) the requirement should be for flexibility at the planning and approval level. The imposition of prescriptive rules by the courts, which reflect historical conditions, does not assist the development of this flexibility; it retards the ability of the system to adjust quickly to change at a non-strategic level i.e. at the level of an individual application.

In short, the imposition of an over-legalistic approach may often not result in good planning outcomes but in bad and backward thinking ones. It may effectively prevent or intolerably delay the response of the development community to fast-changing demographics and can create a climate of uncertainty and inefficiency which is unfair to participants at all levels.

H. THE EFFECT OF DECISIONS TAKEN OUTSIDE OF STATUTORY TIME PERIODS

Section 3.5.15 of IPA which requires an assessment manager to give a written notice of a decision to the applicant within five business days of making the decision, makes no reference to the statutory time periods discussed earlier. This indicates that a decision taken outside these periods is nevertheless a valid decision provided that a submitter or the applicant has not already lodged an appeal.[111] Earlier case law under the superseded Act continues therefore to be relevant. Deriving originally from the

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111 IPA, s 3.5.19.

decision of Lord Denning in *James v Secretary of State for Wales,*[112] it is clear that the time periods are directory not mandatory.[113] The only decision which runs counter to this line of authorities is that of McPherson J in *Veivers v Cordingly*[114] in which he drew a distinction between decisions which attract public submission rights and those which don't. In essence this is a distinction between code and impact assessment under the new Act. In the opinion of this judge if no public rights were involved a valid decision could still be made even if the applicant had filed an appeal. Though cited in later decisions[115] *Veivers* has not subsequently been applied or followed.

Despite the extensive treatment given to various time periods in Part 6, Division 11 of the EPAA regulations, nothing in the regulations specifically addresses the validity of consent authority decisions taken out of time. However taken in the context of the discretion given to consent authorities under EPAA, s 63(3) and the availability of deemed refusal rights under s 82(1)[116] (which ties the statutory time periods only to appeal rights under s 97) the NSW position would appear to be indistinguishable from that applying in Qld. Similarly, the NSW position concerning the right of a consent authority to decide an issue in respect of which an appeal has been lodged reflects the Qld approach and indeed this principle has found acceptance in other areas of law.[117]

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112 [1968] AC 409.

113 See *Good-Mix Concrete P/L v Brisbane City Council* (1975) 30 LGRA 326, *Taylor v Gold Coast City Council* (1978) 36 LGRA 336, *Birch Carroll & Coyle Ltd v Mulgrave Shire Council* (1980) 1 APA 263.

114 (1988) 67 LGRA 61.

115 See, *Mobil Oil Australia Ltd v Wellcome International P/L* (1998) 81 FCR 475.

116 See also, EPAA, Regs, cl 113. Also EPAA, s 97(1).

117 See, Campbell, Enid "Revocation and Variation of Administrative Decisions." 1996 22 *Monash University Law Review* pp 54-56 and *Re Sarina & Secretary, Department of Social Security* (1988) 14 ALD 437.

The approach of both jurisdictions in these matters is fundamentally correct. The applicant is able to either force the timing of an issue on appeal without having that right undercut by an *ad hoc* ability on the part of the consent authority to make decisions in the interim and, should the applicant and consent authority be able to arrive at a satisfactory outcome before the matter is decided on appeal, the applicant can obviously withdraw the appeal.

I. CURRENCY PERIODS

Given the greater complexity of the NSW Act it is refreshing to see that, on the question of currency periods, EPAA's treatment is both more succinct and more generous than the situation in Qld.[118]

In the case of "complying developments" the currency period is 5 years[119] but this period will not run out if some work is "physically commenced" on the land.[120] The balance of application types are dealt with in s 95 and once again the general term is five years. Even though s 95(2) grants a general discretion to a consent authority to vary the currency periods the subsequent sub-section places at least some restrictions on their right to do this in some specific cases. [121] This discretion is further conditioned by s 95A which grants the applicant the right to apply for an extension of

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118 Note however that currency periods in Queensland will be affected by IPOLAA 2001.

119 EPAA, s 86A.

120 Adopting the greater specificity of EPAA, s 95(4) this includes "building, engineering or construction" work.

121 See judgment of Bignold J in *H & A Kemal P/L v Hurstville City Council* [1998] NSWLEC 48.

the currency period if the consent authority had reduced the lapsing period to less than five years.[122] The exercise of this authority is discretionary however and this, together with the use of the words, "if satisfied that that the applicant has shown good cause" has led to a body of case law developing.[123]

In a recent decision of Pearlman J in *CSR Ltd v Fairfield City Council and Anor*[124] the judge observed that:

> It would not be appropriate to limit the scope of so wide an expression as "show good cause" nor would it be appropriate to define the limits of the discretion vested in the council to grant or refuse an extension under s 95A. But two things are clear... Firstly, the considerations which a council should take into account in exercising its discretion as to whether to grant an extension are planning considerations. Secondly, the exercise of the discretion under s 95A does not involve a re-consideration of whether the consent should have been granted in the first place.

Bignold J in *Nick Giannaras and Ors v The Council of the City of Queanbeyan*[125] had previously indicated that in his opinion a third factor should also operate viz. that "good cause" in any given case must, in some manner, relate to considerations that involve the implementation of the development consent. [126]

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122 See EPAA, s 95A(1).

123 Appeal rights on this specific issue are preserved by EPAA, s 95A(3).

124 [2001] NSWLEC 118.

125 [1992] NSWLEC 97.

126 For other dimensions of the "lapsing" issue in NSW see *Australand Holdings Ltd v Hornsby*

In contrast, under IPA, although a similar right exists to request an extension of a currency period[127] no criteria are laid down in reference to which the assessment or concurrence agencies are obliged to consider the application. "Good cause" as a statutory framework does not exist, though it is doubtful if this will prevent the P & E Court from deciding the issue on grounds similar to those which apply currently in NSW or on general administrative law principles of procedural fairness, due process and natural justice (as part of its general declaratory jurisdiction).

The currency periods under IPA are marginally less generous than in NSW. In the case of a material change of use the period is four years from the approval date, or if the approval either states or *implies* a lapsing period then that stated or implied period. [128] In the case of a development requiring code assessment only, the period is reduced to two years or, once again, to the period stated or implied in the approval. However, if the application is for a "reconfiguration" of a lot (sub-division), [129] which involves "operational works"[130] this period is increased to 4 years or to the period "stated or implied".

There is, as yet, no case law under the new Act though given the general vagueness of the Act's treatment of the issue the case law that developed under the previous Act is

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Shire Council [1998] NSWLEC 42; *CJ Attard v Blue Mountains City Council* [1993] NSWLEC 15 and *Detala P/L v Byron Shire Council* [2000] NSWLEC 63.

127 IPA, s 3.5.22.

128 IPA, s 3.5.21(4)(b)

129 Which is otherwise code assessable.

130 See IPA, s 1.3.5.

likely to remain apposite. In *Ure v Noosa Shire Council*[131] Quirk DCJ adopted a very strict approach to the construction of that statute's right to request an extension which followed from a similarly strict construction by the Court of Appeal in *Friends of Stradbroke Is Assoc Inc v Sandunes P/L.*[132]

It is difficult to assess the relative fairness and efficiency of these two regimes. If we can concede that there is little difference between the two jurisdictions in terms of the actual currency periods then two questions are relevant. First, is a five or four year currency period sufficient and generally equitable *per se* and secondly, whether the absence of reference criteria in IPA, relevant to the assessment of an application, is prejudicial to the applicant.

In the first instance currency periods of the order of four or five years must be regarded as sufficient, and indeed reasonable, in most development contexts with the possible exception, on occasion, of some large-scale residential sub-divisions which are proposed beyond the edges of current utility infrastructure (or, in Qld, which clearly are not consistent with the councils "benchmark development" framework[133]). The statutory periods, particularly in NSW are sufficiently bolstered by the ability to apply for an extension and the ability to appeal a decision as discussed above. In the second instance the Qld Act is degraded somewhat by the lack of clear reference assessment criteria which is strange in view the constant sub-text in the Act which

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131 [2000] QPEC 57

132 [1998] QCA 374. See also *Kewlands P/L v Logan City Council* [1998] QPELR 44.

133 Reasons of space have prevented a discussion of "benchmark development sequences". To date, no one in the field has raised the question but is it possible that, in Qld, we have interred "Strategic plans" in a field of "policy" only to see its ghost arise as a benchmark development sequences? (And then to see the concept disappear, only a few years later, as a result of IPOLAA 2001).

demands the incorporation of objective standards. Even the wide terms of the NSW Act are better able to equip their consent authorities to consider this issue and certainly have allowed the Land and Environment Court a broader discretion to elaborate.

J. MINISTERIAL CALL-INS

The right of the relevant Minister(s) to make a unilateral executive decision in respect of a project has, in both jurisdictions, sometimes been exercised badly and sometimes disgracefully. The intellectual justification for the existence of unappealable executive rights is, in both jurisdictions, given as "the State interest".[134]

The IPA "Explanatory Guide"[135] attempts to justify it as follows:

> The State has a valid and direct interest in IDAS. Accordingly, it is appropriate that the State has the necessary powers under the Act to allow it to act on matters of genuine State interest. If those powers did not exist, the State would be forced to operate outside the Act and the system created, and enact specific legislation to deal with matters of State interest. This approach is potentially clumsy, confusing and costly for all parties. It also cuts directly across the intent of IDAS and the Act as a whole.

The entire justification reflects the intellectual desperation that obviously went into composing it. It is, in fact, a wonderful example of muddled thinking and muddled

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134 See IPA, s 3.6.5 and EPAA, s 88A.

135 Qld Department of Local Government and Planning at p 118

logic and if consideration is given to actual history of the procedure ie as it actually has been used in the past, it emerges as a political justification for the exercise of unfettered power rather than any genuine commitment to the principles of the Act.[136]

Specifically the justification can be criticised on the following grounds:

1) What the "State Interest" has meant in the past has been executive approval of projects such as Toowong Shopping Centre, Iwasaki Resort, Robina Shopping Centre, a coterie of service stations and such like. Hardly what many of us would describe as coming within any sensible definition of State interest. (It is interesting, in passing, to note that the Iwasaki resort subsequently went into receivership, the developers of Toowong went into receivership and the purchaser of Toowong recently recorded, on sale, a capital loss of nearly $30 million on its investment). Not only were they not of State interest, they were, in the main, bad ideas!

2) The departmental guide seems to imply that the only recourse in matters of State interest would be separate i.e. specific, legislation. In fact, the most frequently used tactic of the Minister was not to create special legislation but to simply take the matter outside the normal IDAS process under the old Act and to rezone.

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136 IPOLAA 2001 increases ministerial power by granting him/her the right to call-in an application to change or cancel a development *condition.* See IPOLAA 2001, Ch 3, Pt 8, Div 3.

3) It is lacking in verisimilitude to set up a straw man viz. the need to have recourse to special legislation, when that was not the preferred Ministerial option in any event.

4) The suggestion that these powers have been incorporated in the Act because the department wishes to preserve the integrity of the IDAS system is galling. To turn the words of the Explanatory Guide against itself, "the intent of this section of the Act" *is* to "cut directly across the intent of IDAS".

As indicated, the central conception is that of the "State Interest" which is defined in IPA, Sch 10 as:

> (a) an interest that, in the Minister's opinion, affects an economic or environmental interest of the State or region; or
> (b) an interest in ensuring there is an efficient, effective and accountable planning and development system.

Once again, a few points are worth noting about this definition: a) the use of this power in the past has manifestly resulted in the creation of a less accountable planning system, not a fairer or more accountable one and, b) quite literally any proposal, if considered in the shadow of executive expediency, can "affect the economic or environmental interests of the State or region". In the context of *political sensu largo,* or "politics in the large sense", it is merely a question of perspective. In short, the discretion to call-in is very wide indeed. Ministerial IDAS powers are detailed in Pt 6,

Div 1 of IPA and, since the purpose of this work is not to provide a commentary but rather to isolate those provisions which create the possibility of inefficiency or inequity, the following IPA propositions appear to me to be of doubtful integrity (in the sense of the overall, intellectual integrity of IDAS):

1) no appeal rights exist in respect of the Minister's decision[137]
2) even if an appeal has been made before the matter is called in the appeal is of no further effect[138]

The whole set of propositions, which taken together constitute Ministerial IDAS powers can only be understood in a political context.[139] Having established an, ostensibly, fair system (or one which makes claims to fairness), the exercise of such unfettered executive power is certainly antithetical to the stated participatory ethos of the Act and almost indecently hypocritical in other respects. As examples; who should bear the appeal costs of a matter called in at that stage; why should submitters be excluded from the process,[140] and since, historically most Ministerial action results in approval, does not the continued existence of such a procedure call into question the access that some corporations and individuals have to political decision makers and ultimately justify the charge that it is an elitist system designed to benefit the few?

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137 IPA, s 3.6.7(1)(e).

138 The late stage at which a matter can be called in has been justifiably criticised by Meurling (QELA 1997 Seminar Papers) at p 72.

139 Which is certainly indicated by the terms of IPA, s 3.6.9(3) under which the Minister must table a report to parliament containing specified details.

140 See *Barry v Minister for Environment and Planning* [unreported, 7/12/83, LEC, 7 December 1983) McClelland CJ, No40098 of 1981]

It can be said that the same considerations, and the same concerns, apply in NSW but to a slightly less extent. The Minister is given the same broad power under EPAA, s 88A, to form an "opinion" that a matter is of State or regional significance and to become "the consent authority for the development application".[141] He has additional power to determine the application "despite any other provision of this Act or an environmental planning instrument".[142] Interestingly however, although s 119(i) indicates that the Minister *may* direct that a commission of enquiry be held, if the local authority "requests" that such an enquiry be held[143] then a public enquiry must be held in accordance with s 119. This, in itself, is an interesting, indeed welcome, reservation on Ministerial discretion (without necessarily derogating from the Minister's power to make his or her own decision) that has no parallel in Qld. Nevertheless, s 89A goes on to make it clear, as in Qld, that neither applicants nor objectors have any rights of appeal once the decision is taken.

The ultimate question is whether such a Ministerial decision can be overthrown by a court on administrative law grounds such as natural justice, due process or manifest unreasonableness. The principal authorities derive from NSW and give little encouragement to those applicants (or objectors) who may be tempted to proceed along these lines. The leading decision in the planning arena, rather than the broader area of administrative law, is *Medway and Emery v The Minister for Planning and Others.*[144] On the basis of this decision of Talbot J and many others where it has been

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141 EPAA, s 88A(2)(a).

142 EPAA, s 89(2)(c).

143 EPAA, s 89(3).

144 [1992] NSWLEC 100. See also, *Bushell v Secretary of State for the Environment* [1981] AC 75, *Parramatta City Council v Hale* (1982) 47 LGRA 319, *Sommerville v Dalby* (1990) 69 LGRA 422, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 163 CLR 24 at 40.

cited or followed, the principles which courts will seek to apply should any such claim be made are as follows:

a) knowledge and opinion is not limited to that of the Minister but it also includes the department.

b) the court will view its role in reviewing the exercise of administrative discretion as limited and the courts role is not to substitute its decision for the decision of the Minister.

a. There is no requirement to afford natural justice at the point of making a determination under s 88A (previously s 101(1)).

b. Ministerial rights are directed at the interests of the wider community, not towards the rights and expectations of individuals.

The remaining principle which could (and would be pleaded) is *Wednesbury* unreasonableness. Unfortunately the authority given to Ministers in both States is so wide that a challenge to the validity of a Ministerial decision on this ground is most unlikely to be successful. In essence, Ministerial decisions in both jurisdictions are unappealable even on administrative law grounds.[145]

It is difficult to assess the likely impact of Ministerial call-ins on the efficiency of the total IDAS process. Arguably the process may be more efficient since it disposes of the tiresome obligation (which is happily imposed on others) to consult with the public and to comply with the entire panoply of regulations which accompany any conventional application. In this respect, as a process, it may have more in common

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145 See, Bradbury, Alan "Duty to Observe Procedural Fairness in the NSW Planning System." (1995) 12 *EPLJ* p 440 and Pearson, L and Lipman, Z "Fast-Tracking Mining Projects in NSW" (1996) 13 *EPLJ* p 402.

with planning, as it is known and practiced, in some of the countries to our immediate north. Its use however carries with it grave concerns in terms of its equitable and fair treatment of other participants and its ultimate distain for the land and environment courts.[146] As indicated in the opening remarks, its use has, on far too many occasions, been disgraceful. It is, in summary, an unjustified and unnecessary procedure which should be abolished in all jurisdictions.

K. APPEAL RIGHTS

The right to take a matter on appeal is, in most cases, the final step in the IDAS chain[147] and since at this level some differences do exist between the two jurisdictions a short treatment of appeal rights is merited.[148]

Both jurisdictions grant the right to appeal a decision to three distinct classes: to applicants, to submitters/objectors and finally to advice agencies. Under EPAA, applicants may, within 12 months, institute an appeal [149] against a refusal of their development application with the same 12 months period being applicable to appeals

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146 In a private conversation with Brennan CJ (then recently retired) the judge acknowledged the reservations which the High Court has always had in overturning decisions of specialist courts in the planning field. A problem, which, as he pointed out, the court could usually avoid at the "leave to appeal" stage. The minister and his senior officers have no such reservations.

147 Though "purists" might argue that is an entirely separate jurisdictional issue outside of IDAS.

148 Reasons of space dictate that the coverage be limited to "appeal rights" rather than appeal processes and the considerable jurisprudence which has developed around many ancillary issues.

149 EPAA, s 97(1). Applicants, however, have no right of appeal against a determination if their proposal involves a state significant development **and** a Commission of Enquiry has been held. A party's rights however under s 123 are preserved.

instituted on a deemed refusal basis.[150] Applicants may also appeal against the conditions of an approval and a "deferred commencement" requirement.[151]

Objectors are given a right to participate in the hearing by virtue of s 97(4) provided they lodge the appeal within 28 days after the decision notice is given. In theory the principle appeal cannot proceed until the objector application has been heard, however in reality the two matters will be heard together.[152] Similarly, referral agencies have 28 days to lodge an appeal against a local authority decision.[153]

One salient difference between the two jurisdictions is that, under EPAA, objector appeals are limited to designated developments (including designated developments which are also integrated developments).[154] Objectors have no rights of appeal against decisions on local development applications that, in many instances, constitute the bulk of the matters which, at the neighbourhood level, give rise to such grievance and contention. One consequence of such a policy would be to substantially reduce court lists and the writer has been advised by the NSW department that this, in fact, is why such rights are not granted. This, in itself, is remarkable and reflects the never-ending capacity of governments to juggle, rationalise or simply ignore competing values. The participatory ethos is, as has been shown, embedded in EPAA at many levels, yet when an issue such as the extent of potential litigation becomes a matter of concern, what had previously been considered a fundamental right is happily dispensed with.

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150 EPAA, s 82(1).

151 EPAA, ss 80A(2), 97(2) and 97(3) respectively.

152 EPAA, ss 97(6) and 99.

153 EPAA, ss 97(5) and 98.

154 EPAA, s 98(1).

Arguably, the minimisation of litigation by this means leads to an overall improvement in the efficiency of the IDAS system, and even though this writer, in other portions of this work, has hardly given unqualified support to an often over-emphasised participatory ethos it must be conceded that, in this instance, efficiency comes into direct collision with the question of equity.

To avoid the charge of manifest hypocrisy the Department of Urban Development and Planning should, somewhere, amid the copious amount of material produced by the Department, supply an intellectual, rather than a mere pragmatic, justification for such a decisive abrogation of what is, ostensibly, a matter of fundamental planning value. One will however search in vain. Nor, does the writer resile from the fact that he finds it difficult to argue for the retention of appeal rights in this area preferring to come down on the side of efficiency. This is not to say that a case cannot be argued on a comparative basis. That is to say, it is unfair that citizens of NSW are denied a right which is preserved in Queensland.

As indicated above, IPA allocates appeal rights to the same three classes. The applicant's[155] rights are guaranteed by s 4.1.27 which grants a right of appeal[156] in the following circumstances: for a refusal, or part refusal, of an application, against a condition attaching to the approval, to the granting of a preliminary approval when a permit was applied for, against the length of the currency period and to appeal on a deemed refusal basis.

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155 IPA defines "applicant" in two ways (see Sch 10) depending on its use in the context of appeal rights or the formal IDAS stages.

156 But, in sharp contrast to the EPAA, the appeal must be lodged within 20 business days of the decision notice being given. A 20 day period is common to all three classes.

Submitters (objectors) appeal rights are restricted only to those aspects of an application which involve a "public notification" requirement i.e. involve, at some point, impact assessment.[157] With that qualification however submitters can lodge an appeal against the granting of the approval, or any condition attaching to the approval or the length of the currency period stated in the approval.[158] One further qualification exists which has been discussed previously viz. that to be a submitter for the purposes of s 4.1.28(1), the submitter must have made a "properly made submission".[159] Consequently, even an incompetent submission received by the assessment manager is insufficient to establish a jurisdictional claim for the party to be heard in the Planning and Environment Court.

Advice agencies also are granted the right to appeal within the limits of their own jurisdiction provided the application involves impact assessment and provided the agency had advised the consent authority to treat its response as a submission for an appeal.[160]

"Local Developments" in Queensland are subsumed under the general category of those which are impact assessable and those which are code assessable. If they are impact assessable, even if they are intrinsically "local", then a decision can be taken on appeal by a submitter. Paradoxically, though the right to appeal considerably

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157 IPA, ss 4.1.28(5) and 6.1.28(2)

158 IPA, s 6.1.28(1).

159 IPA, Sch 10 definitions.

160 IPA, s 4.1.29(1). Concurrence Agencies may be joined in an action by an appellant but cannot appeal in their own right, their power of veto making such a provision redundant. Arguably, a fourth category exists pursuant to s 4.1.30, however the group referred to in this section will in most cases parallel the submitter category.

strengthens the negotiating power of, say, nearby residents the P & E Court does not appear to be overwhelmed with submitter appeals. There are two reasons for this. First the cost of mounting an appeal is considerable and second, some submitters simply use their power to successfully extort sometimes considerable sums of money from the applicant in return for an agreement not to appeal.[161] In this sense the Queensland position, which grants undiluted appeal rights in respect of local developments, can become quite iniquitous and result in a gross inequity to applicants. On this question of principle therefore the writer supports the NSW position.

L. CONCLUSIONS

The purpose of this summary is not to re-canvass the issues and the conclusions with respect to equity, efficiency and fairness already reached in this chapter but to attempt a short overview of the fundamental ethical and efficiency concerns which underpin this central procedure in the IDAS system. Perhaps nowhere else in the Acts is the tension between the specific and the general, between an application and a general statement of assessment criteria or overarching principle, as evident.

Both Acts still allow for too greater a degree of administrative discretion. The use of vague concepts as the "public interest" and "site suitability" add to an already multi-layered body of assessment criteria contained within both the Acts and the regulations and it has, of necessity, been left to the courts to apply their own tests in an attempt to ensure that the potentially adverse affects of this confusion are mitigated.

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161 The writer is not familiar with anything in the planning literature which addresses this issue. Very large sums have been paid out in this manner and given the reality of human nature it seems unlikely to disappear.

It is however easy to criticise the current state of relative confusion that exists amongst applicants and planners (and not only planners in the private sector) and rather more difficult to suggest approaches which may have the affect of increasing the overall efficiency of the system, and of enhancing the possibility that outcomes will be fair (or fairer) for participants.

Some suggestions are however outlined in the following paragraphs:

- Iconoclastic suggestions from sectors of the bureaucracy that the appeal process should be limited only to those appeals which are filed on a "deemed refusal" basis should, of course, be rejected and rejected out of hand.

- The variety of criteria against which an application is to be assessed needs to be enumerated precisely as has, in part, been done in IPA.

- The temptation which has now become almost irresistible to some planners to adopt what is conventionally known as a "holistic" approach should be moderated, if necessary by statute, to ensure that other countervailing principles must also be weighed in the balance. These principles would recognise the simple fact that a "holistic" approach is, in reality, more an emotional state than an objective reality and that management principles may often be more applicable to a problem than a commitment to a certainly unattainable dream that we can marshal all the facts which would allow us to make totally reliable predictions.

- Following on from the "management" issue mentioned in the previous paragraph, some statutory reservations must be stated as to the role of ecology. At present, with the centrality afforded to very general statements of

ecological ideology, the intellectual framework within which the decision process must proceed is becoming eroded. Indeed, the cognate meaning of many of the words used to describe these central propositions is coming under serious doubt. Are, in short, these propositions mere statements of some vague, and ultimately undefinable, principle or are they meant to be genuine "operational" tools. At present we do not know and if planning itself is not to be, ultimately, about an impossible "everything" this issue must be addressed.

- Criteria of assessment should, as far as possible, be referrable to objective standards and benchmark criteria not to free-ranging administrative discretion which is the enemy of efficiency and often deleterious to equity and fairness.

- The compensation provisions of both Acts must be upgraded to ensure that if a condition or decision affects the private right to use land then the community, who presumably are the beneficiaries, must pay fair compensation.

- A similar compensatory mechanism must be put into place for those adversely affected by administrative directions concerning threshold emission and so on which, in planning terms, reflects the gradual erosion of the "finality" principle.

In tabular form the overlapping issues of equity and efficiency are summarised in the following table.

M. COMPARATIVE ASSESSMENT TABLES

Attribute	Equity/Efficiency
Compliance by Local Authorities with statutory time periods is enforced.	**Qld:** No **NSW:** No ***Best Practice:*** Neither
Assessment criteria provide an objective basis for a decision.	**Qld**: A wide range of subjective criteria are applicable. **NSW:** Inclusion of public interest test allows further scope for executive discretion. ***Best Practice:*** Neither
Applicants have the right to stop the assessment process to make representations.	**Qld:** Yes, for up to three months. **NSW:** No ***Best Practice:*** Qld
Clear statutory guidelines exist in respect of conditions which can or cannot be imposed.	**Qld:** Clear guidelines under IPA **NSW:** Guidelines are unclear. ***Best Practice:*** Qld.

Statutory insistence that conditions be relevant and reasonable.	**Qld:** Clear statement of this principle in the Act. **NSW:** Isolated references but no consolidated statement. ***Best Practice:*** Qld.
Approvals and conditions attach to the land.	**Qld:** Yes. **NSW:** Local Authorities given some discretion to make approvals personal to the applicant. ***Best Practice:*** Qld.
Compensation is available to those affected by subsequent change in approval conditions or licensing standards.	**Qld:** No **NSW:** No ***Best Practice:*** Neither
EPIs, DCPs etc are policy documents not legal ones.	**Qld:** All planning instruments, with the exception of State Planning policies, are policy documents. **NSW:** Plans are, in the main, more prescriptive. ***Best Practice:*** Qld.
Currency periods for approvals are reasonable.	**Qld:** In general four years. **NSW:** In general five years. ***Best Practice:*** Both.

Ministerial call-in procedure is subject to statutory constraint.	**Qld:** No statutory restrictions are imposed. **NSW:** Some reservation if a Local authority requests a public enquiry. ***Best Practice:*** NSW.

SEVEN

SUMMARY AND CONCLUSIONS

The search for a development control system which is both efficient and equitable can, in conventional terms, be likened to a quest for the Holy Grail. The task is beset on all sides by a constantly changing intellectual climate, rapidly changing social and economic expectations and by political realities which often belie the quasi-judicial nature of the process. Perfection is, consequently, either an unattainable ideal or an evanescent phenomenon which can often pass without notice. In reality, because of the matters referred to, no development control system can probably ever function at an optimal level. It can, however, set itself the task of pursuing incremental improvement even within an existing legislative framework.

The intent of this chapter therefore is to suggest, in overview, those elements of an efficient and equitable system which could realistically be incorporated into an existing legislative structure or development control paradigm.

Chapter 1

(1) The Hilmer recommendations, together with pioneering work in public choice economics by James Buchanan and constitutional theory by Friedrich Heyek, enables questions to be asked about the fundamental, historical assumptions behind the legitimate role of the state.

(2) When such a questioning is directed at a development control system it permits us to ask why the granting of a development permit should remain as a monopoly activity of Local Government.

(3) There are two reasons for the continued entrenchment of this monopoly power:

i) it allows a local authority access to a considerable and constant flow of fees for applications of various types; and

ii) it enables local politicians to intervene in the development control process for overt or covert political reasons.

(4) In terms of the overall integrity of the system however neither factor is persuasive and neither factor possesses sufficient legitimacy to justify the dysfunctional effect on efficiency and equity of the sometimes unremitting involvement by politicians.

(5) Currently private certification is only available in both jurisdictions when the application is assessable on an objective basis against, principally but not exclusively, the standard Building Code and it is not available when an application, or part of an application, is, in IPA terms, impact assessable.

(6) Local Authorities contend that private certification should not be extended to impact assessable developments because they impact on communities and the protection of communities (in all its manifestations) is the prerogative of politics.

(7) The counter-argument, and the one which is supported here, is that frequently the political dimension comes into play in the defence of purely pragmatic political ends and that it is, in many cases, not a genuine reflection of a broader fiduciary perspective on the issues which is granted solely to elected politicians.

(8) Furthermore, the costs associated with such political intervention are often very large indeed and these costs are passed on to the community in terms of increased development costs, increased rentals, increased prices and often slower rates of economic growth and higher rates of unemployment.

(9) The proposal put forward here is that a deregulated approval process, which is able to operate in tandem with the local political system yet not be a part of it, is an achievable objective for all but the most significant local developments.

(10) In order to achieve this the following machinery matters would need to be addressed:

- Appropriate qualifications in planning, urban design and law would need to be possessed by those parties seeking contracts with the Local Authority.

- Initial probationary contracts could be offered in respect of designated geographical areas. After the probationary period longer term contracts could be made available.

- A formal liaison system instituted to coordinate the activity of private assessment or approval contractors with the Local Authority.

- A prudential oversight function to be given to a separate department within the appropriate anti-corruption body in each State.

- The Local Authority would be granted a call-in function similar to that available to the State planning minister. Should such a procedure be used by the Local Authority it should automatically trigger a public enquiry and detailed reasons for the call-in should be made publicly available.

- Each decision of a private practitioner to be ratified by the Local Authority. The decision then becomes the decision of the Local authority, all appeal rights are preserved and the Local Authority becomes the responding party in any proceedings.

(11) The objective of this proposal is to remove as many local development applications as possible from the ambit of the traditional local government approval system.

(12) Such a system is perfectly in accord with the principles of NCP and indeed is a rather perfect expression of those principles.

(13) The protection of community values obviously involves a cost to someone. As indicated above, these costs are sometimes hidden as an increase in rent or a reduction in employment opportunities. Often however they are more direct such as the consequential loss associated with an administrative designation.[1] Governments in Australia have traditionally avoided the issue of issue of compensation for those whose income has been adversely affected by an administrative decision. In the USA however such an activity by government is properly and more decently described as a 'taking'.

(14) A much more earnest attempt must be made in both jurisdictions to address the issue of compensation for those affected by a policy decision of a Local Authority. The principle is a clear one: if the community benefits from the abridgement of the proprietary rights of other individuals, then the community should pay.

(15) The necessity for a harmonised system of development control (as distinct from a uniform one) has become increasingly recognised across all jurisdictions. Despite the federal government's recent foray into the area through the EPBC Act, the DAS remains a valuable body through which reform proposals can be discussed and implemented. It is hoped that the Commonwealth will remain committed to the role of the DAS in the post-EPBC context.

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1 Such as a 'character housing' designation for a residential area, a heritage listing or a

(16) Wherever practicable administrative discretion, subjectivity and intuition should be replaced by objective criteria and benchmark standards. This principle should apply as equally to the performance of a State development control system as a whole as it does in the area of development conditions. The various Property Council reports referred to in Chapter 1 which describe appropriate performance indicators represent a valuable contribution.

Chapter 2

(17) The intervention of the federal government through the EPBC Act could result in significant duplication as approvals are sought in a genuinely two-tiered system.

(18) In terms of the overall efficiency and equity of a development control system, such duplication has little to recommend it even in terms of the putative goals of the legislation and it is certainly contrary to the spirit of both the DAF and COAG.

(19) It is considered essential that assessment and approval bilaterals be quickly negotiated with the States on a basis which reflects the States' genuine commitment to essentially the same goals. That the States' commitment to these goals is implicitly ignored in the EPBC is to be regretted.

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vegetation protection order.

(20) In the short to medium term the outcome of this overlay of federal criteria must be considered problematical. It is based rather starkly in the crude assumption that State government mechanisms including State Environmental Protection Agencies either lack the will or the expertise to tackle environmental issues head-on.

Chapter 3

(21) The application is the first step in the development control process and it is noteworthy that sharp dissimilarities exist between NSW and Qld. The core difference is undoubtedly the information requirement which is loaded into this stage in NSW and which is in rather stark contrast to the minimal requirements which exist in Qld.

(22) The NSW approach confuses means and ends. There is no intrinsic reason why an application on lodgment should require detailed statutory information when an efficient regulatory regime could transpose that requirement to the following stage when the consent authority has at least had an opportunity to examine the proposal in principle.

(23) An application, after all, is merely an application and every statutory means should be used to ensure that the validity of an application is guaranteed. The best way to achieve this is to insist on minimum requirements.

(24) EPAA in reality creates this difficulty by the confusing array of development categories each with specific, and it often appears, historical ancillary procedural (notification) and other (information) requirements.

(25) The NSW Act, despite recent amendments is a product of 1970s thinking and it requires urgent review.

(26) The Qld Act, which reflects the cognitive approach developed in the United Kingdom and carried forward in New Zealand is far preferable to the present NSW situation. It is at least intellectually consistent and understandable despite the hopefully short-term concern as to the precise meaning of the term "material change of use". The adoption of a similar cognitive framework in NSW must surely be inevitable.

(27) Both jurisdictions must also address the status of exempt, self-assessable and complying developments whose status in both Acts remains diffuse, undefined and relatively contentless.

(28) An expansion in the context of these development categories could, together with private certification and approval, single-handedly remove most of the administrative pressure from the system. This, in turn, would (or should) allow Local Authority planners to in fact plan.[2]

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[2] The concept of "benchmark development sequences" though they are open to criticism on libertarian or public choice grounds, was at least an acknowledgement that *planning* was fundamental to development control. Their abolition by IPOLAA 2001 is regrettable and perhaps, ominous.

(29) The board issue relating to applicants is the question of the information onus, ie whose responsibility should it be to accurately determine the nature and scope of the information which must be lodged with the application. The present IPA regime effectively places that onus on the Local Authority however the foreshadowed amendments to the Act will see this obligation removed by late 2002. It was an aspect of IPA that was strenuously objected to by Local Authorities, in part because of the potential liability for negligence under the *Local Government Act* 1993.

(30) The likely removal of this obligation represents a substantial watering down of IPA and erodes the more principled base of the original Act.

(31) In terms of principle, the responsibility to accurately detail the information requirements relevant to each specific application should rest firmly on the Local Authority. Apart from the rather broad canvass of the statutes and regulations, the use of administrative discretion to conjure up requirements, and indeed new requirements on a continuing basis, is antithetical to the efficiency and equity to any IDAS system.

(32) Additionally, in an era where the necessity to comply with over-riding federal requirements now exists, the information requirements emanating from Local Government, State concurrence authorities and Environment Australia are likely to vary in the detail and the emphasis given to various factors.

(33) To place an applicant in a situation where he or she may have to second guess these matters is unfair and unreasonable and the fact that a certain class of applicant may be able to manoeuvre through them using a network of informal contacts known to their planning consultant only adds to the unfairness.

(34) Both Acts, reflecting pressure from the Local Authorities, are unwilling to confront this issue at the present time, though with the likely compounding of information requirements in the future, it is almost certainly an issue which will need to be revisited on a principled basis.

Chapter 4

(35) Applicants in both jurisdictions suffer from the same administrative propensity to request sometimes voluminous information beyond that which is relevant to the nature or extent of a proposed development. There are obvious reasons for this log-of-claims stratagem, though these hardly relate to a commitment by such an administration to enhancing the overall efficiency of the system.

(36) Rather, they reflect a culture of self-preservation and an energetic resolve to avoid criticism at all costs. This clearly places an unfair burden on applicants, is wasteful of both public and private resources and reinforces the continuing inequity of the use of public power to impose unfair, unreasonable and sometimes nonsensical obligations on private citizens.

(37) Associated with an initial and excessive information request is the recourse to continual and supplementary requests for details which can occur at any time

through to the decision date. Both jurisdictions suffer from this phenomenon which, it must be said, occurs in complacent disregard of any or all statutory time frames.

(38) It has to be said that there is little that can be done in a practical sense to redress this wrong. Though a commitment to the provision of objective standards and to a precise delineation of the necessary content of submitted reports would assist, the ability of administrators to work around the system will undoubtedly continue irrespective of the existence of legislative strictures.

(39) The involvement of politicians in purely planning matters is as inevitable as it is regrettable, being a consequence of the uneasy insertion of a quasi-judicial process into a structure which can be, at heart, more concerned with the reality of re-election.

(40) Though such interference can never be removed from the system, it could be moderated if four initiatives were introduced:

- private certification and approval should be expanded
- a development ombudsman, accessible only to applicants, is a genuine necessity given the capacity of administrators to work around the system
- a flexible FOI process would certainly assist applicants and objectors, though it has to be said that political interference tends to occur on the edges of planning issues and it is not by any means an

infrequent occurrence for Local Authority planners to be dismissed from a meeting but for the meeting to continue between the applicant or objector and the politician. In short, many aspects of the ongoing relationships between politicians and their planners will always remain undocumented.

- the integration of all development approval systems into one seamless process is the stated intention in both jurisdictions and it must be considered as an essential prerequisite in any jurisdiction which maintains a claim to efficiency and equity.

(41) In the final result, an interventionist state will thrive provided it maintains a monopoly on the power to "permit" and this power, in turn, is dependent upon the right to demand information. Accordingly, even an effective integration of all approval processes (there are 65 in Qld and no doubt a similar number in NSW) is unlikely to reduce the volume of information demanded by the system in aggregate.

(42) To effect meaningful reform in this area, implementation of the first proposal referred to in paragraph (40) is essential.[3]

Chapter 5

(43) The direct financial cost of administering each of the development control systems considered in this thesis is substantially increased by the imposition of

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[3] At the very least a debate concerning the monopoly power of the state in land use matters is called for, even if the state's monopoly approval power were to remain unaffected.

mandatory notification and participation procedures. The indirect costs of the same processes, particularly in regard to applicants, can only be guessed at.

(44) It is because these transaction costs are potentially so large that some space was devoted to analysing the supposed justification for the procedure which ranges across many disciplines, including, *inter alia*, psychology, sociology and political theory.

(45) In the end, all attempted justifications lack cogency, or more accurately, they lack the degree of intellectual integrity which one is entitled to expect from a proposition which, if implemented, would impose significant cost burdens on the system and on particular users of the system.

(46) In fact there is little justification beyond an ideological commitment to feeling-good-together for the entire notification and participation process. It is consequently regrettable that both jurisdictions (though Qld is the worst offender in this regard) should persist with a process which has grown like topsy on the basis of an intellectual paradigm which derives directly from the flower-power culture of Berkeley in the late 1960s.

(47) The reasons for the conclusion in the above paragraph are canvassed in detail in the thesis, but they resolve to two:

- the cost implications clearly outweigh the putative and in the main illusory benefits, and

- both jurisdictions permit open access to the declaratory jurisdiction of their respective planning courts. NSW operates a similar open standing policy in respect of appeal rights and the same approach should be adopted in Qld.

(48) In the current climate, a proposal to entirely abolish the procedure must be considered iconoclastic, however justifiable that conclusion may be. In the shorter term, the more politically attractive alternative would be to expand the exempt, self-assessable or complying categories with a view to raising the non-participation group of applications to around 85 percent of the total.

Chapter 6

(49) Suggestions from sectors of the bureaucracy that the appeal process should be limited only to those appeals which are filed on a "deemed refusal" basis should, of course, be rejected and rejected out of hand.

(50) The variety of criteria against which an application is to be assessed needs to be enumerated precisely as has, in part, been done in IPA.

(51) The temptation, which has now become almost irresistible to some planners, to adopt what is conventionally known as a "holistic" approach should be moderated, if necessary by statute, to ensure that other countervailing principles must also be weighed in the balance. These another principles would recognise the simple fact that a "holistic" approach is, in reality, more an emotional state than an objective reality and that management principles may often be more applicable to a problem than a commitment to a certainly

unattainable dream that we can marshal all the facts which would allow us to make totally reliable predictions.

(52) Following on from the "management" issue mentioned in the previous paragraph, some statutory reservations must be stated as to the role of ecology. At present, with the centrality afforded to very general statements of ecological ideology, the intellectual framework within which the decision making process must proceed is becoming eroded. Indeed, the cognate meaning of many of the words used to describe these central propositions is coming under serious doubt. Are, in short, these propositions mere statements of some vague, and ultimately undefinable, principle or are they meant to be genuine "operational" tools. At present we do not know and if planning itself is not to be, ultimately, about an impossible "everything" this issue must be addressed.

(53) Criteria of assessment should, as far as possible, be referrable to objective standards and benchmark criteria not to free-ranging administrative discretion which is the enemy of efficiency and often deleterious to equity and fairness.

(54) A compensatory mechanism must be put into place for those adversely affected by administrative directions concerning threshold levels and so on which, in planning terms, reflects the gradual erosion of the "finality" principle.

APPENDIX I

Other International Environmental Agreements.

1982	World Charter for Nature
1992	The Rio Declaration on Environment and Development
1993	Convention on Civil Liability for Damage Resulting from Activities Damaging to the Environment
1950	International Convention for the Protection of Birds.
1970	BENELUX Convention Concerning Hunting and Protection of Birds.
1972	Convention for the Protection of the World Cultural and Natural Heritage.
2000	Framework Agreement for the Conservation of the Living Resources of the High Seas of the South Pacific.
2000	Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean

Australian World Heritage Sites.

The Tasmanian Wilderness. (41.58-43.67S/145.42-146.92E)
The Lord Howe Island Group. (31.65S/159.05E)
Australian Central Eastern Rainforest Reserves. (28-37S/150-154E)
Wet Tropics of Qld. (15.65-19.28S/144.97-146.45E)
Uluru-Kata Tuta National Park. (25.30S/131.OOE)
Shark Bay. (24.73-27.27S/112.82-114.28E)
Fraser Island. (25.25S/153.17E)
Riversleigh/Naracoorte Mammal Fossil Sites. (19.02S/138.67E)/(36.95S/140.83E)
Heard and McDonald Islands
Macquarie Island. (54.50S/158.93E)
The Greater Blue Mountains Area. (33.70S/150.OOE)
The Great Barrier Reef. (24.50-10.68S/142.50-154.OOE)
Kakadu National Park. (13.OOS/132.50E)
Willandra Lakes Region. (33.OOS/144.OOE)

Other International Agreements/Principles on Sustainable Development.

The Forest Principles (1992)	Reflecting a global consensus on the sustainable use of global forests.
Desertification	United Nations Document.
The Rio Declaration	A set of principles that attempt to balance the need for economic development, the protection of the environment and the specific needs of undeveloped countries.
The Kyoto Protocol	Currently in abeyance.
Convention on Environmental Impact Assessment in a Transboundary Context (1991)	

APPENDIX 2

ENVIRONMENT PROTECTION & BIODIVERSITY CONSERVATION ACT ASSESSMENT BILATERAL

DRAFT

This draft bilateral agreement is not endorsed by the State of New South Wales

AN AGREEMENT BETWEEN THE COMMONWEALTH OF AUSTRALIA AND THE STATE OF NEW SOUTH WALES

UNDER SECTION 45 OF THE COMMONWEALTH ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999

RELATING TO ENVIRONMENTAL IMPACT ASSESSMENT

Aim

1. The agreement aims to minimise duplication of environmental impact assessment processes, strengthen intergovernmental co-operation and promote a partnership approach to environmental protection and biodiversity conservation. In particular, this agreement provides for the accreditation of the New South Wales environmental impact assessment processes (set out in Schedule 1) to ensure an integrated and coordinated approach for actions requiring approval from both the Commonwealth (under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999) and the State of New South Wales. This agreement will therefore enable the Commonwealth to rely primarily on the New South Wales assessment process set out in Schedule 1 in assessing actions under the Environment Protection and Biodiversity Conservation Act 1999.

2. The specific objects of this agreement are to contribute to:

a. protecting the environment;
b. promoting the conservation and ecologically sustainable use of natural resources;
c. ensuring an efficient, timely, and effective process for environmental assessment and approval of actions; and
d. minimising duplication in environmental assessment of projects in respect of matters of national environmental significance through Commonwealth accreditation of New South Wales processes.

Parties to the agreement

3. The parties to this agreement are the State of New South Wales and the Commonwealth of Australia.

Term of agreement

4. This agreement will come into force on [date].

5. The agreement will expire on [five years after commencement].

Nature of the agreement

6. This agreement is a bilateral agreement made under section 45 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999.

7. The parties note that, with the exception of clause 10, assessment means assessment of the impacts on matters of national environmental significance only.

8. The parties note that any breach of the agreement will not give rise to any right of action, other than as prescribed in the Commonwealth Environment Protection and Biodiversity Conservation Act 1999, against the party in breach.

Effect of this agreement

9. Certain actions do not require assessment under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999

9.1 Pursuant to subsection 47(1) of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999, it is declared that an action does not require assessment under Part 8 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 if the action is assessed in the manner described in Schedule 1 to this agreement.

9.2 Clause 9.1 applies to actions which are taken wholly within the State of New South Wales. In relation to actions taken in more than one jurisdiction (including New South Wales), the parties agree to consult and use their best endeavours to reach agreement with other affected jurisdictions on an appropriate assessment process, such as that set out in Schedule 1.

9.3 Consistent with section 49 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999, the parties note that the provisions of this bilateral agreement do not have any effect in relation to an action in a Commonwealth area or an action by the Commonwealth or a Commonwealth agency. However, the parties further note that discussions will take place between the Commonwealth and New South Wales in relation to implementing Attachment 3 of the COAG Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment ("Compliance with State Environment and Planning Laws"). Following those discussions, the parties intend to amend this agreement, as necessary, so that it will apply to actions in a Commonwealth area, and actions taken by the Commonwealth or a Commonwealth agency, where it is agreed that those actions will be subject to State environment and planning laws.

10. New South Wales to ensure that impacts on matters that are not of national environmental significance are assessed

10.1 This clause applies to an action that:

a.is a controlled action (as determined by the Commonwealth Environment Minister) taken or proposed to be taken in New South Wales; and
b.does not require assessment under Part 8 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 because of this agreement and section 83 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999; and
c.is an action:
1.taken or proposed to be taken by a constitutional corporation;
2.taken by a person for the purposes of trade or commerce between Australia and another country, between two States, between a State or Territory, or between two Territories; or
3.whose regulation is appropriate and adapted to give effect to Australia's obligations under an agreement with one or more other countries.

10.2 The Commonwealth undertakes that the written notice referred to in clause 12.2 will indicate:

a.whether the Commonwealth believes that the action covered by the notice is an action to which this clause applies; and
b.if so, which of paragraphs (i)-(iii) in clause 10.1(c) applies to the action.

10.3 The State of New South Wales undertakes to ensure that the environmental impacts that the action has, will have, or is likely to have (other than the relevant impacts) are assessed to the greatest extent practicable.

10.4 The State of New South Wales notes that the Commonwealth Environment Minister may not decide whether to approve an action covered by section 130(1C) until a written notice described in section 130(1B) of the EPBC Act has been received from the State. The written notice must state that the impacts referred to in clause 10.3 have been assessed to the greatest extent practicable and explain how they have been assessed. The State of New South Wales undertakes to use its best endeavours to provide such a written notice in relation to actions covered by section 130(1C).

Procedures to be followed

11. New South Wales to use best endeavours to ensure that actions are referred

11.1 The parties will work cooperatively to ensure that proponents are aware of their obligations under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999, and will use their best endeavours to encourage proponents to refer actions that are proposed to take place in the State of New South Wales that may require approval under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 to the

Commonwealth Environment Minister.

11.2 The parties agree to develop administrative arrangements which will streamline the referral process for proponents. Where possible the parties will develop administrative arrangements which will allow proponents to simultaneously satisfy both Commonwealth and State requirements. In this respect, the parties note that section 69 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 - which provides that a State or agency of a State that is aware of a proposed action may refer the action to the Commonwealth Environment Minister - may, in appropriate cases, provide a mechanism for streamlining the referral process.

11.3 Subject to sections 69, 70 and 71 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999, the parties recognise that final responsibility for referring actions which may require approval from the Commonwealth Environment Minister under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 lies with the person proposing to take the action. In making the undertakings set out in this clause, the parties do not accept any responsibility for the actions of proponents who may or may not choose to refer actions.

12. Commonwealth to inform New South Wales of decision about whether a proposed action is a controlled action

12.1 This clause applies to an action or proposed action that is:

a.referred to the Commonwealth Environment Minister under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999; and
b.proposed to be taken in New South Wales.

12.2 The Commonwealth undertakes that the Commonwealth Environment Minister will give written notice of his or her decision whether the action is a controlled action to the New South Wales Minister within ten business days of making the decision.

13. Confirmation by New South Wales that an accredited process will apply

13.1 This clause applies where:

a.the State of New South Wales receives a written notice from the Commonwealth Environment Minister that an action proposed to take place in New South Wales is a controlled action; and
b.the action does not require assessment under Part 8 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 if assessed in the manner specified in Schedule 1 to this agreement.

13.2 The State of New South Wales undertakes that within ten business days of receiving the written notice referred to in clause 12.2, the New South Wales Minister will indicate in a written notice given to the Commonwealth Environment Minister whether the action will be assessed in the manner specified in

Schedule 1 to this agreement.

13.3 If the New South Wales Minister asks the Commonwealth Environment Minister under section 79 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 to reconsider the decision that the action is a controlled action, then the ten day period referred to in subclause 13.2 begins on the day that the State receives the notice described in subsection 79(3) of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999. This notice, amongst other things, informs the State of the outcome of the Commonwealth Environment Minister's reconsideration.

14. Assessment documentation

14.1 When the Consent Authority or Determining Authority in respect of an action is a council (as defined in the Environmental Planning and Assessment Act 1979), the State of New South Wales will ensure that the assessment is managed in accordance with guidelines agreed between Environment Australia and the New South Wales Department of Urban Affairs and Planning for the purposes of this clause.

14.2 The State of New South Wales undertakes that when an action is assessed in the manner specified in Schedule 1 to this agreement it will:

a. provide a copy of the Assessment Report or the Inquiry Report to the Commonwealth Environment Minister as soon as possible after the Report is prepared; and

b. provide copies of any other assessment documentation relevant to matters of national environmental significance to the Commonwealth Environment Minister as soon as reasonably practicable (and in any event not more than ten business days) after the date on which the Assessment Report or Inquiry Report is provided to the Minister.

14.3 The State of New South Wales may, when it provides the Assessment Report or Inquiry Report or the other assessment documentation referred to in clause 14.2, also provide additional information on social and economic matters if such information will be relevant to the Commonwealth Environment Minister's decision whether to approve the action under section 136 of the Commonwealth's Environment Protection and Biodiversity Conservation Act 1999.

15. Additional information

If, in deciding whether to approve the taking of an action assessed under this agreement, the Commonwealth Environment Minister uses any information described in paragraph 136(2)(e) of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999, the Commonwealth Environment Minister undertakes to provide a copy of this information to the New South Wales Minister. The intention of this clause is to give the State of New South Wales an opportunity to comment on the accuracy of this information before the Commonwealth Environment Minister decides whether to approve the taking

of the action, subject to the requirements of section 130 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 relating to the time period within which the Commonwealth Environment Minister must decide whether to approve the action.

16. Monitoring compliance with conditions

16.1 This clause applies where an action:

a.is taken in New South Wales; and
b.requires the approval of the Commonwealth Environment Minister under Part 9 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999; and
c.requires approval (however described) under New South Wales legislation.

16.2 The parties agree to cooperate in monitoring compliance with conditions attached to approvals, with the aim of reducing duplication. To this end the parties agree:

a.that each party will inform the other of any conditions attached to the approval(s) to take the action; and
b.that best endeavours will be used to put cooperative arrangements in place for monitoring compliance with conditions on any project which is approved by both parties. The aim of these arrangements is to ensure that reporting requirements for the proponent, and other monitoring efforts such as site inspections, are not duplicated.

17. Enforcing conditions on approvals

The parties agree to inform one another before commencing action to prosecute a person for breaching conditions of an approval for an action which has been approved by both parties, where the conditions relate to, or affect, a matter of national environmental significance.

18. Conditions attached to an approval

The parties recognise the desirability of avoiding, to the extent practicable, attaching inconsistent conditions to approvals for an action under the Environment Protection and Biodiversity Conservation Act 1999 and New South Wales legislation. To this end, the parties:

a.note the provisions of section 134 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999, which include a requirement for the Commonwealth Environment Minister to consider any relevant State conditions when deciding whether to attach a condition to an approval, and
b.agree to inform one another before varying the conditions attached to an approval for an action which has been approved by both parties, where the condition relates to, or affects, a matter of national environmental significance. The parties also agree to advise one another of any such variation after it has been made.

19. Administrative procedures

The parties agree to jointly develop administrative procedures to ensure that the requirements of this agreement are administered efficiently in accordance with their separate legal requirements. The parties note that the administrative procedures will provide for consultation on draft assessment documentation, including draft assessment reports. The administrative procedures will also include guidelines on the exchange of any information about assessments between Environment Australia and the Department of Urban Affairs and Planning.

Maintaining the agreement

20. Monitoring compliance with the agreement

The parties recognise that, under the Commonwealth Auditor-General Act 1997, the Commonwealth Auditor-General may audit the operation of the Commonwealth public sector (as defined in section 18 of that Act) in relation to this agreement, including whether the Commonwealth is meeting its obligations under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 by relying on New South Wales processes accredited under this agreement.

21. Reviewing the agreement

21.1 The parties note that section 65 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 requires the Commonwealth Environment Minister to cause a review of the operation of this agreement to be carried out, and give a copy of the report of the review to the New South Wales Minister.

21.2 The parties agree that:

a.the review of this agreement under section 65 will be carried out jointly by Environment Australia and the Department of Urban Affairs and Planning;
b.the review will evaluate the operation of the agreement against the object of the agreement;
c.the views of key stakeholders will be sought as part of the review;
d.the review will commence at least eight months before the agreement is due to expire, and will be completed at least three months before the agreement expires; and
e.the report of the review will be transmitted jointly to the Ministers.

22. Cancelling or suspending the agreement

22.1 The parties note that sections 57 - 64 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 provide that the Commonwealth Environment Minister may cancel or suspend all or part of this agreement (either generally or in relation to actions in specified classes) under

certain circumstances. Sections 57 - 64 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 also set out a process for consulting on the cancellation or suspension of all or part of this agreement.

22.2 In accordance with section 63 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 the Commonwealth Environment Minister must cancel or suspend all or part of this agreement at the request of the New South Wales Minister, but only if the request is made in accordance with the agreement.

22.3 The parties agree that a request to cancel or suspend all or part of this agreement is made in accordance with this agreement if:

a.the request is made on the grounds that the New South Wales Minister is not satisfied that the Commonwealth has complied or will comply with the agreement; or

b.the request is made on the grounds that the New South Wales Minister is not satisfied that the object of the agreement is being achieved; and

c.before making the request, the New South Wales Minister has informed the Commonwealth Environment Minister in writing of the reason(s) for requesting the suspension and allowed a period of at least twenty business days for the Commonwealth Environment Minister to respond.

Exchange of information

23. Each party agrees to promptly comply with any reasonable request from the other party to supply information relating to the management or administration of assessments covered by this agreement.

24. The parties agree that they may each use data within the control of the relevant departments of government of the other party for the purposes of meeting their respective responsibilities relating to the agreement or the assessment of environmental impacts under their respective Acts, and to make data available to the other. The parties agree that data will remain the property of the owner and its use will be subject to such licence conditions as may be agreed. The parties agree that, subject to clauses 28 and 30, data will not be used or communicated to any other person without the permission of the owner.

Conflict resolution

25. In the event that any dispute arises under this agreement, the parties will settle it by direct negotiation using their best endeavours, acting in a spirit of cooperation. The parties agree that in the event of a dispute, discussions aimed at resolution will normally take place at officials level in the first instance. This clause does not purport to limit the rights and obligations of each party under relevant sections of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 (including those sections dealing with cancelling and suspending bilateral agreements).

26. The parties will notify and consult each other on matters that come to their attention that may improve the operation of this agreement.

Relevant plans and agreements

27. The parties note that a number of agreements and plans may be relevant to assessments under this agreement. The parties undertake that, when actions are assessed under this agreement, relevant agreements and plans will be taken into account as necessary. The parties agree that where the assessment covers impacts on:

a. World Heritage values of a World Heritage property, any management plan for the property is relevant,
b. the ecological character of a Ramsar wetland property, any management plan for the wetland is relevant,
c. a listed threatened species or ecological community, any recovery plan for the species or community, and any threat abatement plan for a process that threatens the species or community is relevant,
d. a listed migratory species, any wildlife conservation plan for the species is relevant.

Freedom of information legislation

28. If a party receives any request, including under Freedom of Information legislation, for any documents originating from another party which are not otherwise publicly available, the parties will consult on the release of those documents.

29. The parties recognise the need for expeditious consultation on such requests so that statutory obligations can be met without delay.

Public Access to Assessment Documentation

30. The State of New South Wales agrees that documentation relating to the assessment of each action which is assessed in the manner specified in Schedule 1 will be available to the public, except where corresponding information would not have been available to the public if the action had been assessed by the Commonwealth under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999.

Advertising

31. The State of New South Wales will, in giving effect to the requirements in Schedule 1 relating to advertising, make special allowances, as appropriate, to ensure affected groups with particular communication needs have an adequate opportunity to comment on actions assessed in the manner specified in Schedule 1.

Interpretation

32. A reference in this agreement to the Commonwealth Environment Protection and Biodiversity Conservation Act 1999, the New South Wales Environmental Planning and Assessment Act 1979 or the New South Wales Threatened Species Conservation Act 1995 is a reference to the relevant Acts as in force at the date of this agreement. If any of the Acts are subsequently amended in a manner that affects the operation of this agreement, the parties will seek to agree as soon as practicable on whether it is necessary to make another bilateral agreement varying or replacing this agreement.

33. A reference in this agreement to an Act includes a reference to any regulations and instruments under that Act.

34. A reference in this agreement to the impacts of an action (or the relevant impacts of an action), includes a reference to any impacts (or relevant impacts, as the case may be) of that action outside of the State of New South Wales.

35. Unless the contrary intention appears, the terms used in this agreement have the same meaning as in the Commonwealth Environment Protection and Biodiversity Conservation Act 1999.

36. Assessment documentation means any formal report, study, agreement, submission or correspondence prepared by or received as part of the formal assessment processes set out in Schedule 1. This includes draft reports or studies which would normally be publicly available under the assessment process.

37. Assessment Report means the report prepared in accordance with Part A (clause 5), Part B (clause 5), Part C (clause 5) or Part D (clause 6) of Schedule 1.

38. Commonwealth Environment Minister means the Minister administering the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 and includes a delegate of the Minister.

39. Consent Authority has the same meaning as in the New South Wales Environmental Planning and Assessment Act 1979.

40. Determining Authority has the same meaning as in the New South Wales Environmental Planning and Assessment Act 1979.

41. Director has the same meaning as in the New South Wales Environmental Planning and Assessment Act 1979.

42. EIS means and Environmental Impact Statement prepared under the Environmental Planning and Assessment Act 1979 (and includes an Environmental Impact Statement that includes a Species Impact Statement).

43. EPA Regulations means the Environmental Planning and Assessment Regulations 1994.

44. Inquiry Report means the findings and recommendations of a Commission of Inquiry held in accordance with Part A (clause 4), Part B (clause 4) or Part C (clause 4) of the Schedule to this agreement.

45. New South Wales Minister means the Minister administering the New South Wales Environmental Planning and Assessment Act 1979 and includes a delegate of the Minister.

46. Statement of Environmental Effects means a Statement of Environmental Effects (including a Statement of Environmental Effects that includes a Species Impact Statement) that is:

a.prepared for the purposes of Form 1 to the EPA Regulations, and
b.prepared in accordance with Part C of Schedule 1 to this agreement.

47. Species Impact Statement means a Species Impact Statement prepared in accordance with Division 2 of Part 6 of the Threatened Species Conservation Act 1995, or in accordance with Subdivision 2 of Division 6 of Part 7A of the Fisheries Management Act 1994.

SCHEDULE 1

Preamble

Subsection 47(1) of the Environment Protection and Biodiversity Conservation Act 1999 provides that a bilateral agreement may declare that actions need not be assessed under Part 8 of that Act if the actions have been 'assessed in a specified manner'.

Clause 9.1 of this bilateral agreement declares that an action does not require assessment under Part 8 of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 if it is assessed in the manner specified in this Schedule.

The Specified Manner of Assessment

For the purposes of clause 9.1 of this bilateral agreement, an action is assessed in the manner specified in this Schedule if:

a.the action is assessed in accordance with the requirements set out below in:
    1.Part A, or
    2.Part B, or
    3.Part C,or
b.the action is assessed in accordance with the requirements set out below in Part D and the only controlling provisions for the action are sections 18 or 18A of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999.

For the purposes of regulations made under section 50 of the Environment Protection and Biodiversity Conservation Act 1999, the manner of assessment specified in this Schedule provides for the following assessment approaches:

a.preparation of an Environmental Impact Statement under Part 4 of the Environmental Planning and Assessment Act 1979 (see Part A below) - this assessment approach corresponds to assessment by environmental impact statement under the Environment Protection and Biodiversity Conservation Act 1999; and

b.preparation of an Environmental Impact Statement under Part 5 of the Environmental Planning and Assessment Act 1979 (see Part B below) - this assessment approach corresponds to assessment by environmental impact statement under the Environment Protection and Biodiversity Conservation Act 1999; and

c.preparation of a Statement of Environmental Effects under Part 4 of the Environmental Planning and Assessment Act 1979 (see Part C below) - this assessment approach corresponds to assessment by environmental impact statement under the Environment Protection and Biodiversity Conservation Act 1999; and

d.preparation of a Species Impact Statement under Division 2 of Part 6 of the Threatened Species Conservation Act 1995 or Subdivision 2 of Division 6 of Part 7A of the Fisheries Management Act 1994 (see Part E below) - this assessment approach corresponds to assessment on preliminary documentation under the Environment Protection and Biodiversity Conservation Act 1999.

Part A - Assessment by Environmental Impact Statement under Part 4 of the Environmental Planning and Assessment Act 1979

1. Law under which the assessment has been carried out

The action is designated development as defined in section 77A of the Environmental Planning and Assessment Act 1979, and an environmental impact statement is prepared under Part 4 of the Environmental Planning and Assessment Act 1979.

2. Guidelines for assessment

2.1 The environmental impact statement:

a.contains the matters referred to in guidelines established by the Director, and in force in relation to the action, under regulation 54A of the Environmental Planning and Assessment Regulations; and

b.meets the requirements of the Director (if any), specified in accordance with regulation 55 of the Environmental Planning and Assessment Regulations, in relation to the form and content of the environmental impact statement.

2.2 The guidelines and the Director's requirements (if any) ensure that the assessment:

a.contains an assessment of all relevant impacts that the action has, will have or is likely to have;
b.contains enough information about the action and its relevant impacts to allow the Commonwealth Environment Minister to make an informed decision whether or not to approve the action under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999; and
c.addresses the matters (if any) prescribed under subsection 102(2) of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 for assessment by environmental impact statement under that Act.

2.3 The Director publishes draft requirements for the preparation of the environmental impact statement, and seeks public comment on the draft requirements before the requirements are finalised, if:

a.the Director believes it is necessary or desirable to seek public comment because the issues to be addressed in the assessment will be complex or there will be a high level of public interest in the issues; or
b.the Commonwealth Environment Minister has requested the publication of draft requirements.

3. Inviting public comment

The environmental impact statement is released for public comment, and the public is given at least 28 days to provide comments to the Consent Authority on the action or on the environmental impact statement. During this period (the public comment period):

a.copies of the environmental impact statement are available for public inspection; and
b.copies of the environmental impact statement are available for purchase.

Before the public comment period begins, notice is given by public advertisement of the availability of copies of the environmental impact statement and the opportunity for the public to provide comments.

4. Responding to public comments

4.1 If an inquiry is not held under Division 2 of Part 6 of the Environmental Planning and Assessment Act 1979 in respect of the action, the proponent prepares:

a.a revised environmental impact statement; or
b.a supplement to the environmental impact statement; taking into account the public submissions (if any) relating to the relevant impacts of the action which are received during the period referred to in clause 3.

The revised EIS, or the supplement to the environmental impact statement, is submitted to the Director or the Consent Authority.

4.2 If an inquiry is held under Division 2 of Part 6 of the Environmental Planning and Assessment Act 1979 in respect of the action, the Commission of Inquiry considers:

a.the environmental impact statement; and
b.any comments provided by the public during the public comment period; and
c.information provided by the proponent which addresses, to the greatest extent practicable, the comments provided by the public.

4.3 Clause 4.2 applies only if both of the following conditions are satisfied in relation to the inquiry:

a.the New South Wales Minister issues directions to the Commission of Inquiry which ensure that:
1.the inquiry assesses all relevant impacts that the action has, will have or is likely to have; and
2.the Inquiry Report contains enough information about the action and its relevant impacts to allow the Commonwealth Environment Minister to make an informed decision whether or not to approve the action under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999; and
b.the Commission of Inquiry prepares an Inquiry Report and submits a copy of the Report to the Commonwealth Environment Minister.

5. Assessment Reports and Inquiry Reports

5.1 If an inquiry is not held in accordance with clause 4 in respect of the action, the Director or the Consent Authority prepares an Assessment Report on the proposed action and submits it to the Commonwealth Environment Minister.

5.2 In preparing the Assessment Report, the Director or the Consent Authority takes into account:

a.the environmental impact statement; and
b.any comments provided by the public during the public comment period; and
c.the revised environmental impact statement, or the supplement to the environmental impact statement, provided in accordance with clause 4.

5.3 The Assessment Report or Inquiry Report (as the case may be) includes:

a.a description of:
1.the action; and
2.the places affected by the action; and
3.any matters of national environmental significance that are likely to be affected by the action; and
b.a summary of the relevant impacts of the action; and
c.a description of feasible mitigation measures, changes to the action or procedures to prevent or minimise environmental impacts on relevant matters of national environmental significance proposed by the proponent or suggested in public submissions; and

d.to the extent practicable, a description of any feasible alternatives to the action that have been identified through the assessment process, and their likely impact on matters of national environmental significance; and

e.a statement of conditions for approval of the action that may be imposed to address identified impacts on matters of national environmental significance; and

f.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, including a description of the monitoring, enforcement and review procedures that apply, or are proposed to apply, to the action.

6. Inviting public comment

6.1 When the public is invited to comment in accordance with clauses 2 or 3, the invitation is published in newspapers circulating generally in each State and Territory.

6.2 The advertisements advise the nature of the proposal, its location(s), the matters of national environmental significance to be covered by the assessment, how the relevant documents may be obtained, and the deadline for public comments.

7 Local Government as Consent Authority

If the Consent Authority for an action is a council (as defined in the Environmental Planning and Assessment Act 1979), the New South Wales Department of Urban Affair and Planning provides to Environment Australia a

written notice certifying that the action has been assessed in accordance with the requirements set out in this Part of Schedule 1 and that the Assessment Report adequately addresses the matters in clause 5.3 of Part A of this Schedule.

Part B - Assessment by Environmental Impact Statement under Part 5 of the Environmental Planning and Assessment Act 1979

1. Law under which the assessment has been carried out

An environmental impact statement is prepared under Part 5 of the Environmental Planning and Assessment Act 1979 in respect of the action.

2. Guidelines for assessment

2.1 The environmental impact statement:

a.contains the matters referred to in guidelines established by the Director, and in force in relation to the action, under regulation 84 of the Environmental Planning and Assessment Regulations; and

b.meets the requirements of the Director (if any), specified in accordance with regulation 85 of the Environmental Planning and Assessment Regulations, in relation to the form and content of the environmental impact statement.

2.2 The guidelines and the Director's requirements (if any) ensure that the assessment:

a.contains an assessment of all relevant impacts that the action has, will have or is likely to have;
b.contains enough information about the action and its relevant impacts to allow the Commonwealth Environment Minister to make an informed decision whether or not to approve the action under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999; and
c.addresses the matters (if any) prescribed under subsection 102(2) of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 for assessment by environmental impact statement under that Act.

2.3 The Director publishes draft requirements for the preparation of the environmental impact statement, and seeks public comment on the draft requirements before the requirements are finalised, if:
a.the Director believes it is necessary or desirable to seek public comment because the issues to be addressed in the assessment will be complex or there will be a high level of public interest in the issues; or
b.the Commonwealth Environment Minister has requested the publication of draft requirements.

3. Inviting public comment

The environmental impact statement is released for public comment, and the public is given at least 28 days to provide comments to the Determining Authority on the action or on the environmental impact statement. During this period (the public comment period):
a.copies of the environmental impact statement are available for public inspection; and
b.copies of the environmental impact statement are available for purchase.

Before the public comment period begins, notice is given by public advertisement of the availability of copies of the environmental impact statement and the opportunity for the public to provide comments.

4 Responding to public comments

4.1 If an inquiry is not held under Division 2 of Part 6 of the Environmental Planning and Assessment Act 1979 in respect of the action, the proponent prepares:
a.a revised environmental impact statement; or
b.a supplement to the environmental impact statement; taking into account the public submissions (if any) relating to the relevant impacts of the action which are received during the period referred to in clause 3.

The revised environmental impact statement, or the supplement to the environmental impact statement, is submitted to the Director or the Determining Authority.

4.2 If an inquiry is held under Division 2 of Part 6 of the Environmental Planning and Assessment Act 1979 in respect of the action, the Commission of Inquiry considers:

a.the environmental impact statement; and

b.any comments provided by the public during the public comment period; and

c.information provided by the proponent which addresses, to the greatest extent practicable, the comments provided by the public.

4.3 Clause 4.2 applies only if both of the following conditions are satisfied in relation to the inquiry:

a.the New South Wales Minister issues directions to the Commission of Inquiry which ensure that:

1.the inquiry assesses all relevant impacts that the action has, will have or is likely to have; and

2.the Inquiry Report contains enough information about the action and its relevant impacts to allow the Commonwealth Environment Minister to make an informed decision whether or not to approve the action under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999; and

b.the Commission of Inquiry prepares an Inquiry Report and submits a copy of the Report to the Commonwealth Environment Minister.

5 Assessment Report

5.1 If an inquiry is not held in accordance with clause 4 in respect of the action, the Director or the Determining Authority prepares an Assessment Report on the proposed action and submits it to the Commonwealth Environment Minister.

5.2 In preparing the Assessment Report, the Director or the Determining Authority takes into account:

(a)the environmental impact statement; and

(b)any comments provided by the public during the public comment period; and

(c)the revised environmental impact statement, or the supplement to the environmental impact statement, provided in accordance with clause 4.

5.3 The Assessment Report or the Inquiry Report (as the case may be) includes:

(a)a description of:

(i) the action; and

(ii) the places affected by the action; and

(iii) any matters of national environmental significance that are likely to be affected by the action; and

(b)a summary of the relevant impacts of the action; and

(c)a description of feasible mitigation measures, changes to the action or procedures to prevent or minimise environmental impacts on relevant matters

of national environmental significance proposed by the proponent or suggested in public submissions; and

(d)to the extent practicable, a description of any feasible alternatives to the action that have been identified through the assessment process, and their likely impact on matters of national environmental significance; and

(e)a statement of conditions for approval of the action that may be imposed to address identified impacts on matters of national environmental significance; and

(f)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, including a description of the monitoring, enforcement and review procedures that apply, or are proposed to apply, to the action.

6 Inviting public comment

6.1 When the public is invited to comment in accordance with clauses 2 or 3, the invitation is published in newspapers circulating generally in each State and Territory.

6.2 The advertisements advise the nature of the proposal, its location(s), the matters of national environmental significance to be covered by the assessment, how the relevant documents may be obtained, and the deadline for public comments.

7 Local Government as Determining Authority

If the Determining Authority for an action is a council (as defined in the Environmental Planning and Assessment Act 1979), the New South Wales Department of Urban Affair and Planning provides to Environment Australia a

written notice certifying that the action has been assessed in accordance with the requirements set out in this Part of Schedule 1 and that the Assessment Report adequately addresses the matters in item 5.3.

Part C - Assessment by Statement of Environmental Effects under the Environmental

Planning and Assessment Act 1979

1 Law under which the assessment has been carried out

The action is advertised development as defined in section 4 of the Environmental Planning and Assessment Act 1979, and a Statement of Environmental Effects is prepared for the purposes of Part 4 of the Environmental Planning and Assessment Act 1979.

2 Requirements for assessment

2.1 The Consent Authority or the Director prepares requirements governing the form and content of the Statement of Environmental Effects, and these

requirements ensure that the assessment:

(a)assesses all relevant impacts that the action has, will have or is likely to have;
(b)contains enough information about the action and its relevant impacts to allow the Commonwealth Environment Minister to make an informed decision whether or not to approve the action under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999; and
(c)addresses the matters (if any) prescribed under subsection 102(2) of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 for assessment by environmental impact statement under that Act.

2.2 Before finalising requirements for the purposes of clause 2.1 above, the Consent Authority or the Director publishes draft requirements for the Statement of Environmental Effects, and seeks public comment on the draft requirements, if:

(a)the Consent Authority or the Director believes it is necessary or desirable to seek public comment because the issues to be addressed in the assessment will be complex or there will be a high level of public interest in the issues; or
(b)the Commonwealth Environment Minister has requested the publication of draft requirements.

3 Preparing a statement of environmental effects and inviting public comment

The Statement of Environmental Effects is prepared in accordance with the requirements established under clause 2 above and is released for public comment. The public is given at least 28 days to provide comments to the

Consent Authority on the action or on the Statement of Environmental Effects. During this period (the public comment period):

(a)copies of the Statement of Environmental Effects are available for public inspection; and
(b)copies of the Statement of Environmental Effects are available for purchase.

Before the public comment period begins, notice is given by public advertisement of the availability of copies of the Statement of Environmental Effects and the opportunity for the public to provide comments.

4 Responding to public comments

4.1 If an inquiry is not held under Division 2 of Part 6 of the Environmental Planning and Assessment Act 1979 in respect of the action, the proponent prepares:

(a)a revised Statement of Environmental Effects; or
(b)a supplement to the Statement of Environmental Effects; taking into account the public submissions (if any) relating to the relevant impacts of the action which are received during the period referred to in clause 3.

The revised Statement of Environmental Effects, or the supplement to the Statement of Environmental Effects, is submitted to the Director or the Determining Authority.

4.2 If an inquiry is held under Division 2 of Part 6 of the Environmental Planning and Assessment Act 1979 in respect of the action, the Commission of Inquiry considers:

(a)the Statement of Environmental Effects; and
(b)any comments provided by the public during the public comment period; and
(c)information provided by the proponent which addresses, to the greatest extent practicable, the comments provided by the public.

4.3 Clause 4.2 applies only if both of the following conditions are satisfied in relation to the inquiry:

(a)the New South Wales Minister issues directions to the Commission of Inquiry which ensure that:

(i)the inquiry assesses all relevant impacts that the action has, will have or is likely to have; and
(ii)the Inquiry Report contains enough information about the action and its relevant impacts to allow the Commonwealth Environment Minister to make an informed decision whether or not to approve the action under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999; and

(b)the Commission of Inquiry prepares an Inquiry Report and submits a copy of the Report to the Commonwealth Environment Minister.

5 Assessment Report

5.1 If an inquiry is not held in accordance with clause 4 in respect of the action, the Director or the Consent Authority prepares an Assessment Report on the proposed action and submits it to the Commonwealth Environment Minister.

5.2 In preparing the Assessment Report, the Director or the Consent Authority takes into account:

(a)the Statement of Environmental Effects; and
(b)any comments provided by the public during the public comment period; and
(c)the revised Statement of Environmental Effects, or the supplement to the Statement of Environmental Effects, provided in accordance with clause 4.

5.3 The Assessment Report or the Inquiry Report (as the case may be) includes:

(a)a description of:

(i)the action; and
(ii)the places affected by the action; and
(iii)any matters of national environmental significance that are likely to be affected by the action; and

(b)a summary of the relevant impacts of the action; and
(c)a description of feasible mitigation measures, changes to the action or procedures to prevent or minimise environmental impacts on relevant matters of national environmental significance proposed by the proponent or suggested in public submissions; and
(d)to the extent practicable, a description of any feasible alternatives to the action that have been identified through the assessment process, and their likely impact on matters of national environmental significance; and
(e)a statement of conditions for approval of the action that may be imposed to address identified impacts on matters of national environmental significance; and
(f)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, including a description of the monitoring, enforcement and review procedures that apply, or are proposed to apply, to the action.

6 Inviting public comment

6.1 When the public is invited to comment in accordance with clauses 2 or 3, the invitation is published in newspapers circulating generally in each State and Territory.

6.2 The advertisements advise the nature of the proposal, its location(s), the matters of national environmental significance to be covered by the assessment, how the relevant documents may be obtained, and the deadline for public comments.

7 Local Government as Consent Authority

If the Consent Authority for an action is a council (as defined in the Environmental Planning and Assessment Act 1979), the New South Wales Department of Urban Affair and Planning provides to Environment Australia a written notice certifying that the action has been assessed in accordance with the requirements set out in this Part of Schedule 1 and that the Assessment Report adequately addresses the matters in item 5.3.

Part D - Assessment by Species Impact Statement under the Threatened Species Conservation Act 1995 or the Fisheries Management Act 1994

1 Actions to which this Part applies

1.1 This Part of the Schedule applies to an action if:

(a)the only controlling provisions for the action are sections 18 or 18A of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999; and

(b)the action has not been assessed in accordance with the requirements set out in Part A, Part B or Part C of this Schedule.

1.2 In addition, this Part of the Schedule applies to an action only if:

(a)the Commonwealth Environment Minister has given to the New South Wales Minister the written notice referred to in clause 12.2 of this agreement; and

(b)the Commonwealth Environment Minister has not indicated in that notice that this Part does not apply to the action.

2. Law under which the assessment has been carried out

The action is assessed by a Species Impact Statement prepared in accordance with Division 2 of Part 6 of the Threatened Species Conservation Act 1995, or in accordance with Subdivision 2 of Division 6 of Part 7A of the Fisheries Management Act 1994.

3 Content of Species Impact Statement

The Species Impact Statement:

(a)contains an assessment of all relevant impacts that the action has, will have or is likely to have;

(b)contains enough information about the action and its relevant impacts to allow the Commonwealth Environment Minister to make an informed decision whether or not to approve the action under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999; and

(c)if the action is likely to impact on a listed threatened species or listed threatened ecological community that is also included in a list kept under the New South Wales Threatened Species Conservation Act 1995, contains the information referred to in section 110 of the New South Wales Threatened Species Conservation Act 1995 in relation to the listed threatened species or ecological community; and

(d)if the action is likely to impact on a listed threatened species or listed threatened ecological community that is also included in a list kept under the New South Wales Fisheries Management Act 1994, contains the information referred to in section 221K of the New South Wales Fisheries Management Act 1994 in relation to the listed threatened species or ecological community.

4. Public Comment on the Species Impact Statement

The Species Impact Statement is released for public comment. The public is given at least 28 days to provide comments to the Director General of National Parks or the Director General of Fisheries on the action or on the Species Impact Statement. During this period (the public comment period):

(a)copies of the Species Impact Statement are available for public inspection; and
(b)copies of the Species Impact Statement are available for purchase.

Before the public comment period begins, notice is given by public advertisement of the availability of copies of the Species Impact Statement and the opportunity for the public to provide comments.

5 Responding to Public Comment

The proponent provides to the Director General of National Parks or the Director General of Fisheries any additional information, or changes to the Species Impact Statement, needed to take into account the public comments received during the public comment period.

6 Assessment Report

6.1 The Director General of National Parks or the Director General of Fisheries prepares an Assessment Report on the action and submits it to the Commonwealth Environment Minister.

6.2 In preparing the Assessment Report, the Director General of National Parks or the Director General of Fisheries takes into account:

(a)the Species Impact Statement;
(b)any comments provided by the public during the public comment period; and
(c)any additional information, or changes to the Species Impact Statement, provided by the proponent under clause 5.

6.3 The Assessment Report includes:

(a)a description of:

(i)the action; and
(ii)the places affected by the action; and

(b)a summary of the relevant impacts of the action; and
(c)a description of feasible mitigation measures, changes to the action or procedures, which have been proposed by the proponent or suggested in public submissions, and which are intended to prevent or minimise impacts on listed threatened species and listed threatened ecological communities; and
(d)to the extent practicable, a description of any feasible alternatives to the action that have been identified through the assessment process, and their likely impact on listed threatened species and listed threatened ecological communities; and
(e)a statement of conditions for approval of the action that may be imposed to address identified impacts on listed threatened species and listed threatened ecological communities; and

(f)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, including a description of the monitoring, enforcement and review procedures that apply, or are proposed to apply, to the action.

7 Inviting public comment

7.1 When the public is invited to comment in accordance with clause 4, the invitation is published:

(a)on a website approved by New South Wales National Parks and Wildlife Service and linked to the Environment Australia website or

(b)in newspapers circulating generally in each State and Territory.

7.2 The advertisements advise the nature of the proposal, its location(s), the matters of national environmental significance to be covered by the assessment, how the relevant documents may be obtained, and the deadline for public comments.

APPENDIX 3

Definition of Owner

[*Local Government Act* 1993, sch 9]

"Owner"

(a) in relation to Crown land, means the Crown and includes;

(i) a lessee of land from the Crown; and

(ii) a person to whom the Crown has lawfully contracted to sell the land but in respect of which the purchase price or other consideration for the sale has not yet been received by the Crown; and

(b) in relation to land other than Crown land includes;

(i) every person who , jointly or severally, whether at law or equity, is entitled to the land for an estate of freehold in possession; and

(ii) every such person who is entitled to receive, or is in receipt of, or if the land were to be let to a tenant would be entitled to receive, the rents and profits of the land, whether as beneficial owner, trustee, mortgagee in possession, or otherwise; and

(iii) in the case of land that is the subject of a strata scheme under the Strata Titles Act, 1973 or a leasehold strata scheme under the Strata Titles (leasehold) act 1986, the body corporate under that scheme; and

(iv) in the case of land that is a community, precinct or neighbourhood parcel within the meaning of the Community Land Development Act 1989, the association for the parcel: and

(v) every other person who by this Act is taken to be the owner; and

(c) in relation to land subject to a mining lease under the Mining act 1992, the holder of the lease; and

(d) in Part 2 of Chapter 7, in relation to a building, means the owner of the building or the owner of the land on which the building is erected.

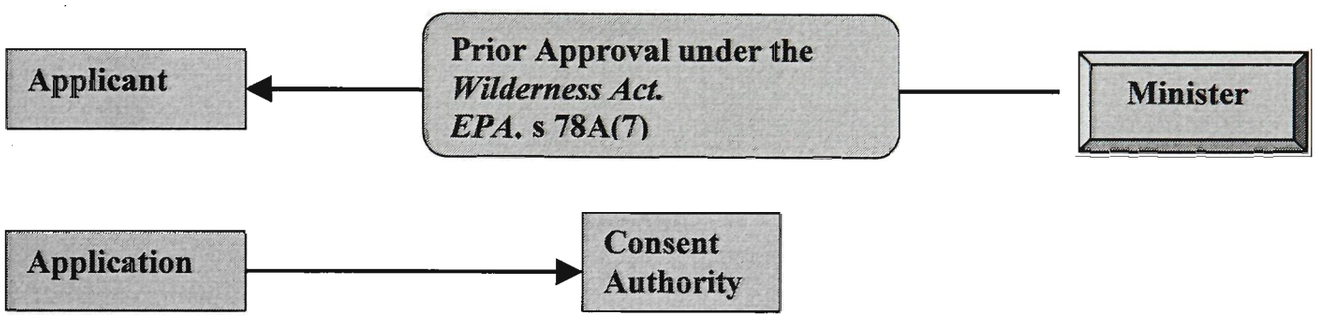
APPENDIX 4

***Environmental Planning and Assessment Act* 1979**

Information submission on Lodgment.

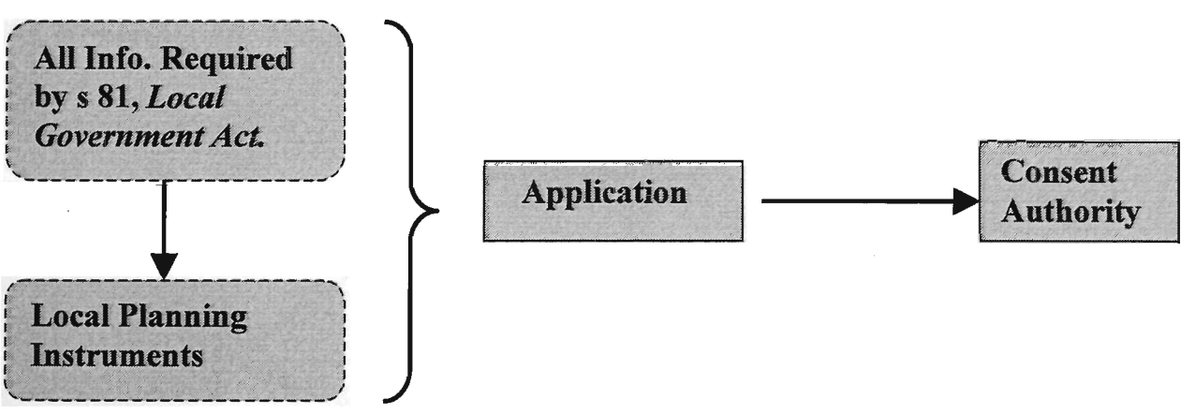
Application #1

An application which relates to a wilderness area under the *Wilderness Act, 1987.*



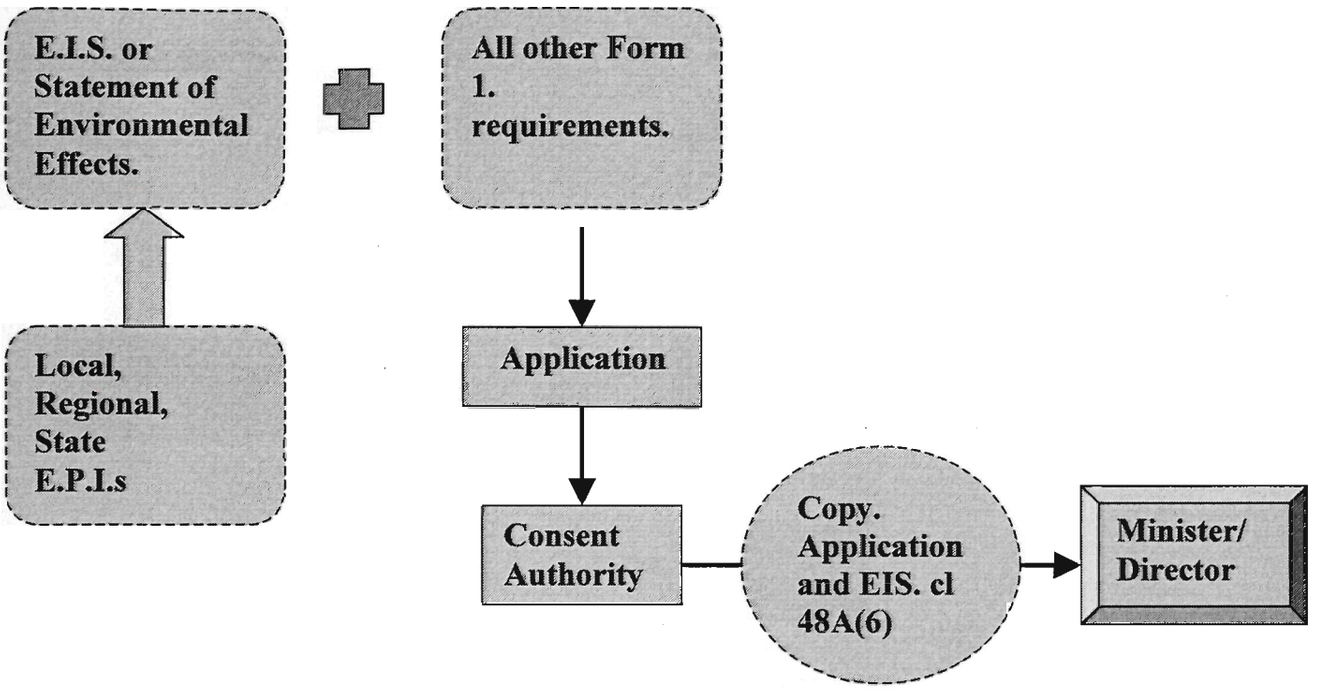
Application #2

In respect of matters mentioned in EPA, s 78A.



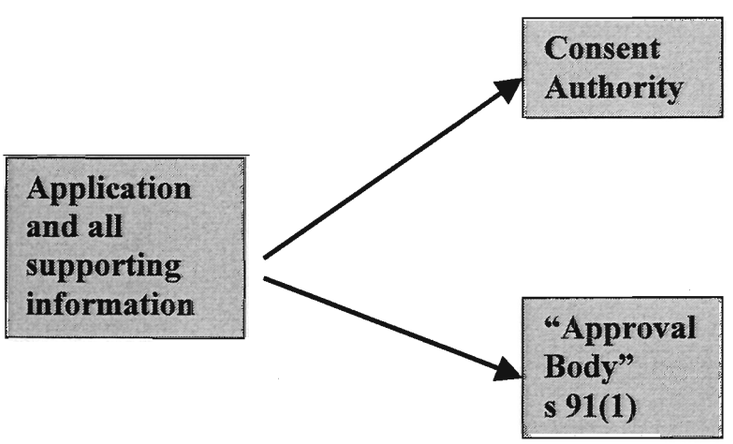
Application #3

An application for a 'Designated Development'



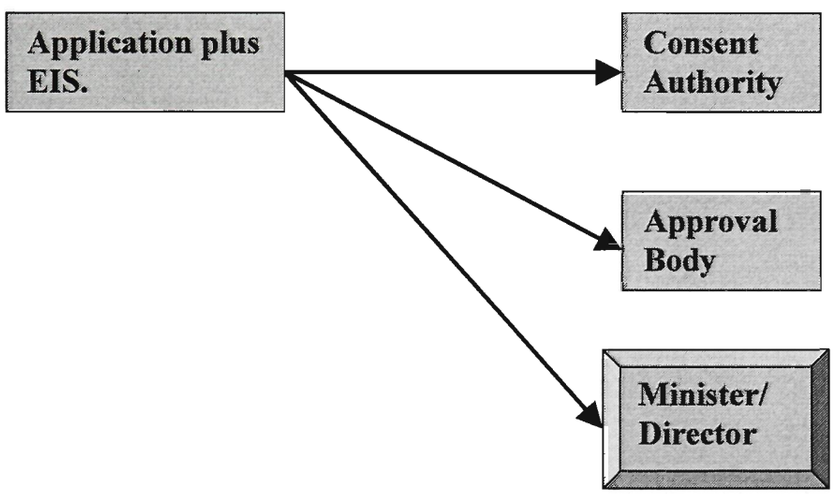
Application #4

An application for 'Integrated Development'



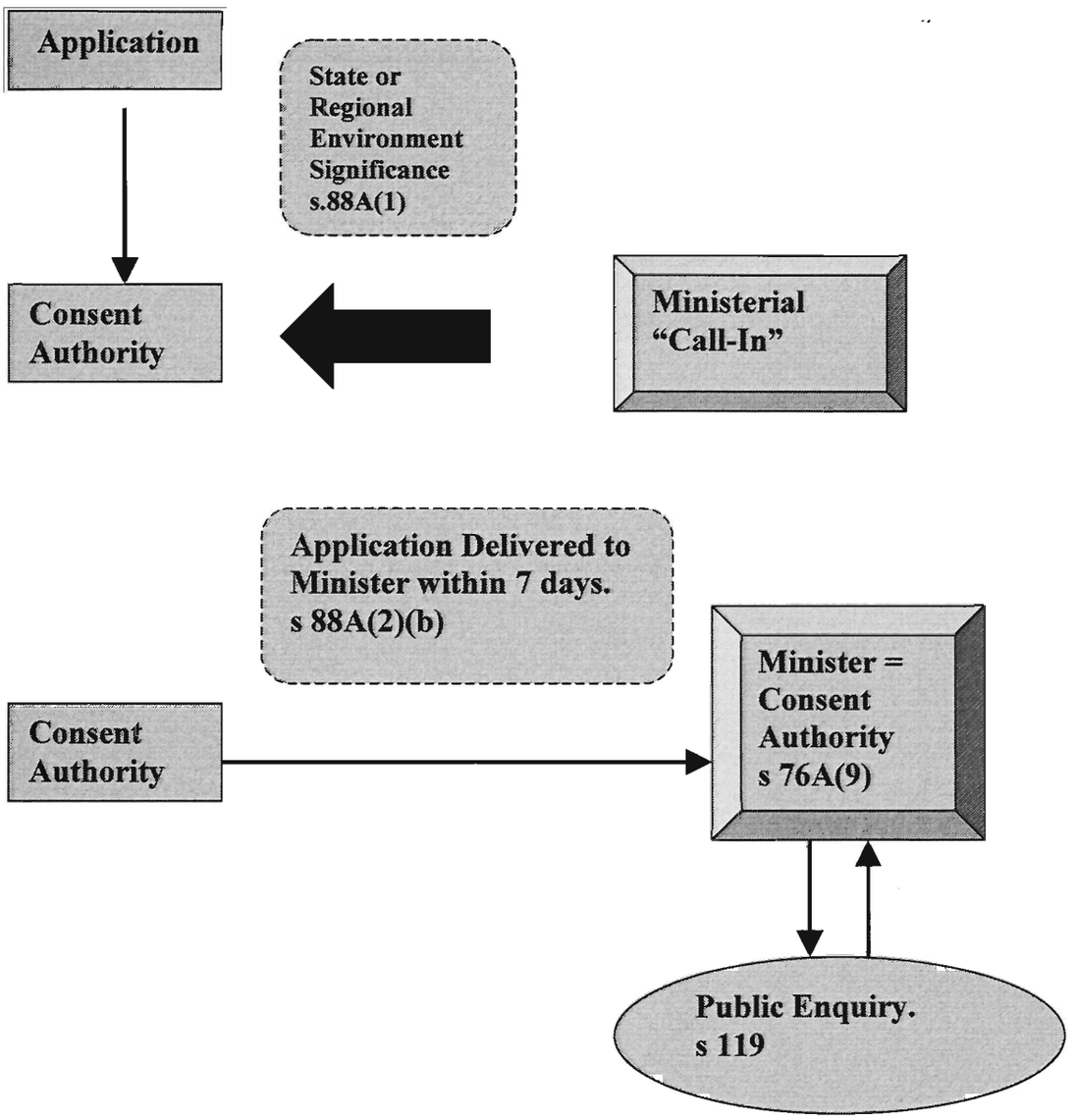
Application #5

An application for a 'Designated Development' which is also an 'Integrated Development'.



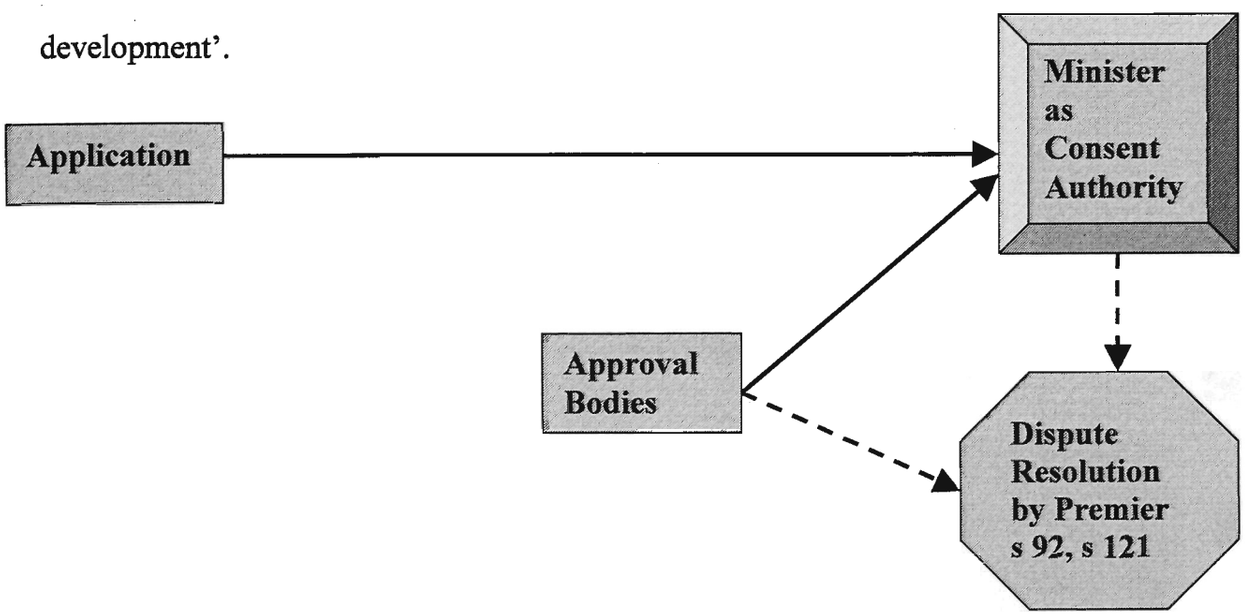
Application #6.

An application for a 'State Significant' development.



Application #7

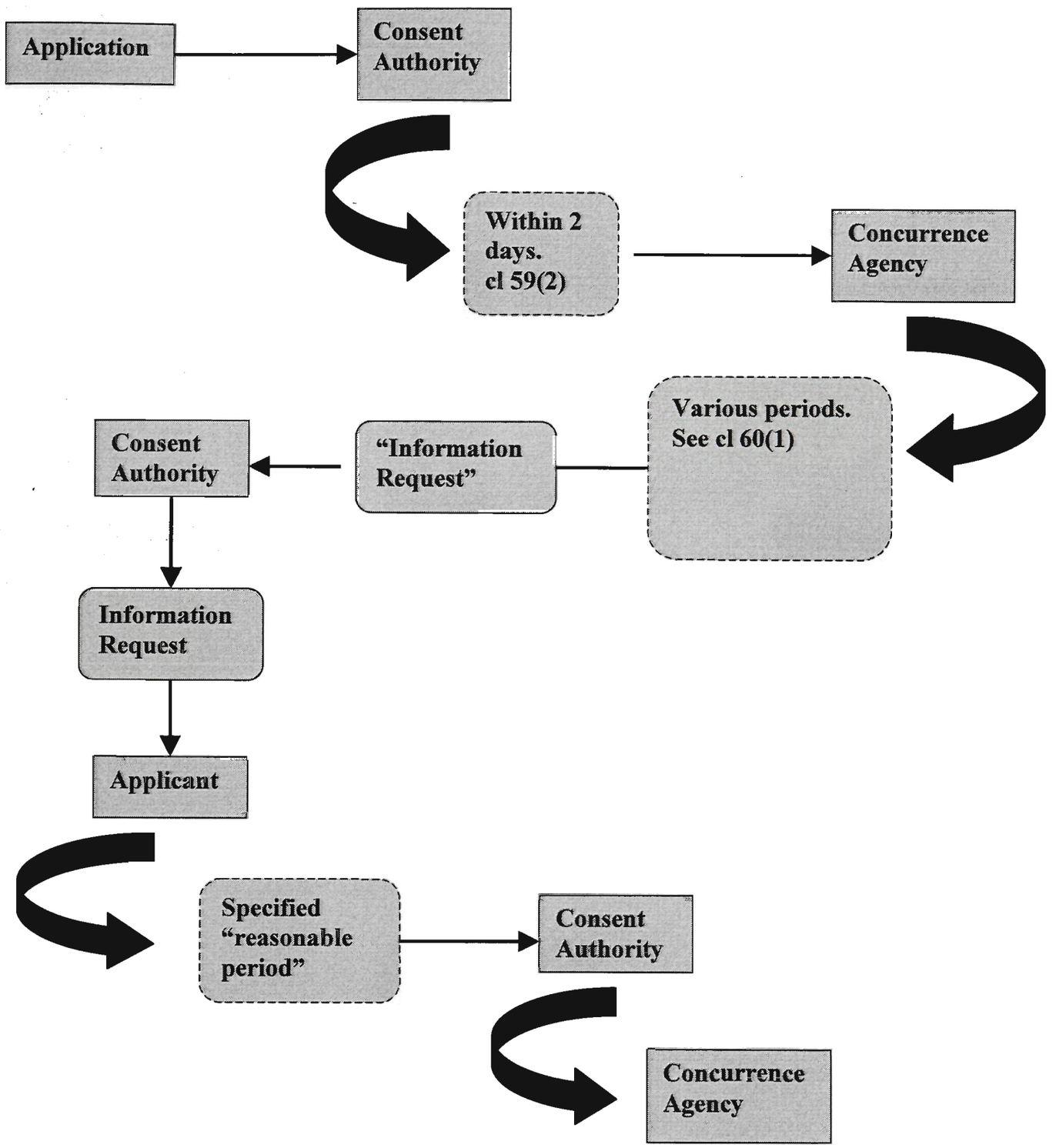
Application for a 'State Significant" development which is also an 'Integrated development'.



APPENDIX 5

***Environmental Planning and Assessment Act*, 1979**

Information Requests (**with** Concurrence Agencies)[1]



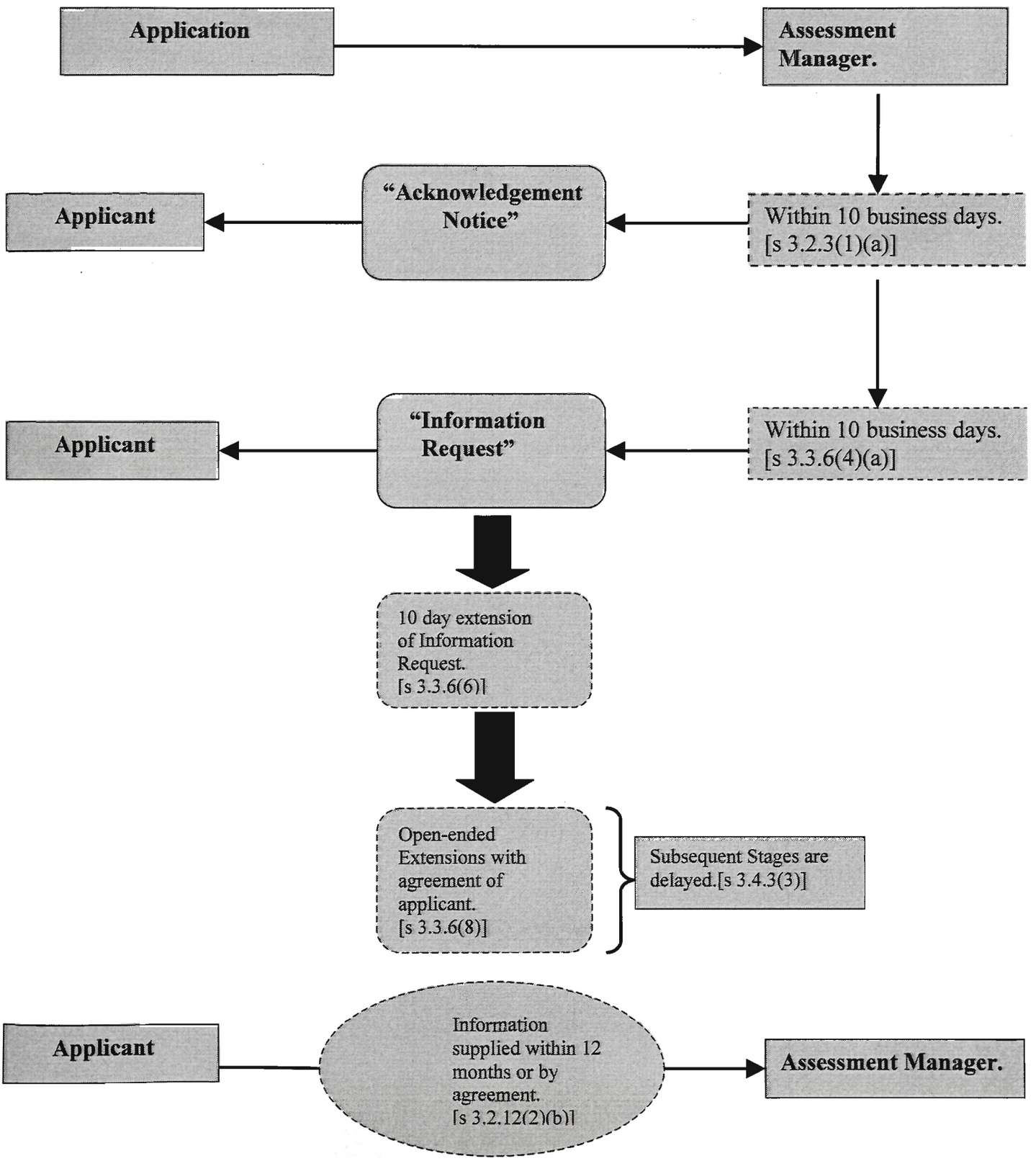
1 A similar procedure applies to applications which involve 'approval bodies' i.e. 'integrated developments' EPAA Regs, cl 53

APPENDIX 6

Integrated Planning Act 1997

Information Request Preocedure
(**without** Concurrence or Referral Agencies)*

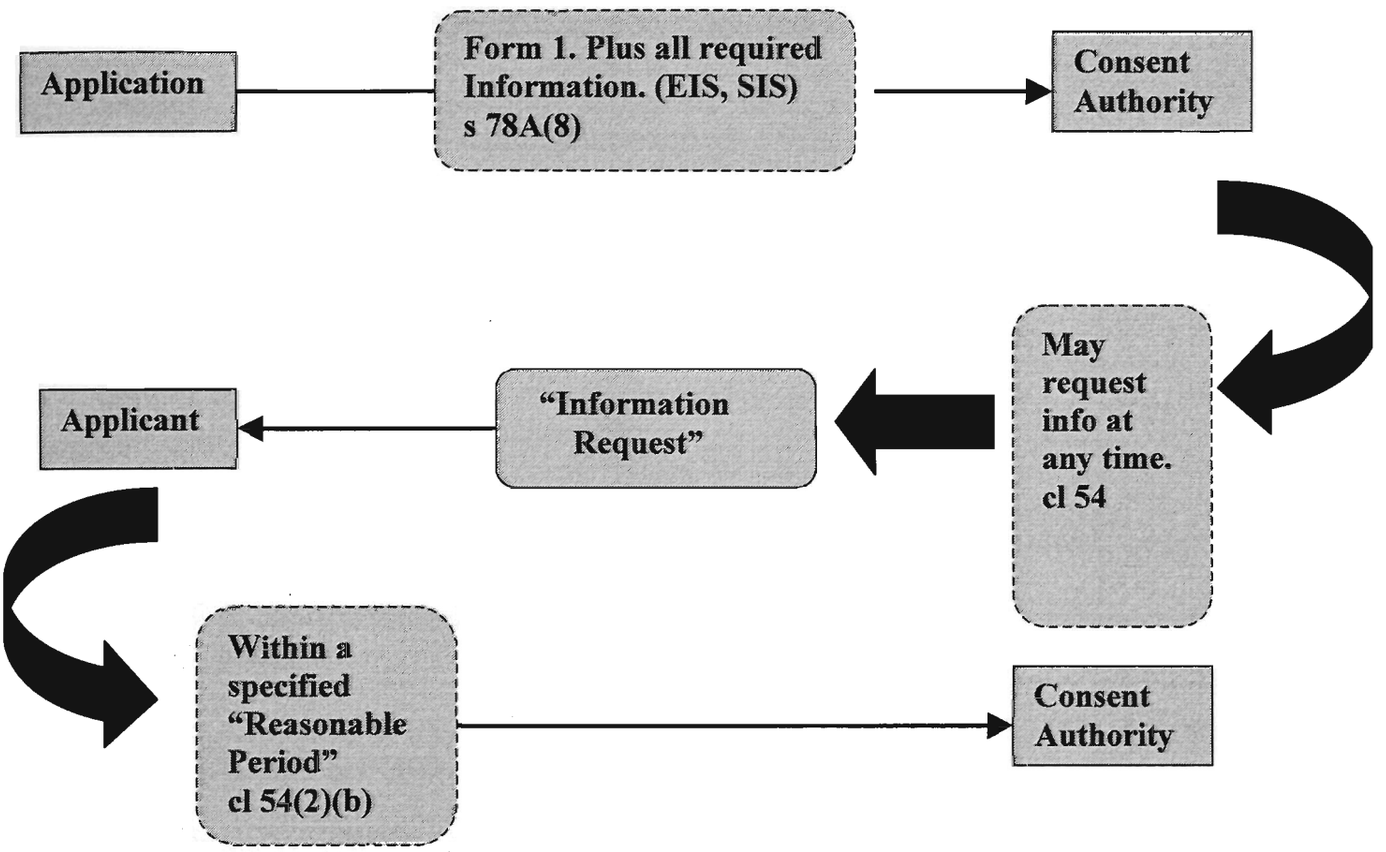
* Assumes an IPA compliant scheme.



APPENDIX 7

***Environmental Planning and Assessment Act* 1979**

(*Typical* Information Request Procedure)



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