

## Explanatory Notes

### Short title

The short title of the Bill is the Planning and Development (Planning for Prosperity) Bill 2015.

### Policy objectives and the reasons for them

The objective of the Bill is to deliver Australia's best land use planning and development assessment system by providing for:

- simplified plan making arrangements by reducing the complexity of State instruments; and establishing more suitable processes for plan making; and improving infrastructure designation;
- a streamlined development assessment system by simplifying the categories of development and decision rules; and
- an Act that is navigable and easy to use; removing procedural and prescriptive detail, and obsolete and redundant provisions of the Sustainable Planning Act 2009 (SPA).

On 13 June 2013, the previous Queensland Government announced a review of SPA which establishes Queensland's current planning and development assessment system. The former government's announcement was in response to growing concerns from stakeholders that SPA is long, complex and unresponsive, resulting in an over-regulated and burdensome planning system that stifles, instead of facilitates development. This high level of regulation has also created a process-driven system, rather than one focused on delivering positive outcomes.

The fundamental elements of the repealed Act are:

- integrating State, regional and local policies in plan making;
- applying an integrated, structured development assessment system to produce well-balanced decisions; and
- ensuring there are appropriate dispute resolution opportunities including the efficient resolution of technical matters.

There has been significant consultation with stakeholders since 2012 about the need for reform and it has been evident that the intent of the repealed Acts fundamental elements remains sound. However, stakeholders have continued to express their views that:

- it is difficult to understand and navigate the more than 700 pages of the current legislation and multiple related instruments;
- planning schemes prepared under the current legislation are difficult to understand and apply;
- there are inconsistencies between the strategic intent of schemes and the provisions applying to development assessment which create the potential for process dysfunction;
- it takes too long for planning schemes to be made and amended;
- the system over-regulates particular activities (for example, in some schemes, low risk activities such as constructing a driveway or landscaping require a development application);

- it can be difficult to determine when, where and how to make a development application;
- a development application can take an unnecessarily long time to proceed through the system, even when the proposal is delivering on the intent of the planning system;
- the quality of the decisions made in the assessment process is variable; and
- the provisions of the Act are difficult to apply in court proceedings.

When all areas for reform were considered together, it was evident that the most efficient and constructive way of adopting changes was through the development of a new streamlined Act.

The proposed new Act, as outlined in this Bill, responds to stakeholder concerns about the time and costs associated with the current legislative system. The Bill will be accompanied by work to ensure cultural and operational changes; empowerment of local government; red tape reduction; and State leadership. The new Act will fully repeal the current Act and regulation, replacing them with a new Act and Regulation. The Bill incorporates approaches which have been agreed through consultation, analysis and engagement, to offer substantive system improvements.

The Bill aims to significantly improve the integrity, speed, navigability and legibility of the system, and reduce the complexity of the Act and the system it establishes. This is expected to deliver an improved, more responsive set of processes for plan making and development assessment in the State; and ensure a reduction in transaction and delay costs for system users. It aims to provide a balance between consistency and flexibility, enabling predictability while maintaining good planning outcomes.

## **Achievement of policy objectives**

The Bill's purpose is to facilitate the prosperity of Queensland, pursuing ecologically sustainable development balancing economic growth, environmental protection and community wellbeing. To achieve this, the Bill provides for an efficient, effective, transparent, integrated and accountable system for planning and development assessment.

Consistent with the intention to remove the barriers to efficient and effective plan making and development assessment practices, it is proposed that the legislation's purpose be focussed on the characteristics of the system it establishes, and not the outcomes the system is intended to achieve at any given time. The outcomes to which the system is directed are clearly expressed through the State planning policy, regional plans and planning schemes. This clear distinction between the system and its outcomes means the legislation is much simpler and concentrates on the central and salient features of the system. This provides for more navigable and effective legislation.

The features of this system include:

- State planning policy that is a comprehensive expression of the State's interest in the planning and development of Queensland;
- regional plans that direct the way in which State planning policy applies to particular parts of the State;
- planning schemes with clear, purposeful strategic intent given appropriate effect through complementary and facilitative land-use policies and development requirements;
- development assessment provisions and processes that provide for the expeditious determination of development proposals;
- dispute resolution procedures that are fair, accessible and affordable;

- the basis for using temporary instruments, both State and local, to address an urgent concern about a potential planning or development outcome;
- the ability for the State to determine proposals for facilities or utilities that are a necessary part of a functional community;
- arrangements for determining and applying charges for essential trunk infrastructure; and
- the means by which the State is able to ensure the system is operating effectively.

To achieve this policy, the Bill:

- reduces the current number of mechanisms for expressing the State's interests in plan making from four instruments to two instruments by removing State Planning Regulatory Provisions (SPRP) and Standard Planning Scheme Provisions (the Queensland Planning Provisions, commonly referred to as QPP).  
Regulatory matters in these current instruments that need to continue will be carried forward in the Regulation. This significantly improves the current complex hierarchy and range of instruments, and potentially conflicting policy positions;
- improves the mechanism to support the provision of community infrastructure by removing the need for separate or additional referrals. Local governments will no longer be able to designate infrastructure, as they will have alternative mechanisms available to achieve the same outcome;
- refines the current framework for making and amending local planning schemes to build in more flexibility to negotiate a process that is fit-for-purpose for a particular local government; and confirming State interests early in plan development. This scalable process is intended to deliver shorter processes, less complexity and greater opportunity for early consideration of State interests; and
- changes the development assessment system to encourage a more deliberate assessment of risk by local governments as a basis for pushing more development out of the system where appropriate and, where it remains appropriate to regulate certain types of development, to manage it more effectively and quickly. The combination of fewer, more clearly defined categories of development; more straightforward decision rules; and fit-for-purpose processes, are intended to give confidence to a local government to focus on higher-risk development balanced with the interests of the community.

The dispute resolution process is also refined by recognising its breadth of jurisdiction and establishing the Planning and Environment Court in its own Act; and in the Bill, expressing appeal rights more clearly, and adopting efficiencies in the development tribunals.

To achieve the policy intent, the level of regulatory prescription is reduced, with an emphasis on making more non-mandatory guidance material available to assist and support practice and implementation. Process and detail is generally removed from the Act and where process still needs to be regulated, placed in regulation or other instrument where appropriate to do so. It is not intended that a more concise Act would be delivered by simply moving prescription to an expanded suite of statutory instruments.

Overall, the State will continue to have an integrated planning and development assessment system, dealing State, regional and local matters. Sound plan making, development assessment and dispute resolution processes are fundamental. The more effective parts of the current framework will continue, with adjustments to enable operational improvements and behavioural change. The legislative requirements are simplified through the Bill, incorporating key changes that improve arrangements and processes and provide a more navigable, effective Act and system.

## **Alternative ways of achieving policy objectives**

Alternatives to the implementation of a whole new Act have been considered. These included maintaining the status quo; and making amendments to the current Act. Each alternative considered was rejected as unable to achieve catalytic change in current practices; respond to the breadth of issues and concerns being raised about the current planning and development framework under the repealed Act; or achieve regulatory burden reduction to the extent possible under the proposed approach.

Alternative options within individual components of the Act were considered on an issue by issue basis including through discussion papers, forums, and focus groups discussions. Formal public consultation was also conducted over eight weeks, with the release of a consultation draft of the Bill and an information paper. Some 224 submissions were received and feedback has been important in informing the refinement of Bill provisions. If the proposed new framework in the Bill is not implemented:

- users will continue to spend time and money trying to navigate through or around the system;
- there will continue to be highly prescriptive arrangements set in the Act that require time and money for compliance; and
- concerns and issues will continue to be felt by stakeholders and users regarding their experiences with the system, potentially leading to multiple incremental legislative amendments without comprehensive and cohesive reform and benefits.

## **Estimated cost for implementation**

A program approach to planning reform has been adopted, which is intended to ensure that all projects are identified and coordinated; all documents and business process changes are identified; and stakeholders supported in implementation. Investment will be made in skills development, instrument development and ongoing advice and support for users of the new system, to facilitate improved practices and outcomes.

The program's implementation costs are to be funded within current resources. A significant portion of these estimated costs is for information technology. The reform program includes investment in business change processes with stakeholders, including council as a key deliverer within the framework. Other products and services within the framework and program will also save time and costs to State and local government in the medium to longer term, including improved processes and guidance for plan making; and simpler clearer development categories and assessment practices for better schemes and improved processing times and effort.

Improving elements of the dispute resolution system may require resources for the development tribunals or the Alternative Dispute Resolution registrar to manage demand. However, this is balanced against broader costs to the government and the community for disputes that go to a full hearing.

There will be initial costs to government in rolling out and training the broad range of system users to the new arrangements, like electronic environments for planning and development assessment with capacity to meet demand. However the costs to the State are considered to be outweighed by

the benefits and cost savings expected for all users of the system over the long term. This includes establishing the State's role as a leader and innovator providing best practice advice and assistance to assist a local government and system users in achieving better planning outcomes for the community.

## **Consistency with fundamental legislative principles**

The Bill is generally consistent with fundamental legislative principles. Potential breaches of fundamental legislative principles are addressed below.

### **Unlinking public notification from category of assessment**

The Bill changes the names of the categories of assessment pertaining to development, as well as their potential scope to, in effect, enable the improved allocation of appropriate levels of assessment to development on a risk basis. Merit assessment replaces impact assessment as it enables a broader assessment against a range of matters for proposed development that is complex or departs from development anticipated by a local government's planning scheme.

Under the repealed Act, the instances in which a development application requires public notification are tied to assessable development requiring impact assessment. Similarly, under the Bill only development applications subject to merit assessment can be required to be publicly notified. However, unlike with impact assessment under the repealed Act, public notification is not a mandatory requirement for all merit assessment.

Under the Bill, the decision about whether a particular use, or development type falling outside of certain parameters, should be subject to public notification will continue to be based on factors such as the scale, type and location of the development, its potential for impact on the area in which it will be located, and the extent to which the proposed development falls within the scope of the planning intent of the area in which the development will be located. As under the repealed Act, this decision will be made predominantly by local governments in their role as assessment managers, through the preparation of their planning schemes. This approach continues to provide for local governments to determine which development applications are to be publicly notified, in the context of their planning for local circumstances in the local government area.

Unlinking public notification from the underlying category of assessment has the practical effect of encouraging a more risk based approach to allocating levels of assessment. However, it may also have the effect of potentially limiting the circumstances in which a development application must be publicly notified and potentially lessening the opportunity for the public to become aware of a proposed development. This may result in fewer submissions on development applications, and fewer development applications and approvals being subject to appeal by interested parties other than the applicant.

Local governments establish in their planning schemes the levels of assessment for different uses based on a range of factors including those raised during community consultation and public notification of the draft planning scheme. Under the Bill, the local government's planning scheme will remain the primary instrument for establishing the levels of assessment for each defined use and whether public notification will be required. This is consistent with the current practice. There is no requirement in the Bill for a local government to take any approach that is different from their

current arrangements, and it is not intended that there will be any immediate reduction in development that requires public notification.

The Bill does not aim to limit or restrict public involvement in the planning framework and it does not limit third party appeal rights. Where a development application is required to be publicly notified, any person may make a submission on the development application. The Bill will not limit the circumstances in which a submitter may appeal a development decision, or a condition of an approval.

### **Inclusion of executive officer liability provision**

In 2009, the Council of Australian Governments (COAG) adopted principles on directors' liability provisions (DLP). These principles required each jurisdiction to review its legislation to assess existing DLPs, as part of achieving national consistency and principles based approach to the imposition of liability for directors.

In 2012, the Department of Justice and Attorney-General coordinated an audit of over 3,800 executive officer liability offence provisions in over 80 acts across Queensland's statute book, resulting in the Directors' Liability Reform Amendment Bill 2012. The repealed Act was excluded from this audit and subsequent omnibus bill implementing the results of the audit, due to the repealed Act being under comprehensive review.

The Bill proposes to include certain provisions imposing liability on executive officers. Executive liability (standard) provisions (type 1), which consider whether an executive officer took all reasonable steps to prevent corporate offending, are proposed to apply to some offences under the Bill. The balance of offences will attract accessorial liability by virtue of the operation of section 7 of the Criminal Code Act 1899, should it be established that an executive officer assisted in the commission of the offence.

The executive liability (standard) provisions are provided in the bill for the following reasons:

- committing these offences would have the potential to result in significant public harm, including environmental harm or injury to persons;
- the offences are not in relation to simple day to day operations of the business, which the director may have no involvement in;
- there are reasonable steps a director could take in order to ensure compliance by the corporation;
- liability of the corporation on its own may not sufficiently promote compliance; for example, if the corporation is a shelf company with no assets, and the offence results in a risk to the environment or public health and safety that has to be rectified, it may be justifiable to prosecute the director; and
- the penalties applying to these offences are significant.

The provisions proposed do not reverse the onus of proof; they do not require a director or executive officer to prove that he or she did not authorise or permit the conduct of the corporation that constituted the corporation's offence. Where corporations are involved in such offences, it is appropriate that there is effective accountability at a corporate level. Further the process of development of a particular site can involve many individuals acting in a representative or

contractual capacity. It would not be appropriate to prosecute only the individual directly responsible for the offence, if that person was acting under instructions of another.

As the Bill does not propose to reverse the onus of proof, the fundamental legislative principles are not infringed.

### **Giving weight to law that came into effect after the application was made**

The Bill allows assessment managers and referral agencies to assess applications on the basis of the law in place when an application is made, but also to give weight to a law that came into effect after the application was made, but before the decision is made. The Planning and Environment Court also has this power when “standing in the shoes” of the assessment manager for an appeal to the court.

Laws and policies can be implemented over time to reflect changing local circumstances, including public attitudes. The Bill is designed to ensure that these new laws and policies can be considered in the assessment of development applications. This is particularly important since time frames for consideration of an application may be extensive.

This function is circumscribed by judicial authority, in particular to ensure instruments are not made with the express purpose of prejudicing assessment of development applications. The weight given to a particular policy instrument is proportionate to the stage of its development, and particularly community awareness.

The Planning and Environment Court has kept a careful watch on matters where this function has been used, and has ensured that it is applied fairly in circumstances where its application is warranted. In particular the Court will not allow an assessment manager to give weight to any code, law or policy that appears to have been developed specifically in response to the application itself.

The Bill does not provide for the retrospective application of new laws and policies. It simply allows these laws and policies to be considered and, if warranted, given appropriate weight.

### **Ministerial powers**

The Bill confers on the Minister, powers to issue directions with respect to a development application and a proposed change to, or extension or cancellation of, a development approval. However, these powers are limited to matters which involve a State interest.

The Minister’s powers of direction are designed to put into place the policy decisions of executive government, and are intended to protect or give effect to a State interest. These powers are intended to allow a more proactive and management-based approach to Ministerial involvement in matters of State interest.

The Minister’s powers are not intended to be used routinely or often. However, occasions may arise where a State interest (such as an important environmental value) could be severely affected by the implementation of a development approval. In these situations, exercising these reserve powers allows the Minister to redress what otherwise may affect State interests.

### **Preventing an appeal against a decision of the Minister**

The Minister's powers of direction are generally not subject to statutory rights of review or appeal. Under the Bill, there is no right of appeal against the Minister's decision on the application. It is also not possible for declaratory proceedings to be brought in the Planning and Environment Court, except by the assessment manager in limited circumstances. However in certain circumstances, declaratory proceedings may be started in the Supreme Court of Queensland.

If there was an ability to appeal or to bring declaratory proceedings in respect of an application which has been called in, this would be inconsistent with the intent of the Bill. The State government should be the final arbiter on matters of State interest. Appeal rights are precluded because decisions of the Minister under the Bill are effectively policy decisions of executive government, made to protect or give effect to a State interest.

The Minister is directly accountable to Parliament, and must prepare a report providing an analysis of any submissions made on the application and the Minister's reasons for the decision. The Minister must table a copy of this report in the Legislative Assembly within 14 sitting days of making the decision.

The combined effect of the Ministerial powers under the Bill is to provide certainty about Ministerial directions, and finality about decisions regarding State interests. It is the only way to ensure that State interests are not prejudiced or threatened by the potential for ongoing litigation. It also ensures that accountability for decisions in relation to Ministerial powers is allocated to Parliament.

### **Judicial review**

The Bill provides broad appeal rights for administrative decision making under the development assessment system, and the Planning and Development (Planning Court) Bill 2015 provides comprehensive declaratory powers in respect of other administrative decisions under the Bill. Both appeals and declaratory proceedings can be brought in the Planning and Environment Court and in the development tribunals.

These comprehensive appeal, declarations and orders powers are, for the matters they cover, intended to provide a complete alternative to judicial review under the Judicial Review Act 1991. The Planning and Environment Court is a specialist jurisdiction with expertise in planning and development assessment matters, and can consequently deal with declaratory proceedings concerning these matters more efficiently than the Supreme Court could deal with them under the Judicial Review Act 1991, without sacrificing the quality of decision making.

Section 12 of the Judicial Review Act 1991 provides that the Supreme Court may dismiss an application for judicial review if another law makes adequate provision for a review of the matter. This clause effectively confirms that this Bill does provide an appropriate alternative avenue of review, thereby removing confusion, and preventing applicants making costly, time consuming and unsuccessful applications under the Judicial Review Act 1991. This clause does not curtail the rights of persons to have administrative decisions reviewed judicially. In fact, by expanding the declaratory jurisdiction of the Planning and Environment Court, persons seeking a review of administrative decisions under the Bill have been given greater access to a cost effective, specialist jurisdiction.

The Bill ousts the jurisdiction of the Judicial Review Act 1991 (JRA) in relation to the making of decisions. However, it provides that a person who has been denied an opportunity of making an

application under the JRA for a statutory order of review, prerogative orders, or injunction can apply for a statement of reasons for the decision. In addition, any person who is aggrieved by a decision or action made under the Bill, has appeal rights to the Planning and Environment Court and/or the Development Tribunals (except in the limited case of Ministerial call-ins and directions for a development application).

The Bill also expressly includes the ability to appeal to the Supreme Court on the ground of jurisdictional error. This follows the decision in the High Court in *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1, such that the Supreme Court can issue relief for jurisdictional error and prevent Constitutional invalidity.

Further, under the Planning and Development (Planning Court) Bill 2015, any person may bring proceedings in the Planning and Environment Court for a declaration about a matter done, to be done or should have been done under this Bill or the Planning and Development (Planning Court) Bill 2015 (except in the limited case of Ministerial directions for development applications). In certain circumstances, declaratory proceedings may also be started in the Supreme Court of Queensland. The Planning and Development (Planning Court) Bill 2015 continues to provide extensive declarations and orders powers to the Planning and Environment Court, which give the same rights of review of administrative decisions as are available under the JRA. These are in addition to the comprehensive appeal rights available to applicants and submitters under the Bill. In addition, the Bill contains continued jurisdiction for the Development Tribunals (formerly the Building and Development Dispute Resolution Committees), including the ability to make declarations about some matters.

The Planning and Environment Court and the Development Tribunals are expert jurisdictions that can deal with the review of applications expeditiously, as they are familiar with the planning and development assessment system. In this respect, it is considered that the Bill and Planning and Development (Planning Court) Bill 2015 continues the ability to seek review of administrative decisions, particularly for the general public, by allowing such reviews to occur in an accessible expert jurisdiction. The combined effect of these provisions ensures that the ousting of the jurisdiction of the JRA does not operate to prejudice any person.

### **Exclusion of right to legal representation before a committee**

The Bill prevents an agent representing a person before a Development Tribunal from being a lawyer. This has been a long standing feature of the Development Tribunals (formerly the Building and Development Dispute Resolution Committees) and is generally acknowledged by users of the system as working well. If legal representation was allowed it would likely increase the formality and length of proceedings and limit the advantage of having access to justice in an accessible, economical and efficient way for matters that are predominantly technical in nature. There are also significant concerns that parties could be disadvantaged by their inability to afford legal representation, as well as there being increases to the costs of proceedings more generally.

Parties are still afforded the opportunity to seek legal advice about the proceeding at any time prior to the decision. This may be relevant where fairness to a party may dictate that they be allowed to provide written submissions to the Development Tribunal; e.g. because of a physical or mental disability. In all instances, the Development Tribunal is bound to ensure a right to natural justice and that parties are given a reasonable opportunity to most efficiently present a person's case.

The Planning and Development (Planning Court) Bill 2015 continues the ability for decisions of the Development Tribunals to be appealed in the Planning and Environment Court on issues based on points of law or jurisdiction.

### **Exclusion of fresh evidence for tribunal hearings for appeals about development applications**

The Development Tribunals provide an accessible, affordable and timely service for members of the public not satisfied with building, plumbing and planning decisions made by local governments and private certifiers. The majority of proceedings are of a technical nature with low legal complexity. Hearings are informal with appellants being able to be represented by an agent, other than a lawyer.

The Bill states that appeals about development applications are heard by way of a reconsideration of the evidence that was before the person that made the decision appealed against. The informality of the current process is one of the main benefits of a Development Tribunal proceeding because it allows mutually acceptable outcomes between the parties in an informal environment. This results in the majority of decisions being finalised within 5 weeks of the hearing. If fresh evidence (hearing anew) were allowed in Development Tribunal proceedings it would likely result in an increase in the legal formality and complexity of proceedings; the associated introduction of rules of evidence; and a subsequent increase in the length of time from hearing to final decision.

However, the Bill includes that a Development Tribunal may, but need not, receive and consider other evidence presented by a party to the appeal with the permission of the Development Tribunal. This is so that, in conducting the proceeding, the Development Tribunal can use its discretion to provide parties a reasonable opportunity to be heard and are afforded natural justice pursuant to the Bill, to efficiently present a parties case.

### **Whether penalties are proportionate to the gravity of the offence**

Maximum penalties for offences under the SPA did not necessarily deter offenders who made a business or commercial decision when balancing the profits of a potential development against prosecution. However in the review of the offences for the purposes of the Bill, there is a recognised need to adhere to the fundamental legislative principles and ensure that the maximum penalties are proportionate to the offences. Any increase ensured that the penalties accurately reflect the seriousness of the offences and are comparable to similar offences.

For example, the Regional Planning Interests Act 2014 (Qld) includes high penalties for offences for undertaking a resource activity in particular areas of the State without a regional interests development approval, or for contravening an approval. The maximum penalty for wilfully committing these offences is 6250 penalty units (currently \$711,562.50) or 5 years imprisonment. The maximum penalty for these offences if committed without an element of wilfulness is 4500 penalty units (currently \$512,325). These offences are similar to the offence under the Bill, including carrying out assessable development without a development permit, or non-compliance with a development approval. However, there is no element of wilfulness to these (or other) offences under the Bill.

More recently, the Environmental Protection and Other Legislation Amendment Act 2014 made amendments to the Environmental Protection Act 1994 including increasing the maximum penalties

for some of the more serious offences under that Act to bring them in line with those under the Regional Planning Interests Act 2014.

In light of these recent and proposed reforms, and the concerns raised by stakeholders, the maximum penalties have been increased to a maximum of 4500 units for the following reasons:

- The current maximum penalties were introduced under the now repealed Integrated Planning Act 1997 (IPA), and have not been reviewed or contemporised since that time, including any alignment with the increase in market demands, property values and inflation over that period.
- The offences are integral for ensuring compliance with the development assessment regulatory system established under this Bill and will ultimately uphold the integrity of the planning system.
- To adequately deter operators from causing significant and potentially irreparable damage to the State's economic, social and environmental prosperity.
- To ensure consistency and alignment for similar penalties for development and environmental offences across the Queensland Statute book to ensure they sufficiently act as a deterrent to potential offenders.
- To respond to proposed legislative reforms across other jurisdictions including NSW, suggesting that higher penalties for development and environmental offences are appropriate.

The Bill provides a higher penalty, 4500 penalty units, for offences such as carrying out prohibited development, carrying out assessable development without development permit, compliance with development approval, unlawful use of premises, contravening an enforcement notice or remedial order. Contravening an enforcement notice may include imprisonment in certain circumstances.

The Bill also provides a higher penalty if the assessable development is on a Queensland heritage place or local heritage place. The gravity of the offence related to a Queensland heritage place or local heritage place is attributed to ensuring compliance and integrity of the development assessment regulatory system and to adequately deter operators from causing significant and potentially irreversible or irreparable damage to the State's and local heritage put in place and protected for the benefit of the community and future generations. The penalties are the same for similar offences under the Queensland Heritage Act 1992.

**To provide that the Commonwealth or a State cannot be prosecuted for an offence against this Act**

The Bill affords no powers of immunity from prosecution other than those normally afforded to the State under legislation. The Bill provides that the Act binds all persons, including the State of Queensland, the Commonwealth and all other States. However, the Bill does not bind the functions and powers of the Coordinator-General under the State Development and Public Works Organisation Act 1971. The Coordinator General's actions are regulated by the State Development and Public Works Organisation Act 1971. The Coordinator-General is immune from the Bill; the Bill does not bind the Coordinator-General's functions and powers.

**To allow the process for making and amending planning instruments to be included in rules and guidelines**

The Bill allows the Minister to make rules and guidelines which establish the process for making and amending a local planning instrument.

The plan-making and amendment processes provided for in rules and guidelines will be generally consistent with the current planning framework provided for in the repealed Act. These processes are detailed in nature and subject to changing circumstances as needs arise. As such these are better attended to in other places, such as in subsidiary instruments or guidance, enabling these processes to be more responsive. This in turn frees the Bill of unnecessary detail, which assists its clarity.

The Regulation remains a statutory instrument with legal effect. The rules and guidelines will be approved under the Regulation and like all subordinate legislation, will be subject to portfolio committee examination. Any amendments to the Regulation will be subject to the normal requirements of the Statutory Instruments Act 1992 for regulatory impact assessment and Parliamentary scrutiny and disallowance.

**To allow the development assessment process to be included in subordinate legislation, rules and guidelines**

The Bill provides for certain matters currently provided for in the repealed Act to be instead prescribed under the Regulation. The resulting changes will be extensive. In particular, the Bill allows the Minister and the chief executive to make subordinate legislation and rules which establish the development assessment process, including for the criteria for deciding an application and how a decision on an application will be made.

The development assessment process provided for in subordinate legislation, rules and guidelines will be generally consistent with the current planning and development assessment framework. These processes are detailed in nature and are better attended to in other places, such as in subordinate legislation or subsidiary instruments or guidance, rather than the Bill. This frees the Bill of unnecessary detail, which assist its clarity and enables these processes to be more responsive; more easily adapted to changing circumstances when the need arises.

The Regulation remains a statutory instrument with legal effect. The rules and guidelines will be approved under the Regulation and like all subordinate legislation, will be subject to portfolio committee examination. Any amendments to the Regulation will be subject to the normal requirements of the Statutory Instruments Act 1992 for regulatory impact assessment, Parliamentary scrutiny and disallowance.

**To confer power to make regulations during a transitional period of 5 years duration**

The Bill provides a transitional regulation-making power that enables the making of a regulation that is necessary to enable or facilitate the transition from the repealed Act to the Bill and the Planning and Development (Planning Court) Bill 2015. The regulation must be declared as a transitional regulation and it may have retrospective operation to a time that is no earlier than when the old Act was repealed.

The Bill provides that this type of regulation expires five years after the repealed Act is repealed. This is longer than the period usually provided for under legislation with transitional arrangements. The period of five years is established to recognise that implementation of new or amended regulatory arrangements in plan-making usually take a number of years to flow through to instruments and assessments.

Expiry at any lesser period would compromise the effectiveness of these transitional regulatory arrangements, and expose local councils to deciding development applications based on planning scheme provisions that do not reflect contemporary requirements; or going through expensive and lengthy processes to update their schemes to align with the new planning framework. Detriment may also accrue to the prospective developer required to comply with onerous, expensive and out-dated plan requirements.

The regulation can operate retrospectively, but because the changes to planning schemes occur over a longer period, the likelihood of unmanageable or unexpected adverse impact is low. The extent of this delegation of legislative power is appropriate in the circumstances and provides the level of detail necessary to ensure the provisions of the Bill are workable.

### **Urban encroachment**

The restriction on a person's rights to take nuisance action or seek remedy for particular nuisances has been raised as a potential issue with regard to the urban encroachment provisions contained in the Bill. However, the common law rights of residents of existing development will not be overridden as the limitation on rights will apply only to new, intensifying and encroaching development.

Under the urban encroachment provisions, no criminal proceedings under local laws or civil nuisance proceedings may be taken against the registered premises with respect to emission of aerosols, fumes, noise, light, odour, particles or smoke, provided the premises is operating within its licence conditions, development approval, or code of environmental compliance. The protection is provided for a limited period, after which the registered premises is required to renew the registration if continued protection is required.

The proposed urban encroachment provisions require an owner or owner's agent of premises to inform intending lessees of new intensified development about the limitation of their rights. This requirement will apply to any agreement for the leasing or renting of new residential or commercial premises in an affected area. Where this requirement is not met, a penalty may be applied to the owner or owner's agent of premises. The application of a penalty is justified because the occupier's civil nuisance and criminal complaint rights will be affected by the provisions.

The provisions are justified as the owner will initially be made aware of the provisions through the notification on all titles within the affected area by the registered premises. Existing owners will be informed of the legislation, can read the Act and those with letting agreements will be aware of the obligation to inform new tenants. A new owner will see the notice on title, refer to the legislation and be informed of their obligation if they are intending to enter into a letting agreement.

The intent of the urban encroachment provisions of the Bill is to ensure existing lawfully operating uses (registered premises) subject to encroaching development, and the encroaching development, are able to coexist.

## **Party houses**

In relation to the definition of party house in the repealed Act, the definition may potentially capture more activities than intended, or may be inconsistently applied across local government areas. However, the purpose of the provisions is to empower local government to regulate the use in a way that is relevant to the issues within its local area.

In relation to the party house restriction area, the Bill provides that the use of a residential dwelling in the area is taken not to include, and to never have included, the use of the premises as a party house. The purpose of the party house restriction area is to clarify that, from a land use planning perspective, it was never intended that a residential dwelling includes, or is an equivalent land use as, a premises used as a venue function. These are two separate land uses and serve different purposes. The purpose of the party house restriction area is not to remove development rights.

The effect of the party house restriction area is that the carrying out of a party house use becomes an unlawful use and therefore an offence, even though the use may have been lawful at the time it was carried out. There may be some rare instances in which a residential dwelling as part of a planning scheme definition has an existing lawful right to operate as a party house. Should such circumstances exist, these will be made unlawful if that residential dwelling falls within a party house restriction area. Local governments are better positioned to identify if any residential dwelling includes an existing lawful right to operate as a party house. Where an existing residential dwelling has an approval to operate other activities, for example, a restaurant, this approval would remain in place.

## **Consultation**

Consultation on reviewing the repealed Act commenced in 2012 with a series of stakeholder working groups involving local government, peak bodies, and professional and legal representatives being held. These groups examined key operational questions around plan making, development assessment and referrals, and dispute resolution, and identified opportunities for immediate improvement. Key reforms were identified and a package of amendments progressed, that included implementation of a single State Planning Policy which commenced on 2 December 2013, and the State Assessment and Referral Agency (SARA), which has been operational since 1 July 2013.

A further series of sessions conducted with key industry figures along with matters not encompassed in the 2012 reforms, formed the basis of a paper that was presented to the inaugural annual Queensland Planning Forum in March 2013. Issues and thought-provoking ideas were posed to progress consultation on more fundamental review of Queensland's planning and development assessment framework. Participants at the annual forum were surveyed in April 2013 to further evidence key issues and priorities for reform.

A regular stakeholder forum was established in May 2013 to continue the discussions arising from the annual Forum. Members include Agforce, Australian Institute of Building Surveyors, Council of Mayors (SEQ), Environmental Defenders Office, Housing Industry Association Ltd, Local Government Association of Queensland, Planning Institute of Australia, Property Council of Australia, Queensland Chamber of Commerce, Queensland Environmental Law Association, Queensland Law Society, Queensland Master Builders Association, Queensland Resources Council, Shopping Centre Council of

Australia and the Urban Development Institute of Australia. Up to three representatives from each member body attended.

Focus groups comprising a small number of leading practitioners across industry and local government were also established to test reform ideas and their impacts on day-to-day operations. Members include eminent planning professionals, solicitors and barristers, officers within various parts of the system, and local government practitioners. Further discussion on the implementation of reforms was held at the second Annual Planning Forum in March 2014.

An early working version of the ideas for discussion was released in April 2014 to a targeted but large group of recipients comprising the forum member organisations, focus group members and a range of other stakeholders engaged in developing the Bill. Feedback was invited and, along with further scrutiny by forums and focus groups, informed the Bill. A consultation draft Bill was released for open consultation on 1 August 2014 for an eight week period to 26 September 2014. The draft Bill was forwarded to every council in Queensland, as well as to all attendees at the Annual Forum 2014, all identified stakeholder groups including the membership of the forums, focus groups and others. The Bill was also available during that period on the Department's website.

A full consultation program was developed to meet with all councils in Queensland as well as regionally based stakeholders. Stakeholder groups were offered detailed briefings on the Bill including through an expressions of interest process through the consultation website. All requests were met, including a detailed workshop with the Planning Institute of Australia, and presentations to large groups organised through the Queensland Environmental Law Association, and a number of forums through the Urban Development Institute of Australia. Other presentations included to the Environmental Defender's Office's community LawJam, various law firms, Property Council of Australia, Council of Mayors SEQ, SEQ Development Assessment Managers group, Local Government Association Queensland Planning Reform Reference Group; and energy providers.

Another key element of the consultation strategy was a workshop with a range of councils to scrutinise how their current schemes or scheme development work can transition to the new framework. This workshop informed the Bill's transitional provisions specifically, as well as related project work on required scheme content and scheme making processes, to ensure the Bill accommodated a smooth transition. Councils who participated included Logan City Council, Gold Coast City Council, Mackay Regional Council, Rockhampton Regional Council, Cairns Regional Council, Cassowary Coast Regional Council, Townsville City Council, Toowoomba Regional Council, Fraser Coast Regional Council, Brisbane City Council, Moreton Bay Regional Council, and Lockyer Valley Regional Council. Council of Mayors (SEQ), several planning consultants and the Local Government Association of Queensland (LGAQ) also participated.

A number of these presentations were recorded and / or live-streamed and made available on departmental websites and emailed to stakeholders so the information could be accessed if attendance was not possible. A further two-hour live question and answer session was also held to respond to queries from the public.

Stakeholders were invited to provide comment on the Bill, and 224 submissions were received. These submissions were analysed and supplement the extensive engagement and feedback received in developing the Bill.

Overall, there has been broad support for the policy concepts of the Bill. It is clear that stakeholders are aware of the need to balance particularly and flexibility, and that the current balance could be adjusted to improve the system. There has been strong positive commentary

from a range of stakeholders, particularly the planning and legal stakeholders and a range of peak bodies. Because of the diversity of stakeholders who use or contribute to the system, differing levels of support have been expressed on a range of matters as expected. Many matters have been addressed and some compromise positions have been determined to resolve issues. The Bill has been heavily informed and adjusted by the consultation, particularly in response to feedback about the practical application and realisable benefits of proposals.

The development industry and legal community have generally indicated high levels of support for the reforms. Representative bodies and individuals have been heavily involved in the engagement strategies and provided high levels of input. The planning community's representative body has also indicated strong support for the reforms and the opportunities they present to the sector.

Variable views have been expressed by local governments, as anticipated. A high level of engagement with local governments was initiated across the State, and will be necessary to ensure transitional arrangements and key documents required under the Bill are trialled, adjusted and implemented. The environmental and community interests sectors have raised a number of issues which have been managed through the Bill development process, including maintaining of ecologically sustainable development; and community engagement in, and accessibility to, planning processes.

## **Consistency with legislation of other jurisdictions**

The Bill is specific to the State of Queensland, and is not uniform with or complementary to legislation of the Commonwealth or another State, however in preparing the draft Bills, the planning and development assessment systems of other jurisdictions nationally, together with any reform processes currently underway were critically analysed for any learning's. The Bill has, in part, been informed by this analysis, ensuring the Bill is not only generally consistent with the direction being pursued across other jurisdictions for more risk appropriate, navigable and clear planning and development systems, but also adapts progressive ideas where appropriate in a Queensland context to establish leading practice nationally for a land use planning and development assessment system.

## Chapter 1 Preliminary

The purpose of this chapter is to:

- establish the short title of the Bill and commencement arrangements for the Bill;
- express the Bill's purpose and how it is achieved;
- introduce the planning and development assessment system; and
- establish the application of the Bill.

Terms used in this chapter include:

**State planning policies** are a State planning instrument made by the Minister that expresses planning and development assessment policies about matters of State interest. The term includes a temporary State planning policy. A temporary State planning policy is a State planning instrument with temporary effect made by the Minister if the Minister considers it is urgently required to protect or give effect to a State interest.

**regional plans** are a State planning instrument made by the Minister that expresses planning and development assessment policies about matters of State interest for a particular region of the State.

**planning schemes** are a local planning instrument made by a local government that expresses integrated State, regional and local planning and development assessment policies for the local government's planning scheme area.

**temporary local planning instruments ( TLPI )** are a local planning instrument made by a local government that expresses planning and development assessment policies to protect a planning scheme area from adverse impacts under urgent or emergent circumstances.

**planning scheme** policies are a local planning instrument made by a local government that directly relate to and support the planning and development assessment policies of a planning scheme, or the processes for making and amending the planning scheme.

**development assessment** system is the system through which planning policies, including planning instruments, and requirements for development, are implemented enabling appropriate development to occur. The system includes the development assessment process for administering development applications and establishing the rights and responsibilities in relation to development approvals.

### Short title

Clause 1 establishes the short title of the Bill.

### Commencement

Clause 2 states that particular provisions of the Bill commence on the 1 July 2016 and the remainder of the Bill commences on a day to be fixed by proclamation.

The proclamation will be made by the Governor and commence the Bill after it is passed by the Legislative Assembly and is given royal assent. This intended to enable adequate time for system adjustments between passage of the Bill and implementation.

## **Purpose of the Act**

Clause 3 establishes the purpose of the Bill and how it is to be achieved.

The purpose of the Bill is to facilitate Queensland's prosperity through ecologically sustainable development by achieving an optimum balance between economic growth, environmental protection and community wellbeing. Balance will be achieved through the many policy decisions made throughout the preparation of planning instruments, to the satisfaction of either or both the Minister and the local government; and also to a lesser extent through particular development assessment decisions.

The purpose is important to understand the scope and intent of the Bill, and the use of the powers and delivery of functions under it. A focus on the characteristics of the system rather than the planning outcomes the system is to achieve, provides more navigable, less ambiguous and more effective legislation. The clause lists these key characteristics of the system that achieve the purpose:

- An efficient land use planning and development assessment system is not overly prescriptive and provides for more responsive development assessment process.
- An effective land use planning and development assessment system facilitates the outcomes that the State and a local government and their communities are seeking to achieve.
- A transparent land use planning and development assessment system has policy making and assessment process that are highly visible and legible to the community and users of the system.
- An integrated land use planning and development assessment system facilitates consistent policies and decision-making, and allows the planning system to respond quickly to emerging issues at all levels.
- An accountable land use planning and development assessment system enables explicit decision-making and establishes opportunities for community involvement.

The Bill establishes the framework of tools and planning instruments, the development assessment system and other arrangements that advance the purpose of the Bill. The framework supports the expression and achievement of strategic State, regional and local planning and development assessment policy.

Notification and public consultation requirements ensure planning instruments reflect the balancing of community views and aspirations and increase the community's role in plan making. The clause lists key elements of the system.

- State planning policies express the State government's policy about a matter of State interest and how that matter must be dealt with in planning schemes, council development assessment process and in designating premises for community infrastructure.
- Regional plans express the State government's policy about a matter of State interest for a region and establish the strategic direction to achieve regional outcomes.
- Planning schemes express integrated State, regional and local planning and development assessment policy for the local government's planning scheme area.
- Temporary local planning instruments (TLPs) express planning and development assessment policy to protect a planning scheme area from adverse impacts under urgent or emergent circumstances.

- Planning scheme policies support the planning and development assessment policy for a local government area and support the local government in undertaking development assessment and making or amending the planning scheme.
- The development assessment system supports the implementation of planning instruments by establishing categories of development and types of assessment; the process for administering development applications; and the rights and responsibilities related to development approvals.
- Infrastructure designation arrangements facilitate efficient identification and development of key infrastructure.
- Infrastructure charges - planning, development assessment and charging arrangements for infrastructure allow for the integrated planning and cost-effective provision of infrastructure.
- Extensive enforcement arrangements proportionate to the nature and scale of the offence ensure compliance with development approvals.
- Ministerial reserve powers allow the Minister to intervene in planning and development process in particular circumstances to ensure the achievement of outcomes consistent with State and regional planning policy.
- Dispute resolution processes are necessary for a fair system that requires decision makers to be accountable for their decisions.

### **Definitions**

Clause 4 states that the dictionary in schedule 2 defines particular words, terms and expressions used in the Bill.

### **Act binds all persons**

Clause 5 states that to the extent it is able; the Bill binds all persons, including the State government, the Commonwealth and the other State governments. The intent of the provision is to ensure the obligations, responsibilities and requirements imposed on individuals and entities under the Bill are met.

The Bill does not confer immunity from proceeding or prosecution to any person. However, the clause provides the State government, Commonwealth and the other State governments' immunity from prosecution for offences against the Bill. This is consistent with what is normally afforded to the State under legislation.

The Bill does not bind the Coordinator-General from carrying out their functions and powers under the State Development and Public Works Organisation Act 1971, which regulates the actions of the Coordinator-General. The clause enables the provisions of that Act to override the process under the Bill. This allows the Coordinator-General to undertake development without having to obtain a development permit where the development is undertaken under a power or a function of the Coordinator-General under that Act.

## Chapter 2 Planning

### Part 1 Introduction

The purpose of this part is to establish:

- State and local planning instruments; and
- the hierarchy of planning instruments.

Terms used in this part include:

**planning instrument** is a document that sets out State, regional or local policies about land use planning and development assessment. Planning instruments include both State planning instruments and local planning instruments.

**State planning instrument** is a statutory planning instrument made by the Minister that expresses policies about planning and development assessment matters of State interest. A State planning instrument protects or gives effect to State interests and can be either a State planning policy or regional plan.

**local planning instrument** is a statutory instrument made by a local government that expresses policies about planning and development assessment matters of local interest. The Minister also has powers to make a planning scheme or a TLPI in particular circumstances. A local planning instrument can either be a planning scheme, TLPI or planning scheme policy.

#### What this chapter is about

Clause 6 provides a simple outline of the contents of the chapter.

#### What are planning instruments

Clause 7 establishes the types of planning instruments that set out matters of State and local interest and the policies for planning and development assessment.

A State planning instrument is intended to protect or give effect to State interests. A local planning instrument identifies strategic outcomes for a locality and measures for achieving those outcomes. It expresses intentions for the future, such as the intention for the provision of infrastructure in a planning scheme area.

The clause also sets out a simple hierarchy of planning instruments, where a State planning instrument prevails over a local planning instrument and a higher order instrument prevails over a lower order instrument to the extent of any inconsistency.

- A State planning policy is made by the Minister and expresses the State government's policy about a planning and development matter of State interest. A State planning policy identifies how that matter must be dealt with in planning schemes; local government development assessment process; and in designating premises for community infrastructure.

A State planning policy includes a temporary State planning policy which is a State planning instrument made by the Minister that temporarily amends or suspends a State planning policy,

or temporarily introduces a new State planning policy, in order to protect or give effect to a State interest. A temporary State planning policy is only used in exceptional circumstances and is not a routine policy tool. A temporary State planning policy allows the Minister to act urgently, without first undertaking notification and public consultation on a draft State planning policy. Where urgent action is not required, the Minister will make either a State planning policy or regional plan.

- A regional plan is made by the Minister and expresses the State government's policy about a planning and development matter of State interest for a region. A regional plan establishes strategic direction to achieve regional outcomes that align with the matter of State interest. Regional policies are used to facilitate these outcomes by addressing existing or emerging regional issues, such as competition between land uses.
- A planning scheme expresses integrated State, regional and local planning and development assessment policy for the planning scheme area.
- A temporary local planning instrument (TLPI) expresses planning and development assessment policy to protect part or all of a planning scheme area from adverse impacts in exceptional circumstances.
- A planning scheme policy supports the planning and development assessment policy for part or all of a planning scheme area, by assisting with the practical implementation of objectives or requirements contained in the planning scheme.

A planning scheme policy may support a local government in making or amending the planning scheme. A planning scheme policy may support the local government in undertaking development assessment by stating for example, the information a local government may request for a development application or the way a local government may seek advice or comment on a development application. A planning scheme policy may also contain information to help satisfy assessment criteria in a planning scheme such as standards identified in a code.

However, a planning scheme policy cannot regulate development or use of premises. Substantive planning policies and policies addressing State or regional objectives are intended to be contained within the planning scheme itself.

A simple hierarchy of planning instruments is intended to reduce inconsistencies and conflicting outcomes across instruments. The hierarchy ranges from a State planning policy at the highest level, through to a regional plan, planning scheme or a TLPI, to a planning scheme policy. If two instruments conflict or deal with the same matter in an inconsistent way, development assessment and decision making give effect to the higher order instrument in preference to the other instrument.

Where relevant State planning instruments are reflected in the planning scheme and considered during the process of assessing development applications. To the extent a State planning instrument is reflected in a local planning instrument, it is not required to be considered separately as part of development assessment.

## **Part 2 State planning instruments**

The purpose of this part is to establish the:

- process for making, amending or repealing a State planning instrument; and

- minimum notification and public consultation requirements for State planning instruments.

Terms used in this part include:

**instrument** (under this part) is a proposed State planning instrument or a proposed amendment to a State planning instrument.

**minor amendment** (to a State planning instrument) is an amendment for correctness or consistency, or an amendment of an administrative nature or prescribed as minor by regulation. A minor amendment may also be an amendment to reflect a part of another State planning instrument, provided there has been adequate public consultation about the matter.

**temporary State planning policy** is a State planning instrument made by the Minister that temporarily amends or suspends a State planning policy, or temporarily introduces a new State planning policy, in order to protect or give effect to a State interest.

### **Making or amending State planning instruments**

Clause 8 enables the Minister to make or amend a State planning instrument, and establishes the process for making or amending a State planning instrument. It establishes transparency and accountability measures in this process including ensuring public engagement with respect to the instrument.

To make or amend a State planning instrument, the Minister must firstly publicly notify and undertake public consultation on the instrument. The clause establishes the required content of the public notice to be published in the gazette, on the department's website and in a newspaper circulating generally in the parts of the State affected by the instrument. The Minister must also give a copy of the public notice and the instrument to each local government affected by the proposed State planning instrument or amendment of a State planning instrument.

The clause provides that the public notice must contain information about where the instrument is available, contact details for information about the instrument and information about how and until when submissions on the instrument can be made. For a proposal to make a State planning instrument, the public consultation and submission period is a minimum of 40 business days from the day after the notice is published. For a proposal to amend a State planning instrument, the public consultation and submission period is a minimum of 20 business days from the day after the notice is published. The clause establishes minimum requirements for the public consultation periods and does not prevent a longer period being set on a case by case basis.

The Minister must consider all properly made submissions on the instrument before deciding to make or modify the instrument or not make the instrument. The Minister must publicly notify the decision to make or modify the instrument or not make the instrument. The clause establishes the required content of the public notice to be published in the gazette, on the department's website and in a newspaper circulating generally in the parts of the State affected by the instrument.

The Minister must also give a copy of the public notice to each local government affected by the State planning instrument or amendment of a State planning instrument. For a decision is to make or amend a State planning instrument, the public notice must include information on when the instrument was made and where the instrument is available. This is intended to establish minimum requirements to ensure that parties affected by the instrument are aware of its making, modification or that it is not being made.

A State planning instrument or an amendment of a State planning instrument has effect on the day after the notice about the making or amending of the instrument is published in the gazette, unless a later day is stated in the instrument. If a later day is stated, the instrument or amendment has effect on and from the later day. If a new regional plan is made for a region, it replaces any existing regional plan applying to the region on and from the day it takes effect.

The clause makes a State planning instrument valid if it is made or amended in substantial compliance with the process. When following detailed process, there is potential for procedural mistakes to be made. The clause is intended to enable a State planning instrument to be valid even if there has been some procedural non-compliance, to avoid the potential for unproductive and expensive litigation about process detail.

However, a State planning instrument can only be considered made or amended if any non-compliance with the process has not adversely affected public awareness of the instrument or opportunity to make a submission.

A State planning instrument made by the Minister is presumed to have satisfied the process in the Bill unless there is evidence to the contrary. A State planning policy has effect throughout the State unless the policy states otherwise. A matter of State interest may have a State-wide application that is not restricted to any particular locality, such as an interest in energy and water supply. Alternatively, a matter of State interest may be localised in a physical sense, such as an interest in airports and aviation facilities.

A regional plan has effect throughout that region unless the plan states otherwise. There are no fixed geographical areas of the State constituting regions. The Minister identifies a statutory region according to the issues to be dealt with and the area required to coordinate planning for that issue. A region may be the combined area of all or parts of two or more local government areas and may also include an area not in a local government area, such as adjacent State waters.

### **Minor amendments to State planning instruments**

Clause 9 enables the Minister to make a minor amendment of a State planning instrument, without following the established process for making an amendment to a State planning instrument. However this only applies in limited circumstances and to specific types of minor amendments.

A minor amendment to a State planning instrument is an amendment for correctness or consistency, or an amendment of an administrative nature or prescribed as minor by regulation. A minor amendment may also be an amendment to reflect a part of another State planning instrument, provided there has been adequate public consultation about the matter. A way that adequate public consultation may be considered to have occurred is if the matter has already gone through public consultation as part of the making of the other State planning instrument, such that it is not necessary for public consultation to be repeated.

The Minister may make a minor amendment of a State planning instrument, without following the established process and without having to undertake notification and public consultation on the proposed amendment. Instead, the minor amendment is made by publicly notifying the amendment of the State planning instrument.

The clause establishes the required content of the public notice to be published in the gazette, on the department's website and in a newspaper circulating generally in the parts of the State affected

by the State planning instrument. The notice must contain information about when the amendment was made and where a copy of the amended instrument is available.

The clause provides that a minor amendment of a State planning instrument has effect on the day after the notice is published in the gazette, unless a later day is stated in the instrument. If a later day is stated, the instrument or amendment has effect on and from the later day.

### **Making temporary State planning policies**

Clause 10 enables the Minister to, in particular circumstances; make a temporary State planning policy without following the established process for making a State planning instrument, and without having to undertake notification and public consultation on the proposed instrument.

The clause enables the Minister to make a temporary State planning policy if a State planning policy is urgently needed to protect or give effect to a State interest. A temporary State planning policy can be made for any matter, including for matters not already covered by an existing State planning policy.

A temporary State planning policy can suspend or affect the operation of another State planning policy or temporarily introduce a new State planning policy. However, the clause provides that a temporary State planning policy cannot amend or repeal another State planning policy.

To make a temporary State planning policy, the Minister must publicly notify the temporary State planning policy. The clause also establishes the required content of the public notice to be published in the gazette, on the department's website and in a newspaper circulating generally in the parts of the State affected by the temporary State planning policy.

The notice must identify the parts of the State in which the temporary State planning policy has effect and contain information about where the temporary State planning policy is available. Where relevant, the notice must also contain information about any State planning policy affected by the temporary State planning policy.

A temporary State planning policy comes into effect quickly but only has effect for two years after the day it made, or a lesser period stated in the policy of not more than two years. There is no power to extend the operation of a temporary State planning policy beyond the period stated in the policy. Where the matters addressed by the temporary State planning policy continue to be relevant, the two year period is intended to provide the Minister adequate time to integrate the provisions of the policy into another State planning instrument. However there is nothing to prevent a temporary State planning policy from being replaced or remade after it expires.

### **Repealing State planning instruments**

Clause 11 enables the Minister to repeal a State planning instrument and establishes the process for repealing a State planning instrument.

The clause enables the Minister to repeal a State planning instrument at any time by either making another State planning instrument that specifically repeals it or by following the process established in this section.

To repeal a State planning instrument, the Minister must publicly notify the repeal of the State planning instrument. The clause also establishes the required content of the public notice to be published in the gazette, on the department's website and in a newspaper circulating generally in the parts of the State affected by the instrument. The Minister must also give a copy of the public notice to each local government affected by the instrument being repealed. The notice must contain information about the State planning instrument, identify the parts of the State in which the instrument has effect, and State that the instrument is being repealed.

The clause provides that for an instrument being repealed by another State planning instrument, the instrument is repealed on the day the other State planning instrument takes effect. For an instrument being repealed by public notice, the instrument is repealed on the day after the notice is published in the gazette, unless a later day is stated in the public notice. If a later day is stated, the instrument is repealed from the later day.

### **Advice to Minister about regional plans**

Clause 12 requires the Minister to consider the advice of the regional planning committee when developing or implementing a regional plan.

The Minister establishes and decides the membership of a regional planning committee for each region. The clause provides that to establish a regional planning committee the Minister must publicly notify the committee's name and membership. The public notice is to be published in the gazette, on the department's website and in a newspaper circulating generally in the region to which the regional planning committee relates.

A regional planning committee and its business, outputs and level of support may vary across regions. The role of the regional planning committee is advisory only and a committee has no legislative or executive power for regional planning.

## **Part 3 Local planning instruments**

The purpose of this part is to:

- provide a process for making, amending or repealing local planning instruments;
- establish minimum notification and public consultation requirements for local planning instruments;
- enable the Minister to direct a local government to take an action in relation to a local planning instrument or proposed instrument or amendment; and
- enable the Minister to take urgent action if required to protect a matter of State interest.

Terms used in this part include:

**instrument** (under this part) is a local planning instrument or amendment of a local planning instrument.

**required contents** are the mandatory contents a local planning instrument is required to contain. The required contents are prescribed in the Regulation. The required contents may include definitions, requirements that prevail over local planning instruments from commencement or will prevail over instruments or amendments as they are made under the Bill.

## **Division 1                      Introduction**

### **What this part is about**

Clause 13 states that this part establishes the processes for making, amending or repealing a local planning instrument and the State's powers in relation to a local planning instrument.

The clause enables a local planning instrument that is made or amended in substantial compliance with the process, to be valid. When following detailed process, there is potential for procedural mistakes to be made. The clause is intended to enable a local planning instrument to be valid even if there have been some procedural non-compliance, to avoid the potential for unproductive and expensive litigation about process detail. However, a local planning instrument can only be considered made or amended if any non-compliance with the process has not restricted the Minister's opportunity to consider whether State interests would be adversely affected or has not adversely affected the public's awareness of the instrument or their opportunity to make a submission.

### **Required contents for local planning instruments**

Clause 14 provides for requirements for the contents of local planning instruments to be prescribed by regulation.

This aims to enable an appropriate level of consistency across the State for particular parts of planning and development assessment. At the time a local planning instrument is made or amended, the State interest review process will examine consistency with the Regulation.

The clause establishes that the prescribed requirements in the Regulation prevail over a local planning instrument to the extent of any inconsistency. Where a local planning instrument is inconsistent with the requirements for the contents of local planning instruments, the required contents will have effect automatically and the local planning instruments should be read as if the required contents applied. However, the required contents only apply to the extent of the inconsistency and only to the extent the local planning instrument applied to the planning scheme area.

### **Minister's rules and guidelines**

Clause 15 requires the Minister to make a statutory instrument that contains rules and guidelines about the process for making and amending a local planning instrument.

The instrument is required to contain guidelines about the matters that must be considered when making a notice about the process for making or amending a planning scheme. The instrument must also contain the rules that establish the processes for amending a planning scheme and for making or amending a planning scheme policy or TLPI. Including detailed processes for making and amending local planning instruments in a statutory instrument is intended to enable more flexibility in responding to issues arising in the application of these processes.

The Minister's guidelines establish the matters the chief executive is required to have regard to when preparing a notice about the process for making or amending a planning scheme. The

contents of the notice are discretionary which enables the process to be adapted to the individual circumstances of each different local government. When making or amending a planning scheme, a local government must follow the process set out in a notice prepared by the chief executive.

The Minister's rules establish processes for making particular amendments to a planning scheme, as specified within the rules. When making a type of amendment to a planning scheme specified in the rules, a local government can choose to follow the process set out in the rules or follow the process set out in a notice prepared by the chief executive. The rules also establish the processes for making or amending a planning scheme policy or a TLPI.

The clause provides that the Minister's rules and guidelines come into effect when they are adopted by regulation.

## **Division 2 Making, amending or repealing local planning instruments**

### **Making or amending planning schemes**

Clause 16 establishes the process that must be followed if a local government proposes to make or amend a planning scheme.

The process for making or amending a planning scheme is set out in a notice the chief executive gives to the local government. A local government is required to notify the chief executive in writing of a proposal to make or amend a planning scheme. After consulting with the local government, the chief executive is required to give the local government a notice of the process for making or amending the planning scheme.

After further consultation with the local government, the chief executive may also give a local government an amended notice of the process for making or amending the planning scheme. It is intended that the chief executive establishes the process for making or amending a planning scheme in consultation with the local government. However, the chief executive must still have regard to the Minister's guidelines when preparing the notice or amended notice containing the process for making the planning scheme.

The clause establishes the required content of the notice or amended notice to be given to the local government and published on the department's website. The notice must contain public consultation and notification requirements for the planning scheme, including publishing a public notice in the gazette, on the local government's website and in a newspaper circulating generally in the local government area. The notice may also contain other administrative processes which the local government must follow when making or amending the planning scheme.

Before the Minister can approve the planning scheme, the Minister must be satisfied that the planning scheme appropriately integrates State, regional and local planning and development assessment policies for the planning scheme area and includes a local government infrastructure plan.

The planning scheme has effect on the day after the public notice about the making of the planning scheme is published in the gazette, unless a later day is stated in the planning scheme. If a later day is stated, the planning scheme has effect on and from the later day. If a new planning scheme is made for a planning scheme area, it replaces any existing planning scheme applying to the area on

and from the day it takes effect. A planning scheme has effect throughout the whole of the local government's planning scheme area.

The clause enables a local government to apply the planning scheme for assessing prescribed tidal work in the local government's tidal area, even though the work may be outside of the planning scheme area. However, the clause only applies to the extent prescribed under the Regulation. The clause facilitates the integration of approvals for prescribed tidal works under the Coastal Protection and Management Act 1995 into the development assessment system and enables a local government to be the assessment manager for prescribed tidal works.

### **Amending planning schemes under Minister's rules**

Clause 17 establishes the process that may be followed if the Minister's rules apply to a proposed amendment of a planning scheme.

For particular types of planning scheme amendments specified in the rules, a local government may choose to follow the process established in the Minister's rules. If the local government chooses to follow the process in the Minister's rules, the local government must follow that process when making the amendment.

The Minister's rules must contain notification requirements for the amendment, including publishing a public notice in the gazette, on the local government's website and in a newspaper circulating generally in the local government area. The rules may also contain other administrative processes which the local government must follow when making the amendment using that process.

The amendment has effect on the day after the public notice about the making of the amendment is published in the gazette, unless a later day is stated in the amendment. If a later day is stated, the amendment has effect on and from the later day.

### **Making or amending planning scheme policies**

Clause 18 enables a local government to make or amend a planning scheme policy by following the process set out in the Ministers rules.

The Minister's rules establish the public notification and consultation requirements for making or amending a planning scheme policy. The requirements include publishing a public notice in the gazette, on the local government's website and in a newspaper circulating generally in the local government area, and may also include other administrative processes which a local government must follow when making or amending a planning scheme policy.

The planning scheme policy or amendment has effect on the day after the public notice is published in the gazette, unless a later day is stated in the policy or amendment. If a later day is stated in the planning scheme policy or amendment, the policy or amendment has effect on and from the later day.

A planning scheme policy has effect throughout part or all of the planning scheme area, as stated in the policy. A planning scheme policy is intended to be flexible and address only the local dimensions of matters dealt with by a planning scheme, which may or may not apply across the whole planning scheme area.

### **Making or amending TLPIs**

Clause 19 enables a local government to make or amend TLPI in particular exceptional circumstances. Making a TLPI allows a local government to act urgently, without first undertaking notification and public consultation on a proposed local planning instrument.

The clause enables a local government to make a TLPI if the local government and the Minister are satisfied that a local planning instrument is urgently needed to protect all or part of the planning scheme area from serious adverse cultural, economic, environmental or social conditions and that that risk would be increased by following the process for amending the planning scheme. The Minister must also be satisfied that the making of a TLPI would not adversely affect a State interest.

A TLPI can be made for any matter, including for matters not already covered by an existing local planning instrument. A TLPI can suspend or affect the operation of another local planning instrument or temporarily introduce a new local planning instrument. However a TLPI cannot amend or repeal another local planning instrument.

To make or amend a TLPI, a local government must follow the process set out in the Minister's rules. The rules must contain Ministerial approval and notification requirements for the TLPI or amendment, including publishing a public notice in the gazette, on the local government's website and in a newspaper circulating generally in the local government area. The rules may also contain public consultation and other administrative processes which a local government must follow when making or amending a TLPI.

A TLPI has effect throughout part or all of the local government's planning scheme area. Unlike a planning scheme, a temporary planning instrument is intended to address a specific, often localised issue, rather than be a comprehensive planning instrument.

The TLPI or amendment has effect on the day after the public notice about the making of the TLPI or amendment is published in the gazette, unless a later day is stated in the TLPI or amendment. If a later day is stated in the TLPI or amendment, the TLPI or amendment has effect on and from the later day.

With the Minister's written approval, a TLPI or amendment may also have effect on the day a local government resolution to give the TLPI or amendment to the Minister for approval was made. In this situation, a TLPI would apply retrospectively from the day the resolution was made and not from the day the TLPI was approved. However, this would only apply in very limited circumstances where the Minister is satisfied that immediate intervention was required. The local government resolution must be made at a public meeting to ensure the decision to make the TLPI or amendment is transparent and publicly notified.

A TLPI comes into effect quickly but has effect for only two years after the day it made, or a lesser period stated in the TLPI of not more than two years. A TLPI ceases to have effect if it is repealed. There is no power to extend the operation of a TLPI beyond the period stated in the instrument. However there is nothing to prevent a TLPI from being replaced or remade following due process after it expires.

The clause makes it clear that a TLPI does not create a superseded planning scheme and is not an adverse planning change. Therefore a superseded planning scheme request cannot be made or compensation cannot be claimed for premises affected by a TLPI.

### **Repealing TLPIs or planning scheme policies**

Clause 20 enables a local government to repeal a TLPI or a planning scheme policy by local government resolution and establishes the process a local government must follow after making the resolution.

The clause allows a local government to repeal a TLPI without having to proceed to making or amending the planning scheme. However, for a TLPI or planning scheme policy made by the Minister or on the direction of the Minister, the local government must obtain the Minister's written approval to make a resolution to repeal the instrument.

To repeal a TLPI or planning scheme policy by resolution, a local government must publicly notify the repeal of the instrument. The clause establishes the required content of the public notice to be published in the gazette, on the local government's website and in a newspaper circulating generally in the local government area. The local government must also give a copy of the public notice to the chief executive. The notice must identify the local government, contain information about the TLPI or planning scheme policy being repealed, and the day the resolution to repeal the instrument was made.

The TLPI or planning scheme policy is repealed on the day after the public notice about the repeal is published in the gazette, unless a later day is stated in the notice. If a later day is stated in the notice, the instrument is repealed on and from the later day.

A local government may also repeal a TLPI by making or amending a planning scheme that specifically repeals the TLPI. A planning scheme policy may be repealed by making a new planning scheme which repeals all the planning scheme policies under the superseded planning scheme. However, amendments to a planning scheme do not repeal planning scheme policies. Where it is appropriate for an existing planning scheme policy to carry over to a new planning scheme, it may be remade as part of the process for making the new planning scheme.

For a TLPI or planning scheme policy being repealed by a new or amended planning scheme, the instrument is repealed on the day the new planning scheme or amendment takes effect.

There is no provision for repealing a planning scheme. A planning scheme must always exist for a local government area, so it cannot be repealed except by being replaced by a new planning scheme.

## **Division 3 State powers for local planning instruments**

### **Power of Minister to direct action be taken**

Clause 21 enables the Minister to direct a local government to take an action in relation to a local planning instrument, or proposed instrument or amendment.

The Minister may direct a local government take action, however only when necessary to ensure consistency with the required contents or to protect or give effect to a State interest. The clause is intended to achieve a balance between the protection of State interests and local government autonomy and responsibility, by limiting when the Minister can direct a local government to take action in relation to a local planning instrument.

The clause requires the Minister to firstly notify the local government of a proposed direction to take an action, before directing the local government to take the action. The notice to the local government must be in writing and state the proposed action and clear justification for taking the action. The notice must also state the time within which the local government may make submissions to the Minister about the proposed direction. A local government will be given a reasonable time to make representations about the proposed direction. The notice may contain other administrative processes which a local government must follow when making a submission.

The Minister must consider all properly made submissions on the proposed direction before deciding to make or modify the direction or not make the direction. The Minister must then notify the local government of his or her decision. The decision notice to the local government must be in writing and state the decision and clear justification for the decision. If a local government is directed to take action, the notice must state the nature of the action and the time within which the local government must take the action. A local government will be given a reasonable time to undertake the action or consider a legal challenge if there is any basis for one.

A direction may vary according to the type of instrument and may be as general or specific as the Minister considers appropriate. The Minister may direct a local government to make, amend or repeal a local planning instrument or amendment in accordance with the processes established in this part or with regard to the guidelines, an alternative process set out in the notice given to the local government. The Minister may also direct a local government to investigate, review and report on all or part of a local planning instrument.

The clause enables the Minister to take an action a local government was directed to take if the local government does not comply with the direction in accordance with the decision notice. The Minister must take the action in accordance with the process provided for in the Minister's rules. The action will have the same legal effect as though it had been carried out by the local government. However, the local government may be liable for any costs incurred by the Minister in taking the action.

The clause clarifies that a local government is not liable for anything they do or do not do, if complying with a direction of the Minister to remove something from an existing or proposed local planning instrument or proposed amendment of a local planning instrument.

### **Power of Minister to take urgent action**

Clause 22 enables the Minister to take an action in relation to a local planning instrument, or proposed instrument or amendment, without first giving a direction to the local government or undertaking consultation.

However, the Minister may only take an action if necessary to ensure consistency with the required contents or to protect or give effect to a State interest and urgent action is required. The clause is intended to ensure the Minister can act urgently to protect State interests and facilitate effective promotion of State interests through local planning instruments.

Where urgent action is not required, the Minister will instead direct a local government to take action about a local planning instrument.

The clause requires the Minister to notify the local government of a proposed action the Minister intends to take, before taking the action. The notice to the local government must be in writing and State the proposed action and justification for taking the action.

The clause enables the Minister to take the action in accordance with the process provided for in the Minister's rules with the exception of needing to firstly give a local government a direction to take action and consulting with any person. The action will have the same legal effect as though it had been carried out by the local government. However, the local government may be liable for any costs incurred by the Minister in taking the action.

## **Part 4      Superseded planning schemes**

The purpose of this part is to:

- enable a person to make a request to a local government to apply a superseded planning scheme to the assessment of a proposed development application or to the carrying out of development;
- provide for deemed approval of a superseded planning scheme request if a local government does not make a decision and notify the applicant within the prescribed timeframe;
- establish the circumstances for an adverse planning change;
- provide arrangements for compensation when the value of premises is injuriously affected by an adverse planning change; and
- establish who may be eligible to claim compensation and the circumstances when a claim for compensation is not payable.

Terms used in this part include:

**superseded planning scheme** is a planning scheme and any related planning scheme policies, in effect immediately before a planning scheme or planning scheme policy was replaced or amended, or planning scheme policy repealed, and created a superseded planning scheme.

**superseded planning scheme request** is a written request made to a local government for approval to apply the requirements of a superseded planning scheme to the carrying out or assessment of proposed development.

**superseded planning scheme application** is a development application the local government has decided to accept, assess and decide under the superseded planning scheme.

**adverse planning change** is a planning change that limits the use of premises or that otherwise reduces the value of an interest in premises.

**public purpose change** is an adverse planning change that limits the use of premises to either the existing lawful use of the premises at the time the change was made or to a public purpose.

**gross floor area** is the combined total of all floor areas including all roofed and not roofed area, of all stories, of every building on a site other than specified service, public and vehicle areas. Gross floor area excludes areas used for building services, a ground floor public lobby or public mall in a shopping centre, or parking, loading and manoeuvring motor vehicles.

**yield** for buildings and works is the gross floor area, the density of buildings or persons or the plot ration achievable for premises. For reconfiguring a lot, yield is the number of lots in a given area of land.

**affected owner** is an owner of an interest in premises injuriously affected by an adverse planning change that may be eligible to claim compensation from a local government. Subsequent owners of an interest in premises after the adverse planning change are assumed to not have been adversely impacted by the change.

## **Division 1 Applying superseded planning scheme**

### **Request to apply superseded planning scheme**

Clause 23 enables a person to request a superseded planning scheme be applied to a proposed development or development application. The clause also establishes the process for making and deciding that request; a superseded planning scheme request.

A superseded planning scheme is a planning scheme and any related planning scheme policies in effect immediately before a new or amended planning scheme or planning scheme policy took effect or planning scheme policy was repealed, thus creating a superseded planning scheme.

The clause enables a person to request a local government to accept, assess and decide a development application under the superseded planning scheme or to apply a superseded planning scheme to the carrying out of development that was accepted development under the superseded planning scheme. A request can also be made for a development application for prohibited development, if it was assessable development under the superseded planning scheme or for carrying out prohibited development, if it was accepted development under the superseded planning scheme.

A superseded planning scheme request enables a person to find out the local government's position before taking further action, such as lodging a development application or carrying out development. However, the request must be made to the local government in writing and within one year of the new planning scheme taking effect. A one year time limit for making a request reduces the time the superseded planning scheme has effect and is intended to give the new planning scheme, which reflects current planning standards, its full effect more quickly.

The clause states that particular matters about a superseded planning scheme request may be prescribed in the Regulation. The Regulation may set requirements for making, deciding and notifying a superseded planning scheme request including the form of the request, supporting information, fees, timeframes and any other matters necessary for evaluating and deciding the request.

The clause requires a local government to decide to agree or not agree to a superseded planning scheme request within the decision period set by or extended in accordance with the Regulation. The local government must notify the person that made the request within 5 days of making the decision. If a local government does not give a notice of its decision to the applicant within the prescribed time, the local government is deemed to have agreed to the request.

If a local government agrees to a superseded planning scheme request to accept, assess and decide a development application under the superseded planning scheme, the superseded planning scheme

development application must be made within six months of the local government notifying the applicant of its agreement to the request, or was deemed to have agreed. Despite provisions which prevent a development application being made for prohibited development, if a local government has agreed to a superseded planning scheme request for prohibited development, the superseded planning scheme development application can be made.

If a local government agrees to a superseded planning scheme request to carry out development which was accepted development under the superseded planning scheme, the superseded planning scheme applies to the development and the development may proceed without the need for a development application. Specified provisions of the Bill relating to decisions on representations, extending currency periods, and appeal rights apply to the local government's decision as if it was development approval given by the local government as the assessment manager. The decision is taken to be a development approval that took effect from the day the local government gives notice to the applicant or is deemed to have agreed to the request.

## **Division 2 Compensation**

### **When this division applies**

Clause 24 establishes when a change to a local planning instrument is an adverse planning change. An adverse planning change is the commencement, amendment, replacement or repeal of a local planning instrument, not including a TLPI, which creates a superseded planning scheme and reduces the value of an interest in premises.

An adverse planning change includes a change that limits the use of premises to either the existing purpose for which the premises was being lawfully used at the time the change was made, or to a public purpose. A claim for compensation can be made, except for particular circumstance, for an adverse planning change.

The clause specifies circumstances where a change to a local planning instrument is not an adverse planning change and therefore a claim for compensation cannot be made.

- Change for consistency with another instrument. A change to a local planning instrument that has the same effect as another planning instrument for which compensation is not payable is not an adverse planning change. If the reduction in the value of an interest in premises would have occurred anyway because of the other planning instrument for which compensation is not payable, then a claim for compensation cannot be made. However, this does not apply to a change to a local planning instrument that has the same effect as a TLPI. If a local planning instrument is amended to give effect to a TLPI, a compensation claim may still be able to be made.
- Change for required contents. A change to a local planning instrument that is made to include required contents is not an adverse planning change.
- Change effecting infrastructure. A change to a local planning instrument that removes, amends, delays or changes the standard of an item of infrastructure shown in the planning scheme, is not an adverse planning change. A planning scheme regulates development and use of premises; it does not impose enforceable responsibilities on public entities about the provision of infrastructure.
- Change for Local Government Infrastructure Plan (LGIP). A change to a local planning instrument that is about matters included in a LGIP or infrastructure designation is not an

adverse planning change. The infrastructure designation process identifies premises suitable for infrastructure; it does not prevent a development application being made. If an infrastructure designation leads to a loss in the value of an interest in premises or loss of a development right, compensation is available under the Acquisition of Land Act 1967.

- Change to reduce risk or harm. A change to a local planning instrument that affects development, that had it happened before the change was made, would have resulted in either significant risk to persons or property from natural events or serious environmental harm, is not an adverse planning change. However, this only applies where the risk or harm could not be significantly reduced by development conditions and the change to the local planning instrument is the only option available. In this circumstance, the public interest in preventing such development that might have been lawfully carried out before the change outweighs the effect of making the change and therefore a claim for compensation cannot be made. Natural events may include such things as flooding, land slippage or erosion and serious environmental harm is defined in the Environmental Protection Act.
- Change effecting buildings, works or plot ratio. A change to a local planning instrument that is about the location or physical characteristics of buildings and works or plot ratio for reconfiguration of a lot, and does not substantially alter the achievable yield, is not an adverse planning change.

Yield is generally defined and includes gross floor area, density of buildings or persons and plot ratio. If these factors are substantially different from what they would have been before the change, compensation is not payable. For residential building work, the yield is substantially the same if the gross floor area of the residential building is not more than 2000 square metres and the yield is not reduced by more than 15 per cent.

### **Entitlement to compensation**

Clause 25 establishes when an affected owner is entitled to reasonable compensation from a local government for an adverse planning change. The clause also establishes the time limits within which a claim for compensation must be made.

Compensation is payable in the following circumstances, relative to the loss in the value of the interest in premises or loss of a development right as a result of the adverse planning change:

- Public purpose change. An affected owner is entitled to compensation if the adverse planning change is a public purpose change. In this circumstance, the claim for compensation must be made to the local government within two years from the day after the adverse planning change came into effect for the claim to be payable.
- Refusal of a superseded planning scheme request for assessable development. An affected owner is entitled to compensation in relation to development if after the adverse planning change the development is assessable and because the local government refuses a superseded planning scheme request, the development is assessed under the current planning scheme but not approved in full. The development application must be made and the development refused or approved subject to conditions or only approved in part for the affected owner to be eligible for compensation. This is because an affected owner is only entitled to compensation for the loss of a development right for development the affected owner genuinely intended to pursue.

A development application assessed under the current scheme and approved in full does not entitle the affected owner to compensation. In this circumstance, the claim for compensation must be made to the local government within six months from the day after the applicant is given notice of the decision on the development application for the claim to be payable.

- Refusal of a superseded planning scheme request for prohibited development. An affected owner is entitled to compensation in relation to development if after the adverse planning change development is prohibited development and the local government decides to refuse the superseded planning scheme request.
- An affected owner is entitled to compensation for the loss of a development right. In this circumstance, the claim for compensation must be made to the local government within six months from the day after the applicant is given notice of the decision on the superseded planning scheme request for the claim to be payable.

The affected owner must make a claim for compensation within 2 years after the adverse planning change came into effect, or within 6 months of being notified of the refusal superseded planning scheme request for prohibited development. If a superseded planning scheme request for assessable development is refused, the affected owner must make a claim for compensation within 6 months of being notified that the development application has not been in full. If a local government decides to approve a superseded planning scheme request in full, no compensation is payable. If a superseded planning scheme request is accepted but the development application is refused, the applicant has no right to compensation.

The clause makes it clear that an affected owner is not entitled to compensation if compensation for the change is payable under another Act or has been paid to a previous owner of the interest in premises. An affected owner is also not entitled for compensation for an offence against the Bill.

### **Deciding compensation claim**

Clause 26 requires a local government to decide a claim for compensation by either approving all or only part of a claim, or refusing the claim.

For a claim relating to an adverse planning change that is a public purpose change, a local government may also give a notice of intention to resume the affected owner's interest in the premises under the Acquisition of Land Act 1967 or amend the planning scheme to restore the rights that were lost.

A claim for compensation must be decided and the chief executive officer of the local government must notify the claimant of the decision and appeal rights within 70 business days of the claim being made. If a local government decides to approve all or part of the claim, the notice must also state the amount of compensation the local government is willing to pay. A local government may decide to agree to pay an amount of compensation less than the amount claimed by the affected owner.

Compensation must be paid within 30 days from when the appeal period ends. This gives the claimant time to consider their appeal rights. If an appeal is made, a local government must pay compensation within 30 days from when the appeal ends.

### **Amount of compensation payable**

Clause 27 establishes how the amount of compensation payable to an affected owner is determined.

The amount of compensation is based on the difference between the market value of the owner's interest in premises immediately before and after the adverse planning change came into effect. The effect of any relevant TLPI is not considered when calculating this amount.

The amount of compensation is then adjusted relative to any of the specified factors that are relevant, as follows:

- Benefit to premises. The amount of compensation will be adjusted relative to any benefit accruing to the affected owner's interest in premises, because of the adverse planning change. This may include any wider benefits resulting from the change to the local planning instrument, such as improved amenity in the locality in which the premises is located.
- Benefit to adjacent premises. The amount of compensation will be adjusted relative to any benefit accruing to adjacent premises in which the affected owner also has an interest, because of the adverse planning change or any other change that came into effect before the compensation claim was made. This may include for example, any benefit resulting from another planning change or development approval.
- Benefit from infrastructure. The amount of compensation will be adjusted relative to any benefit accruing to adjacent premises in which the affected owner also has an interest, because of the construction or improvement of infrastructure on that premises before the compensation claim was made. This may include for example, any benefit resulting from infrastructure work undertaken by the local government on the adjacent premises. However, it does not include any infrastructure funded by the affected owner.
- Existing limitations. The amount of compensation will be adjusted relative to any limitations or conditions that would have applied if the premises had been developed under the superseded planning scheme. To the extent that the compensation claim is based on new or additional requirements on development, those requirements must be compared to the requirements that would have applied to the development before the change. For example, if the development would have required a development approval under the superseded planning scheme, the amount of compensation will take into account the effect of any likely conditions of that development approval.
- Effect of other relevant changes. The amount of compensation will be adjusted relative to any other changes to the planning scheme or related planning scheme policies that came into effect after the adverse planning change, but before the superseded planning scheme request was made. Any changes to a local planning instrument that alter the impacts of the adverse planning change will affect the amount of compensation payable.
- Effect of a development approval. The amount of compensation will be adjusted relative to the effect of any development approval on the affected owner's interest in premises, given after the refusal of a superseded planning scheme request.

Any development approval given, even if it is only approved in part or subject to conditions, that affects the owner's interest in premises, will affect the amount of compensation payable.

The amount of compensation will not be affected or adjusted because the premises subject to a compensation claim, becomes separate or ceases to be separate from other premises. In other words, the subdivision or amalgamation of the premises with other premises after the adverse

planning change will not affect the amount of compensation payable. This applies even if the owner benefits from the reconfiguration creating a more marketable parcel.

The clause establishes the circumstances where a local government does not have to pay a claim for compensation.

- A compensation claim is not payable if compensation for the adverse planning change is payable under another Act. If compensation is payable under another Act, the claim for compensation must be made under the other Act.
- A compensation claim is not payable if compensation has already been paid to a previous owner of the interest in the premises for the adverse planning change.
- A compensation claim is not payable for anything done in contravention of the Bill.

### **Payment of compensation to be recorded on title**

Clause 28 requires a local government to record a notice of payment of compensation on the land title, and establishes the process the chief executive of the local government must follow to do this.

## **Part 5 Designation of premises for development of infrastructure**

The purpose of this part is to:

- enable the Minister to designate premises for infrastructure;
- establish the effect of a designation; and
- establish a process for amending a designation.

Terms used in this part include:

**designation** is the process of identifying premises suitable for the development of infrastructure.

**affected parties** are any local government affected by a designation and the owners of premises to which a designation will apply.

**end day** is the day a designation stops having effect.

### **What is a designation**

Clause 29 establishes that a designation identifies premises suitable for infrastructure or suitable for the development of infrastructure. The clause also establishes what a designation may provide for.

To enable consistency across designations, the Minister is the designator under the Bill. However, the Minister has power to delegate this function. Designation enables development for that infrastructure, with the exception of building work, to be accepted development so that it is exempted from assessment against either State or local planning instruments. This facilitates the efficient provision of the infrastructure at the time work needs to commence.

The Minister may designate premises for infrastructure that already exists or for infrastructure the State government or another entity intends to supply. The type of infrastructure that can be subject of a designation is prescribed in the Regulation. There is no requirement that the infrastructure be publicly owned.

A designation provides information about the infrastructure or the infrastructure proposed to be developed on the premises and may include any requirements necessary to ensure the works for the infrastructure or intended use of the premises is suitable for the site and location in which it is proposed. The need to impose design requirements, an operational program or similar may arise in response to consideration by the Minister about whether a designation should proceed.

Details on the design and operation of proposed infrastructure will vary depending on the type of infrastructure and the premises for which it is proposed. A designation might simply identify the premises and type of infrastructure, or may include details of the design requirements for the works or mitigation of impacts of the works, or parts of the operation of the infrastructure. For example, a designation may include such things as proposed plans of development, details on building design, landscaping, site layout including access circulation and car parking, or the nature of activities for which the premises is to be used and hours of operation.

### **Criteria for making or amending designations**

Clause 30 enables the Minister to make or amend a designation. The clause establishes the matters the Minister must be satisfied of or consider before making or amending a designation.

To make a designation, the Minister must be satisfied that the infrastructure either meets statutory requirements and budgetary commitments for the supply of infrastructure, or alternatively that the infrastructure is or will be needed in an efficient and timely way. At least one of these criteria needs to be satisfied for the premises to be designated for infrastructure.

To make or amend a designation, the Minister must be satisfied that adequate environmental assessment and consultation has been carried out in relation to the development of the infrastructure the subject of the proposed designation. Environmental assessment may include consideration of communities, natural and physical resources, qualities and characteristics of locations, places and areas, and other social, environmental, economic and cultural matters. Consultation may include actions to increase public awareness of the existence and nature of the infrastructure and provide opportunities for the public to make submissions on the proposed designation.

The infrastructure designation guidelines made by the Minister set out a process for assessing and consulting on a proposed designation or amendment of a designation. The Minister may be satisfied that adequate environmental assessment and consultation has been carried out if that process has been followed. However, the process is not the only way to adequately carry out assessment and consultation and the Minister may be satisfied in another way. Ultimately the adequacy of assessment and consultation is a matter for the Minister to decide.

To make or amend a designation, the Minister must also have considered all State and local planning instruments and any approved development schemes under the State Development and Public Works Organisation Act 1971 that apply to the premises the subject of the proposed designation. This allows the Minister to consider all relevant State interests providing a single assessment process for the proposed designation. The Minister must also have considered all properly made submissions from the consultation carried out in relation to the development of the infrastructure the subject of the proposed designation.

### **Making or amending designation**

Clause 31 establishes the process the Minister must follow for making or amending an infrastructure designation.

The clause requires the Minister to notify the affected parties of a proposal to make or amend a designation, inviting submissions about the proposal. The submission period must be at least 15 business days from the day the notice was given.

If an owner of premises to which a designation will apply has already been notified as part of the public consultation for the development, they do not need to be notified again. Furthermore, if the Minister is unable to contact the owner of premises, the Minister does not have to notify the owner. This enables the process of making or amending a designation to continue in the event an owner has not been notified, despite all reasonable efforts being taken to contact them.

If the Minister decided not to proceed with a proposal to make or amend a designation, the affected parties must also be notified of the decision not to proceed.

### **Process after making or amending designation**

Clause 32 establishes the process the Minister must follow for a designation or amendment to take effect.

The clause requires the Minister to consider all properly made submissions on a designation and then decide to make or amend the designation. The Minister must publish a public notice in the gazette about the making or amending of a designation and provide each affected owner and the chief executive with a copy of the notice. The notice must include details of the decision, a description of the premises subject to the designation and where relevant, the nature of the amendment.

The Minister must also notify the affected parties and the chief executive of requirements for the development of the premises subject to the designation. This ensures that the affected parties and the chief executive have an accurate impression of the nature and impacts of the designation, particularly as all or some of the requirements may have been included in the designation in response to environmental assessment or public consultation, and may not have been part of the proposal originally consulted upon.

The designation or amendment has effect on the day after the public notice is published in the gazette, unless a later day is stated in the notice. A designation replaces any existing designation if the designation contains a statement to that effect.

### **Duration of designation**

Clause 33 establishes when a designation stops having effect. The clause also enables the Minister to extend the duration of a designation and establishes the process for extending the duration of a designation.

A designation stops having effect six years after it takes effect unless any of the following circumstances apply.

- A local government or a public sector entity owns or has an easement for the same purpose as the designation on the designated premises.
- Another entity owns or has an easement on the designated premises and construction of the infrastructure for which the premises was designated has commenced.
- A local government or a public sector entity has given a notice of intention to resume the designated premises under the Acquisition of Land Act 1967.
- A local government or a public sector entity has signed an agreement to take the designated premises under the Acquisition of Land Act 1967 or to buy the premises.
- The Minister extends the designation and gives a copy of the public notice to any affected local government.

The Minister may extend a designation up to a further six years by publishing a public notice in the gazette any time before the designation's cessation day and give a copy of the notice to all affected parties.

The clause provides that should proceedings by a local government or public sector entity to resume the designated premises discontinue, the designation ceases to have effect. This ensures that if the designation of privately owned premises has not been acted upon after a reasonable period then it does not continue to influence the use of the premises for other purposes.

#### **Repealing designation—Minister**

Clause 34 enables the Minister to repeal a designation and establishes the process for repealing a designation.

The clause requires the Minister to publish a public notice in the gazette about the repeal of a designation and provide each affected owner and the chief executive with a copy of the notice. The notice must include the decision, reasons for the decision, a description of the premises and details of the infrastructure subject to the designation being repealed.

The repeal has effect on the day after the public notice is published in the gazette. The opportunity to remove a designation quickly allows the Minister to act as soon as practicable once it has been determined that a designation is no longer appropriate, rather than wait for the designation to lapse. This prevents a designation being a relevant consideration in planning and development assessment when it has been determined that particular proposed infrastructure will definitely not be proceeding.

Where applicable, the clause clarifies that any development started under a designation may be completed as if the designation had not been repealed. Any use of the premises that is the natural and ordinary consequence of that development is also taken to be lawful.

#### **Repealing designation—owner's request**

Clause 35 enables the owner of an interest in designated premises to request the Minister to repeal a designation if the designation is causing the owner hardship.

The clause is intended to enable an owner of premises affected by a designation to have the designation repealed in certain circumstances. The clause requires the owner to make a written request to the Minister in accordance with the Minister's infrastructure designation guidelines.

After receiving the request, the Minister has 40 business days to decide to repeal the designation, refuse the request or take another action the Minister considers appropriate. Within 5 business days of making the decision the Minister must notify the owner of the decision and the reasons for the decision.

### **Noting designation in planning scheme**

Clause 36 requires a local government to note a designation, amendment, extension or repeal of a designation in the planning scheme and any subsequent planning scheme made before the designation ceases to have effect.

The clause establishes how a designation should be shown in the planning scheme. The note must include a description of the premises and infrastructure subject to the designation, and where relevant any requirements for the development of the premises. The note must also include the day the designation or amendment took effect or ceased to have effect. This ensures that all essential information about a designation is shown on a planning scheme and enables any person inspecting a scheme to be aware of its existence and nature.

The clause clarifies that the notation of designation on a planning scheme does not amend the planning scheme. A designation is part of a scheme; has the same significance as any other part of the scheme; and is a relevant consideration in development assessment. However, a designation is not the only way infrastructure may be identified in a planning scheme.

The planning scheme provisions which apply to the premises subject to the designation remain if the designation is repealed or ceases to have effect. This clarifies that designations operate like an overlay within a scheme, and there is a need to consider an alternative use of the designated premises if the designation ceases to have effect.

## Chapter 3 Development assessment

### Part 1 Introduction

The purpose of this part is to set out the contents of the chapter under which the development assessment system is established.

#### What this chapter is about

Clause 37 provides a simple outline of the contents of the chapter.

### Part 2 Types of development and assessment

The purpose of this part is to:

- establish the categories of development and assessment; and
- rules for the new concept of exemption certificate.

Terms used in this part include:

**categorising instrument** is a regulation or local categorising instrument that assigns categories of development, assessment categories for assessable development, establishes when public notification is required and the assessment benchmarks for development.

**assessment benchmarks** are the matters that a categorising instrument prescribes as the matters the assessment manager must assess assessable development against.

**local categorising instrument** is a planning scheme, temporary local planning instrument (TLPI) or variation approval.

**prohibited development** is development prescribed by a regulation for which a development application cannot be made. A local categorising instrument may provide that development is prohibited development only if a regulation permits it.

**assessable development** is the category of development for which a development approval is required. Assessable development can be subject to either standard assessment or merit assessment. Development may be made assessable under a categorising instrument. A regulation may also prescribe development that a local categorising instrument cannot make assessable development.

**accepted development** is a category of development that a categorising instrument prescribes is accepted development. Development that is not categorised as either prohibited or assessable is also accepted development. For development that is accepted development, no development approval is required. However, a categorising instrument may prescribe that work is only accepted development if it complies with particular criteria.

**standard assessment** is the assessment category for assessable development proposals that can be assessed against standard criteria or codes. The assessment manager must decide to give approval to an application for which standard assessment is required if the application complies with the assessment benchmarks. An application may be refused only if it does not comply with the assessment benchmarks and compliance cannot be achieved by imposing conditions. A regulation,

which will prevail over a local categorising instrument, will prescribe standard assessment for particular aspects of development.

**merit assessment** is the assessment category for assessable development that requires assessment against a broad range of matters. The assessment manager must assess a development application subject to merit assessment, against the assessment benchmarks set out in the categorising instrument and having regard to any other matters prescribed by regulation. However, the assessment manager may also assess the application against or having regard to, any matters prescribed by regulation and any other relevant matters. Only development applications subject to merit assessment can be required to be publicly notified.

**relevant matter** is a matter a development application subject to merit assessment may be assessed against. A relevant matter does not include a person's personal circumstances or a matter that is the subject of a Ministerial direction given to a local government as assessment manager for the development application.

### **Categorising instruments**

Clause 38 establishes two types of categorising instrument; a regulation or a local categorising instrument. A local categorising instrument can be a planning scheme, a TLPI or a variation approval.

A categorising instrument is the primary mechanism for establishing levels of assessment and setting out assessment benchmarks. It also establishes when public notification is required for a development application and the assessment benchmarks applicable to the assessment of a development proposal. A categorising instrument may also establish thresholds or requirements for standard assessment or merit assessment.

The assessment manager is required to assess a development application against assessment benchmarks, the matters that apply to the particular development, established in a categorising instrument. Different categorising instruments, a regulation or a local categorising instrument, may provide different assessment benchmarks or vary assessment benchmarks, or state how assessment benchmarks are to be considered in assessing a development application and the weight to be given to them.

For example, a categorising instrument may State the particular part of planning instrument relevant to the assessment of a development application, whether it must be complied with, and whether particular provisions are intended to prevail over other provisions.

If there is a conflict between assessment benchmarks, the assessment manager will assess the development application having regard to the other material prescribed and makes a decision based on that assessment. However, if the Regulation identifies an assessment benchmark or part of an assessment benchmark that a local categorising instrument cannot vary, the Regulation will prevail over a local categorising instrument to the extent of any inconsistency.

A local categorising instrument may only provide that development is prohibited if a regulation allows it and may not state that development is assessable or change the effect of an assessment benchmark if a regulation prevents it. Irrespective of when a categorising instrument takes effect, a category prescribed in a regulation prevails over a local categorising instrument to the extent of the

inconsistency. For example, a local categorising instrument cannot make development subject to merit assessment if a regulation requires standard assessment.

### **Categories of development**

Clause 39 establishes three categories of development and enables a categorising instrument to make development either prohibited development, assessable development or accepted development. All development is accepted unless specifically identified as prohibited or assessable.

- Prohibited development. Prohibited development is development for which a development application cannot be made. However, a local categorising instrument can only state development is prohibited if the Regulation permits a local categorising instrument to do so.
- Assessable development. Assessable development is development for which a development application must be made and a development approval required for the development to be lawfully carried out. However a local categorising instrument cannot State development is assessable if the Regulation prohibits a local categorising instrument to do so.
- Accepted development. A categorising instrument can make development or an aspect of development accepted. Accepted development is development for which a development approval is not required for the development to be lawfully carried out. If a categorising instrument does not make development or an aspect of development prohibited or assessable, the development is accepted.

Development may be categorised as accepted subject, to compliance with particular relevant characteristics. This is particularly relevant where risks with non-compliance are low and a person does not need expertise or qualifications to determine compliance.

If development does not have some or all of the stated characteristics to make the development accepted, the categorising instrument can make the development default to being assessable.

The clause clarifies that development under an infrastructure designation is accepted development. However, to the extent development is assessable building work under the Building Act; the building work is assessable development.

### **Categories of assessment**

Clause 40 establishes two categories of assessment for assessable development and enables a categorising instrument to make assessable development subject to either standard assessment or merit assessment.

The clause is intended to establish a merits-based approach to assessing development applications with a clear and simple, flexible set of assessment rules for both standard assessment and merit assessment. For both a development application subject to standard assessment and a development application subject to merit assessment, the assessment manager must assess the application against the applicable assessment benchmarks, and having regard to any other relevant matters prescribed by a regulation.

The matters the assessment manager must assess the development application against are the criteria the development is measured against to determine its level of performance. Whereas the matters the assessment manager must assess the development application having regard to provide

the context within which the performance assessment is carried out. If there is a conflict between assessment benchmarks, the assessment manager will assess the development application having regard to the other material prescribed and make a decision based on that assessment.

- Standard assessment. A standard assessment of a development application involves assessing the proposal only against the matters prescribed by a regulation and the standard criteria or codes applicable to the development. Standard assessment is intended to provide a bounded, more predictable assessment for more straightforward development proposals. To the extent a development proposal complies with the applicable benchmarks, the assessment manager must approve the development or achieve compliance with the benchmarks by imposing conditions on the development approval.
- Merit assessment. A merit assessment of a development application involves assessing the proposal against the matters prescribed by a regulation and a broad range of other relevant matters and may require public notification of the development application. Merit assessment is intended to provide a more robust assessment for more complex development proposals that may depart from development anticipated by a planning instrument.

For a development application subject to merit assessment, the assessment manager may also assess the application against or having regard to a broad range of other relevant matters. This provides the assessment manager with the flexibility to focus on policy outcomes and objectively balance key issues and various provisions, rather than every applicable provision when undertaking merit assessment. It is intended to enable the assessment manager to make performance related development decisions.

The other matters the assessment manager may assess the development against or have regard to include other relevant planning matters such as planning need, the currency of the policy framework in light of changed circumstances, or the accuracy or reliability of information underpinning the policy framework. Other relevant matters may include contextual material, for example multiple referral responses, public submissions and additional advice or information. However, other relevant matters do not include any person's personal or financial circumstances.

A categorising instrument, generally a planning scheme, sets the category of assessment that applies to development or an aspect of development. Where a development is comprised of a number of different aspects of development, the different aspects may be subject to different categories of assessment and assessment benchmarks. However, if a regulation requires an aspect of development to be subject to a particular category of assessment, the regulation will prevail over a local categorising instrument to the extent of any inconsistency.

The categories of assessment determine how a local government assigns the degree of input and action that is required from a development proponent to assess the suitability of a development proposal. However, it is intended that the assessment of assessable development be approached holistically, rather than as a series of procedural sequential stages. This foundational thinking is intended to be catalysed through the regulatory arrangements.

The clause clarifies that for assessing a development application, a reference to a matter that is a statutory instrument, is a reference to the instrument in effect at the time the development application was properly made. This is intended to ensure that a development application is assessed against the law in place when the development application was made. The assessment

manager may also assess the development application against or have regard to a statutory instrument that was amended or replaced before the application is decided.

### **Exemption certificate for some assessable development**

Clause 41 enables a local government or the chief executive, to give an exemption certificate to an owner of premises that states a development approval is not required for assessable development, in particular limited circumstances.

An exemption certificate is a new feature, intended to exempt a particular development from the approval process in particular limited circumstances, where the categorisation of the development is the result of an error or no longer applies or the effects of which would be minor or inconsequential.

If a categorising instrument is found to inappropriately categorise particular development as assessable, the most desirable course of action would be to amend the instrument to categorise the development as accepted development instead.

However, amendment processes for some categorising instruments may be lengthy, and in the meantime an assessment manager may be required to accept and assess applications for development, the effects of which do not warrant assessment. Consequently, an exemption certificate is intended to be used as a tool to address the inappropriate categorisation of development while more permanent measures are implemented.

A decision to give an exemption certificate is in the nature of a policy decision by an assessment manager about the application of a categorising instrument to a particular situation (similar for example to a decision about applying a superseded planning scheme to a particular development proposal) instead of an administrative decision about the compliance of a development proposal with the instrument (such as a decision about a development application).

Consequently in common with other policy decisions under the Bill, there is no provision for a person to apply for an exemption certificate, and no provision for a person to appeal a decision to give, or not to give an exemption certificate.

However, although the merits of a decision to give an exemption certificate are not appealable, broad powers are available under the Bill for the Planning and Environment Court to review decisions using its declarations and orders powers. Consequently a person may bring a proceeding before the Court to test aspects of the lawfulness of a decision to give an exemption certificate, such as whether the decision was beyond power because the circumstances under which the exemption certificate were given did not conform with the limitations in the Bill.

Also, there is no provision for an exemption certificate to be given subject to conditions. If there is a need to provide for development of premises on a conditional basis, it is more appropriate this be done through the development assessment process, the outcome of which is contestable by the applicant and any submitters.

However, this does not prevent a certificate describing the accepted development under the certificate with reference to particular characteristics of the development. For example, an exemption certificate may provide that development no greater than a stated size, height, bulk or location on the premises is accepted development.

In practice, there is nothing preventing a person asking an assessment manager for an exemption certificate, nor is there anything preventing an assessment manager establishing an administrative process for accepting, assessing and deciding such requests. Also there is nothing preventing an assessment manager giving an exemption certificate for premises without first being requested to do so.

The clause provides for a local government or the chief executive to give an exemption certificate. However the chief executive may not give an exemption certificate for development which, if the development and no other development were the subject of a development application, the local government would be the assessment manager.

This means that the chief executive is prevented from giving an exemption certificate, not only for development that is assessable under a local categorising instrument such as the local government's planning scheme, but also for development made assessable under the regulation, but for which the local government is the assessment manager, such as reconfiguring a lot.

The clause sets out the circumstances under which an exemption certificate may be given. Firstly, if there is a referral agency for the development, the referral agency must agree in writing to the certificate being given. Secondly, a certificate may be given if one or more of three grounds apply:

- The effects of the development would be minor or inconsequential, considering the circumstances under which the development was categorised as assessable development. This requires a consideration of whether the effects of the development would be minor or inconsequential, in the context of the reasons the development was categorised as assessable.  
For example, a planning scheme may identify a flood line in a residential zone, within which development for a dwelling which would normally be accepted development in the zone becomes assessable development. A person may propose an extension to a deck attached to an existing dwelling, which would extend by only a short distance into the flood line, and so have only a minor or inconsequential effect, having regard to the risk of flooding, which was the circumstance that led to development being categorised as assessable in the first instance.  
Because determining whether the effects of development are minor or inconsequential is a contextual consideration, it is not intended to provide a definition of 'minor or inconsequential' beyond the ordinary meaning of these terms.
- The development was categorised as assessable development only because of a particular circumstance which no longer applies. The requirement that the development was categorised only because of such a circumstance means that an exemption certificate cannot be given on the basis of general "changed circumstances", but only if the sole ground upon which the development was assessable in the first place no longer exists.  
Using the example of the flood line above, development for a dwelling would be accepted development within the area covered by the flood line, but for requirement associated with the flood line. If upstream works are undertaken which mean that the area subject to the flood line is no longer liable to flooding, the sole circumstance under which development for a dwelling within the flood line is assessable development would no longer apply.
- The development was categorised as assessable development in error. Again using the above example of a flood line, if the flooding studies upon which the flood line was established demonstrate that the effects of flooding do not in fact extend to the premises subject to the flood line, and that the premises is subject to the flood line due to an error in

interpreting or applying the study findings, then the assessment manager may give an exemption certificate.

The circumstances under which an exemption certificate may be given are expressed in the Bill in objective terms – that is, the existence of the circumstances are not a matter of a person’s opinion. This is intended to allow for the grounds for giving a certificate to be more easily objectively tested, for example through declaratory proceedings in the P&E Court, as a protection against potential misuse.

The clause requires a copy of the exemption certificate to be given to each owner of an interest in the premises to which the certificate relates. It provides that an exemption certificate attaches to premises and benefits the owner, the owner’s successors in title and any occupiers of the premises.

The clause establishes that an exemption certificate has effect for two years. However any development substantially started under the certificate may be completed as if the certificate had not expired, and that any use that results from the development is also a lawful use. There is no provision for a local government or the chief executive, having given an exemption certificate, to cancel or withdraw it. There is nothing preventing an assessment manager giving a further exemption certificate for the same development before or after the expiry of an exemption certificate for the same development.

The effect of an exemption certificate is that the development the subject of the certificate is still assessable development, however a development approval is not required. The offence provisions under the Bill include arrangements to ensure that carrying out assessable development under an exemption certificate is not an offence.

### **Part 3      Development applications**

The purpose of this part is to:

- establish the process for making a development application for development approval to carry out assessable development;
- establish the functions and decision making powers of the assessment manager; and
- establish the process for changing or withdrawing a development application.

Terms used in this part include:

**assessment manager** is the person a development application must be made to, and which administers the development assessment process. The assessment manager is responsible for administering, assessing and deciding part or all of a properly made development application.

**development approval** is a preliminary approval or a development permit, or a combination of a preliminary approval and development permit.

**preliminary approval** is all or part of a decision notice approving stated aspects of a development application, but does not authorise the carrying out of any assessable development.

**development permit** is all or part of a decision notice approving parts of a development application and which authorises the carrying out of the stated assessable development.

**properly made** describes a development application that complies with the mandatory requirements for a development application, as accepted by the assessment manager.

## **Division 1 Introduction**

### **What this part is about**

Clause 42 states that this part explains how a person makes a development application for approval to carry out assessable development.

### **Who is the assessment manager**

Clause 43 defines the term assessment manager and establishes how an assessment manager for a development application is identified or decided. The clause also enables the prescribed assessment manager to allow another entity to be the assessment manager for a development application, in particular circumstances.

The assessment manager is generally the entity prescribed under a regulation for a particular development application. A regulation may identify a named type of entity, such as a local government, or state that the assessment manager may be any person with the appropriate qualifications or characteristics stated in the regulation. For most applications, the prescribed assessment manager will remain the relevant local government.

Under particular circumstances prescribed in the regulation, the Minister can decide the assessment manager and require another entity that could have been the assessment manager, to instead be a referral agency. This may happen when proposed development involves complex or multiple jurisdictions. Alternatively, the regulation may also enable the Minister to require a development application be split into two or more separate development applications.

The clause enables a local government or the chief executive, as the prescribed assessment manager for particular development subject to standard assessment, to allow another entity to be an alternative assessment manager for a development application for development of that type.

These arrangements are limited to standard assessment because the assessment benchmarks and assessment and decision rules for standard assessment are clear and transparent. Merit assessment allows for consideration of a range of undocumented matters such as planning need, so is most appropriately undertaken by a directly accountable body such as a local government.

For standard assessment, the prescribed assessment manager may decide that given the low- risk or technical nature of particular development, it may be suitable to allow other appropriately qualified entities to be the assessment manager for a development application of that type. If assessing an aspect of development requires particular internal expertise, or carries a higher risk, the assessment manager may decide it is not appropriate to nominate an alternative assessment manager for that development.

However nothing would stop the nomination of an alternative assessment manager for a particular aspect of development, while other aspects of the same development are dealt with internally. For example, aspects of particular work may require an assessment against environmental benchmarks, for which there is particular internal expertise. However the technical or structural aspects of the

same work may be suitable for assessment by an alternative assessment manager. A list of alternative assessment managers may be created for 'assessing (the work) against the (technical/structural) assessment benchmarks under the planning scheme'. As set out below, an applicant would not be obliged to seek two development permits for the same work, but may nevertheless choose to do so if the applicant judges it is beneficial to them.

However there is no obligation on a local government or the chief executive to keep a list of alternative assessment managers. Whether or not the local government or chief executive chooses to keep a list, and for what development, is entirely a matter for that entity. There are no powers for the State to direct a local government to keep lists of alternative assessment managers, and once having established a list, there is nothing stopping the chief executive or a local government from subsequently discontinuing the practice.

Furthermore, the chief executive or local government may keep a list only in relation to development applications for which they are the assessment manager. The chief executive cannot keep a list for, or impose a list on, a local government.

The prescribed assessment manager may decide which entities are appropriate and negotiate with the entities any service level agreements or any other administrative arrangements to ensure appropriate development outcomes. If the prescribed assessment manager keeps a list of alternative assessment managers for particular development, an applicant may then choose either the assessment manager or the other entity to assess and decide the development application.

The ability for an applicant to choose whether to use a prescribed assessment manager or an alternative assessment manager is a key factor in achieving the balance between integration and flexibility sought through these arrangements. For example, an applicant may choose to use an alternative assessment manager if they require approval only for the development for which the alternative assessment manager is listed. If on the other hand the applicant requires approval for several types of development, only some of which can be obtained from an alternative assessment manager, the applicant should be able to obtain these approvals in a single application to one assessment manager, and not be forced to apply to two entities.

Also the alternative assessment manager does not become the chosen assessment manager until it agrees to accept the application. If the alternative assessment manager does not wish to accept the application, for example because the assessment of the application would be beyond its capacity, the applicant may choose to approach another entity on the list, or make the application to the prescribed assessment manager instead.

If a development application is made to a chosen assessment manager, it is assessed, decided and the decision notice is given by that entity.

Under the clause the acceptance of a development application by a chosen assessment manager defines that person as the assessment manager for all purposes for which the Bill provides for that person to be the assessment manager. Consequently the person would remain the assessment manager for a development application, even if their name was subsequently removed from the relevant list before the development application was decided.

The definition of required fee in the dictionary provides that the required fee for a chosen assessment manager is the fee negotiated between the applicant and the chosen assessment manager.

The clause requires a chosen assessment manager to notify the prescribed assessment manager when the chosen assessment manager accepts a development application. Consequently any person wishing to inspect the application may approach the prescribed assessment manager to find out who is the chosen assessment manager for the application.

The Bill requires a chosen assessment manager to give the prescribed assessment manager a copy of the chosen assessment manager's decision notice for the application. It is envisaged that the access rules will require the prescribed assessment manager to keep relevant documentation about the approval available for inspection and purchase, as it would be impractical for this to be done by all chosen assessment managers.

A chosen assessment manager would also be responsible for dealing with any change representations made by the applicant and giving any negotiated decision notice, as well as being the respondent in any appeal against the chosen assessment manager's decision. The chosen assessment manager and applicant would each bear their own costs in any such appeal, however because chosen assessment managers will be assessing against clearly defined assessment benchmarks under the standard assessment rules, it is likely that both the chosen assessment manager and applicant will have an incentive, and will seek to, find an acceptable complying solution in a timely way without the need for a formal appeal.

The Bill also addresses situations when the ongoing responsibilities of a chosen assessment manager will revert back to the prescribed assessment manager. For example, if the chosen assessment manager no longer exists or is unable to assume the role of the assessment manager at the time a change application or extension application is made, those functions will be the responsibility of the prescribed assessment manager.

Both the prescribed assessment manager and chosen assessment manager are defined as an enforcement authority for the purposes of giving enforcement notices.

Service level agreements between the prescribed assessment manager and the chosen assessment manager may incorporate standards of service in relation to matters such as:

- keeping applications available for inspection;
- details about the documentation, reporting and auditing of processes;
- standardised approaches to conditioning and other aspects about decision notices;
- arrangements for dealing with issues such as insurance and liability, and conflicts of interest;
- sureties and guarantees in relation to continued solvency;
- performance indicators for timeliness in the delivery, and quality of, documentation;
- the taking of enforcement action;
- treatment of assets and transfer of moneys for works under maintenance; and
- terms of any infrastructure or other agreements entered into between the chosen assessment manager, prescribed assessment manager and applicant to secure performance of conditions or payment of money.

A breach of a service level agreement may be used as a basis for the prescribed assessment manager to remove a person from the list of alternative assessment managers.

These arrangements do not affect the arrangements under the Building Act 1975 for private certification of building work. Certifiers under that Act will not be subject to a list under this clause, and will still be required to be licensed under, and conform to that Act.

### **What is a development approval**

Clause 44 states that a development approval is a preliminary approval or a development permit or a combination of the two, and establishes the function of both.

A preliminary approval approves development of a stated type, but does not authorise the carrying out of assessable development. A development permit authorises the carrying out of assessable development. A development permit for the development is required before the development can be carried out.

- Preliminary approval. A preliminary approval is all or part of a decision notice for a development application, including any negotiated decision notice, which approves development, but does not authorise assessable development to be carried out. A preliminary approval is often conceptual in nature and may not be development that is identifiably assessable.

For example, it would be possible for an applicant to apply for preliminary approval for a material change of use for a new urban neighbourhood. The application may describe in general terms the mix of uses envisaged for the neighbourhood, such as residential development of a variety of densities supported by a neighbourhood commercial centre and other commercial and recreational uses supporting the residential development. The application may establish broad density of floorspace limits for the development described in the application. A preliminary approval approves development to the extent stated in the approval. A conceptual or general application for a preliminary approval would result in a conceptual or general approval commensurate with the level of detail provided in the application. The more specific the proposal in the development application, the greater specificity any resulting approval is likely to have.

There is no requirement for a development proponent to obtain a preliminary approval. It is a matter entirely for the applicant to decide. However it can be useful where the full scope of information needed to grant a development permit for the particular development is not available or would be unduly onerous to provide at an early stage of development conceptualisation.

A preliminary approval can also include a variation approval, which varies the effect of a local planning instrument on premises the subject of the approval. A variation approval may establish the category of assessment and assessment benchmarks for development the subject of the application and any related development and prevails over a local planning instrument to the extent of any inconsistency. A variation approval may substitute different provisions on that premises for the life of the approval or until the approved development is completed.

- Development permit. A development permit is all or part of a decision notice for a development application, including any negotiated decision notice, which authorises assessable development to occur to the extent stated in the permit. A development permit is subject to any preliminary approval for the development.

Both a preliminary approval and a development permit can condition development. A development approval includes any development conditions imposed on the development approval by the assessment manager, or directed to be imposed by a referral agency or the Minister, or required under another Act. For example, particular conditions may be taken to be imposed under the Building Act or the Environmental Offsets Act.

The clause states that a preliminary approval prevails over a later development permit to the extent of any inconsistency. However, this is subject to any development condition of the later development permit that is intentionally inconsistent with the earlier development approval, and to which the applicant for the later approval and the owner agree in writing.

The reason for a preliminary approval prevailing over a later development permit is to afford applicants certainty in relation to any rights or obligations attached to the preliminary approval. These rights or obligations are intended to provide a framework within which further detailed development approvals may be sought. This certainty would not be available to a proponent if a development permit, for example, approved a lower density of development than that approved under a preliminary approval to which it relates.

A development approval attaches to the premises and binds the owner, the owner's successors in title and any occupier of the premises. It is intended that changes of ownership do not affect the validity of a development approval. If a person other than the owner of the premises is exercising the rights conferred by the development approval, that person is responsible for complying with the conditions of the development approval.

## **Division 2 Making or changing applications**

### **Right to make development applications**

Clause 45 enables a person to make a development application for a preliminary approval, including for a variation approval, or make a development application for a development permit.

The clause supports a performance-based development assessment system that enables a person to bring forward any proposal and have it tested against the relevant planning instruments. However, a person cannot make a development application for prohibited development. The clause clarifies that this is subject to the rights associated with making a superseded planning scheme request which may permit a superseded planning scheme application made for prohibited development.

The same development assessment process is applicable to both a development application for a development approval that is a preliminary approval or for a development approval that is a development permit. A development application for a preliminary approval that is a variation approval is called a variation request.

For a development that comprises different aspects of development, some requiring merit assessment and others standard assessment, a development proponent can make a single development application for the development to the prescribed assessment manager. A development proponent may also make separate development applications for the different aspects of development requiring different types of assessment.

### **Making development applications**

Clause 46 establishes the process for applying for a development approval.

A development application must be made to the assessment manager in the approved form, accompanied by the required fee, and where applicable accompanied by the consent of the owner. The approved form sets out the requirements for a development application to be properly made

including the form to be used, the matters or supporting information to be included in or accompany an application. A development proponent also has the ability to meet with the assessment manager or a referral agency prior to applying for a development approval, to assist with properly conceptualising and preparing the development application.

An application that complies with the requirements as set out in Clause 46 is considered to be properly made and must be accepted by the assessment manager. However, this does not limit the assessment manager or referral agency's ability to request further information during the assessment of the development application or refuse the development.

The clause clarifies that a development application is taken to be an application for an environmental authority if the development application complies with the relevant sections under the Environmental Protection Act.

### **Changing or withdrawing development applications**

Clause 47 enables an applicant to change or withdraw their development application at any time during the development assessment process before the application is decided.

To change or withdraw a development application, notice must be given to the assessment manager and any applicable referral agency for the development application. If the change is or includes a change of applicant, the notice to change the application if made by the proposed new applicant must be accompanied by the consent of the existing applicant. This is intended to ensure the existing applicant and proposed new applicant both consent to the change of applicant.

Owner's consent is required to accompany a notice to change a development application, where the applicant is not the owner of the premises subject to the changed development application, or if the consent of the owner would have been required to accompany the development application, had it been remade including the change.

### **Public notification requirement**

Clause 48 establishes the public notification requirements for a development application subject to merit assessment.

Public notification of assessable development subject to merit assessment may be required by a categorising instrument; however it is not mandatory. The planning scheme as a local categorising instrument will continue to be the main categorising instrument for establishing whether public notification will be required, and this requirement may vary from local government to local government, depending on local circumstances.

This is intended to provide flexibility in determining if a development application requires notification and allowing notification to be based on consistency with planning intent, public expectation and awareness of development, which in turn enables an improved risk based approach to allocating levels of assessment.

A regulation may prescribe development for which public notification is required, and development for which a local categorising instrument may not require public notification. A regulation will prevail if the planning scheme or another local categorising instrument is inconsistent with these requirements.

Public notification gives a person the opportunity to make submissions about a development application, and also secures for that person the right of appeal to the court about the assessment manager's decision. Public involvement in the planning and development assessment system is an essential component of the system.

The development assessment rules will set out the requirements and notification period for formal public notification in relation to development applications. The assessment manager may assess and decide a development application even if there have been some non-compliance with the requirements. However, the assessment manager must be satisfied that the non-compliance with notification requirements, has not adversely affected the public's awareness of the development application or restricted their opportunity to make a submission.

Public notification requirements are detailed and prescriptive and whilst suitable for many development applications, there are circumstances when these requirements would be unduly onerous or may not give effective public notice. Giving the assessment manager discretion to continue with the assessment of a development application even where there has been some procedural non-compliance ensures potentially unnecessary and costly litigation is avoided.

The clause clarifies that if public notification of a development application is required, any person may make a submission about the development application. Any person that made a submission continues to be a submitter and their submission continues to have effect for the purposes of the development assessment process, even if notification is required to be carried out again for the development application.

The clause states that public notification is still required even where a referral agency has directed the assessment manager to refuse all or part of the development application, ensuring that an application is subject to full scrutiny and assessment. For example, a referral agency may direct refusal based on a technical ground alone. Members of the public may have broader concerns that, in the event of any appeal by the applicant, should also be considered by the court. Of course, an applicant is not compelled to continue with an application if a refusal is directed.

While an applicant has the obligation to carry out the public notification, the assessment manager, if asked by the applicant, may agree to carry out the notification on behalf of the applicant, and may charge a fee for providing the service.

## Part 4 Assessing and deciding development applications

The purpose of this part is to:

- enable the assessment manager to assess and decide a development application or variation request;
- establish the functions and response powers of a referral agency; and
- establish a deemed approval and the circumstances under which they are lawful.

Terms used in this part include:

**referral agency** is an agency that may have either advice or concurrence functions or powers, as prescribed under a regulation prescribing the matters relevant to a referral agency's assessment of a development application.

**referral agency response** is a response a referral agency gives to the assessment manager and the applicant about their assessment of a development application. A referral agency response must state the referral agency's decision and the reasons for the decision about the development application.

**referral agency (advice only)** is a referral agency that has only advice functions. A referral agency (advice only) response can be treated as a properly made submission on the development application.

**variation request** is the part of a development application for a preliminary approval that is a variation approval. A variation request proposes to vary the effect of a particular local planning instrument on premises the subject of the development application.

**development** includes development that is the natural and ordinary consequence of that development.

**decision notice** is the notice of a decision given by the assessment manager that states development may be carried out or is refused, and the extent which the development is authorised or the reasons for the refusal. The Bill requires the assessment manager to give a decision notice following the assessment of a development application. A decision notice may subsequently be replaced by a negotiated decision notice.

**deemed approval notice** is a notice an applicant may give to the assessment manager if the assessment manager has not decided the application within the decision making period. The deemed approval notice states that the development application is deemed to have been approved.

**deemed approval** is an approval for a development application that the assessment manager is taken to have given if the assessment manager does not decide the development application within the decision making period.

### Division 1 Referral agency's assessment

#### Copy of application to referral agency

Clause 49 requires an applicant to give a copy of the development application to any applicable referral agency within the required period, as set out in the development assessment rules.

A referral agency is the person prescribed under the Regulation for a particular development application. The Regulation also prescribes the jurisdiction of each referral agency and the triggers for referral of a development application. The clause recognises that it is possible to devolve or delegate the functions of a referral agency to another entity, and provides for the person to be a referral agency with the referral agencies prescribed jurisdiction and functions. A referral agency may also be a person decided by the Minister.

The clause establishes that if the assessment manager would also have been a referral agency for the application; the assessment manager is not a referral agency but takes on the powers and functions of a referral agency. This prevents procedural duplication in cases where a person is prescribed as both the assessment manager and a referral agency, and has both assessment and referral jurisdiction for a development application.

The clause establishes that an applicant does not have to give a referral agency a copy of the development application if a referral agency has already given a response in relation to proposed development before the development application was made. This only applies if the response states that a referral agency does not require a copy of the development application and the development application complies with any other requirements specified in the response, such as the period of time within which the development application must be made. The applicant is also required to give a copy of a referral agency response about the proposed development application to the assessment manager.

The applicant has the obligation to give a referral agency a copy of the development application. However if asked by the applicant, the assessment manager may agree to give a referral agency a copy of the development application on behalf of the applicant, and may charge a fee for providing the service.

### **Referral agency's assessment**

Clause 50 establishes the requirements for a referral agency when assessing a development application.

A referral agency decided by the Minister must assess the development application as if it were the assessment manager. Any other referral agency must assess the development application against or having regard to the matters prescribed under the Regulation, and may assess or have regard to the matters prescribed giving these matters the weight a referral agency deems appropriate.

The clause clarifies that if the Regulation refers to a statutory instrument, or another document provided for by a statutory document, it is taken to be the instrument in effect when the development application is made. However, a referral agency may also have regard to an instrument or amendment that took effect after the development application was made, and gives it the weight a referral agency deems appropriate.

### **Referral agency response**

Clause 51 establishes requirements for a referral agency decision in relation to a development application; and that an information notice about the referral agency's decision must be given to the applicant and the assessment manager.

A referral agency must assess and decide a development application and give a referral agency response without requirements; or direct the assessment manager to take a particular action. A referral agency can also give the assessment manager advice about a development application.

The directions a referral agency can give to the assessment manager are different for a development application for a development permit, rather than for a development application for a preliminary approval that is a variation approval.

- Development application for a development permit. A referral agency may direct the assessment manager to impose conditions on a development approval, give only a partial approval or only a preliminary approval, or establish a particular currency period for the development approval. A referral agency may also direct the assessment manager to refuse a development application. However, a referral agency cannot direct the assessment manager to approve an application for a development permit.
- Development application for a variation approval. A referral agency may direct the assessment manager to give only a partial approval or approve different variations from those sought, or direct the assessment manager to refuse the development application. However, a referral agency cannot direct the assessment manager to approve an application for a variation approval.

The clause clarifies that the powers of a referral agency are subject to any limitations on their prescribed jurisdiction and functions under the Regulation. For example, the Regulation may limit a referral agency's response to advice only, which prevents a referral agency from directing the assessment manager to impose conditions or refuse a development application.

### **Response before application**

Clause 52 enables a person that would be a referral agency to give a response on a proposed development application before a development application is made.

The clause enables a person to approach a referral agency seeking its response to a proposal before a formal development application is made. If the development application when made is the same or not substantially different from the proposed development application for which the person gave a response, the pre-referral response is or forms part of a referral agency response for the development application. This gives an applicant some certainty particularly about a referral agency's requirements or advice on a proposal, in advance of making the application. However, this only applies if the applicant complies with any time limit set by the person for making the development application specified in the response.

The clause states that all requirements applicable to a referral agency's assessment and decision of a development application, also apply to the assessment and decision of a proposed development application, and with any changes necessary for them to be interpreted. For example, a reference to a copy of the development application is taken to be a reference to the proposed development application. For the assessment and decision of a proposed development application, the referral agency must have regard to the matters prescribed under the Regulation, in effect when the proposed development application is made.

A person that would be a referral agency for the development application may require a fee for the assessment of the proposed development application, and the applicant must pay even if a development application is not made. However, if the development application is made, the

applicant does not have to pay another fee for the assessment of the parts of the proposed development application they have already paid for.

### **Effect of no response**

Clause 53 provides that if a referral agency does not give a referral agency response to the applicant and the assessment manager within the required period, the agency is taken to have no directions, requirements or advice on the development application. Timeframes for a referral agency response will be established in the development assessment rules, and subject to any rules about extending or reviving these timeframes.

### **Changing response**

Clause 54 enables a referral agency to amend their response at any time before the development application is decided if the applicant agrees to the amendment, or if the amendment relates to a change to the development application resulting from an information request or submission.

## **Division 2 Assessment manager's assessment and decision**

### **What this division is about**

Clause 55 states that this division is about assessing and deciding properly made development applications, including a the part of an application for a preliminary approval that is a variation request.

A development application may be comprised of a number of different aspects of development subject to different categories of assessment. The clause clarifies that the division applies even if a referral agency directs the outcome of the development application, for example directs the assessment manager to refuse the development application.

### **Assessing and deciding development applications**

Clause 56 establishes how the assessment manager must assess a development application, or part of a development application, subject to either standard assessment or merit assessment.

However, for a development application that is a superseded planning scheme development application, the assessment manager cannot assess the application against the current planning scheme and planning scheme policies. Instead the assessment manager must assess the development application as if the superseded planning scheme was in effect.

The clause establishes how the assessment manager must decide a development application, or part of a development application, subject to either standard assessment or merit assessment.

- Standard assessment. The assessment manager must decide to give approval to an application for which standard assessment is required if the application complies with the assessment benchmarks. An application may only be refused if it does not comply with the assessment benchmarks and compliance cannot be achieved by imposing reasonable or

relevant conditions. However, this does not imply that development proposals must comply only with a strict set of requirements. The assessment manager is able to apply professional discretion to determine compliance with broader performance outcomes or policy benchmarks.

- Merit assessment. The assessment manager must decide to either give approval to an application in full or in part, with or without conditions. If only part of an application is approved, the balance is refused. Alternatively the assessment manager may decide to refuse the whole application.

The clause clarifies that the assessment manager when assessing development application may decide to give a preliminary approval, other than a variation approval, even if a development permit was applied for. The clause states that if only part of a development application is approved, the balance is refused.

### **Assessing and deciding variation requests**

Clause 57 establishes how the assessment manager must assess a part of a development application that is a variation request.

The assessment manager must make their decision based on the assessment and decision of the part of the development application that does not form part of the variation request, together with the assessment of the part of the development application that is the variation request. The assessment manager must decide to either give approval to a variation request in full or in part, or approve different variations from those that were sought. If only part of a variation request is approved, the balance is refused. Alternatively the assessment manager may decide to refuse all the variations sought.

The clause requires the assessment manager to have regard to specific matters when assessing the part of a development application that is a variation request.

- The assessment manager must have regard to the result of the assessment of the part of the development application that does not form part of the variation request. The part of a development application for which a variation is sought is assessed after the assessment of the other part of the development application, and the result of this assessment will impact the assessment of the variation request. This requirement is intended to ensure that any proposed variation to a local planning instrument is firstly dependent on the approval of the development for which the variation is sought.
- The assessment manager must have regard to the consistency of the variations sought with the rest of the local planning instrument. That is the part of the local planning instrument that the applicant is not seeking to vary. This requirement is intended to ensure that any proposed variation to a local planning instrument is legible and consistent with the existing framework of the planning instrument.
- The assessment manager must have regard to the effect that the proposed variation would have on future submission and appeal rights for later development applications. This is particularly with regard to the supporting material and information available in relation to the development application for which the variation is sought. This requirement is intended to ensure that a variation approval is not given where there is insufficient information available for the public to be able to form a reasoned opinion of the proposed development.

- The assessment must also have regard to any other relevant matters prescribed in the Regulation. This requirement is intended to ensure that the proposed development complies with any prescribed requirements or matters.

The assessment of the part of a development application that is a variation request is distinct from and follows the assessment of the part of the development application that is subject to assessment generally. This is because the assessment of the proposed development for which the variation is sought is not carried out against the planning instruments as they are proposed to be varied, but as they are at the time the development application is made.

The outcome of this assessment informs the assessment and decision of the part of the development application that proposes to vary the local planning instrument. The proposed variations are not assessed unless the development the subject of the development application is to be approved. If the other parts of the development application are refused, any proposed variations will also be refused.

A variation approval may State either or both the category of assessment and assessment benchmarks for the development or aspects of development subject of the development application, which includes development that is the natural and ordinary consequence of that development. A variation approval may substitute different provisions on that premises for the life of the approval or just until the approved development is completed and prevails over a local planning instrument to extent of any inconsistency.

### **Development applications requiring owner's consent**

Clause 58 prevents a decision notice for approval of any part of a development application requiring owner's consent, until the consent of the owner has been provided.

### **Complying with referral agency responses**

Clause 59 requires the assessment manager to comply with any action a referral agency directs or requires when assessing and deciding a development application.

For example, if a referral agency directs the assessment manager to refusal of a development application, the assessment manager must refuse the development application. If a referral agency imposes a requirement to give a different currency period for the approval, the assessment manager must comply.

The clause clarifies that the conditions imposed on a development application by a referral agency must be attached the assessment manager's decision notice in the way provided by the agency. The assessment manager must not amend the wording of the conditions.

### **Notice of decision**

Clause 60 requires the assessment manager to give a copy of the decision notice for a development application together with the prescribed material, to the applicant and any other relevant recipient.

The clause sets out the recipients of the decision notice and the required contents and information to be included in a decision notice. The clause is intended to ensure sufficient information is included in the decision notice to allow the applicant, and any other recipients of the decision notice and prescribed material to understand the effect of the assessment manager's decision on the development application.

Other recipients may include the local government, each principal submitter or referral agency, the prescribed assessment manager or any other prescribed entity for the development application. The decision notice must State the extent to which development is authorised or approved, details of any conditions imposed or required to be imposed on the development and all relevant appeal rights. If the development application is refused, the decision notice must State the referral agency that directed refusal, and or the reasons the assessment manager has decided to refuse the development application.

### **Deemed approval of applications**

Clause 61 enables an applicant to give the assessment manager a deemed approval notice for particular development applications, if the assessment manager does not decide the application within the required period.

A deemed approval is not automatic just because the assessment manager did not decide the development application within the decision making period. If the applicant wants the development application to be treated as having been approved by the assessment manager, the applicant must give the assessment manager a deemed approval notice. The deemed approval will be for the development as applied for in the development application, including any changes made to the application.

The clause clarifies that a deemed approval notice can only be given for a development application subject only to standard assessment, and not for a development application subject to both standard and merit assessment. A deemed approval notice cannot be given for a development application that includes a variation request, or if a referral agency directs refusal or only part approval or for a building development application. A deemed approval notice also cannot be given if the owner's consent requirement has not been complied with or until the timeframe applicable to a Ministerial direction has ended.

A deemed approval notice can only be given after the decision-making period ends and before the assessment manager decides the application. It must be given in the approved form and given to any other relevant recipient including the local government, each referral agency, or the prescribed assessment manager for the development application.

If the applicant gives a deemed approval notice, the assessment manager will be taken to have decided to approve the application on the day that the deemed approval notice is received by the assessment manager.

If the assessment manager receives a deemed approval notice, the assessment manager is required to issue a decision notice approving the development, with or without conditions. This is intended to ensure the assessment manager has an opportunity to impose conditions on the approval, despite the fact that it has been deemed to have been approved. If the assessment manager fails to issue a decision notice within 10 business days, any referral agency requirements and standard conditions will automatically apply to the deemed approval. The clause clarifies that the deemed approval

includes any conditions imposed by a referral agency or conditions the assessment manager was directed to impose. For example, if a referral agency response imposes a requirement to give a different currency period for the approval, that period applies to the deemed approval.

In the case of a development approval, the assessment manager loses their ability to issue a preliminary approval where the applicant applied for a development permit. The clause requires the decision notice for the deemed approval to be consistent with the type of approval sought in the development application. However, if a referral agency or the Minister direct approval of the development application be a preliminary approval, preliminary approval can be given instead of a development permit.

## **Division 3 Development conditions**

### **Permitted development conditions**

Clause 62 requires a development condition imposed on a development approval to be relevant to the development or be reasonably required for the development or use as a consequence of the development.

This is intended to make it clear that operating conditions relevant to the use resulting from approved development must also be relevant or reasonable. Such conditions may be about, for example, operating hours, how access is to be used. If a proposed development condition does not meet the requirement to be relevant or reasonable it cannot be imposed.

Development conditions are conditions imposed on development approvals that the approved development is subject to. Development conditions can be imposed by the assessment manager, directed to be imposed by a referral agency or the Minister, or taken to have been imposed as a result of deemed approval of a development application. Particular limitations are placed on development conditions including the relevant or reasonable requirement, and requirements for permitted or prohibited conditions.

The clause establishes the types of development conditions that can be imposed on a development approval. A development condition may be regarding the continuation of a use or works, or the starting time for development or the period within which it must be completed.

A development condition may require compliance with an infrastructure agreement or the payment of security under an agreement. The clause clarifies that a development condition stating that development cannot start until specific development permits have been obtained or development has been substantially started or completed, complies with the relevant or reasonable requirement.

### **Prohibited development conditions**

Clause 63 establishes the types of development conditions that cannot be imposed on a development approval.

A development condition cannot be inconsistent with a development condition of an earlier development approval in effect for the development, unless it is the same entity imposing the condition and the applicant agrees to the condition. This is intended to enable development conditions to respond to changing circumstances across earlier and later development approvals for

the same development. For example, a preliminary approval may have dealt with the broad conceptual aspects of a development and a subsequent application may need to make changes to some of the specific aspects of the development. If a later inconsistent development condition is allowed to be imposed, the later development condition prevails over the earlier development condition, to the extent of the inconsistency.

A development condition cannot require a person, other than the applicant, to carry out works for the development or enter into an infrastructure agreement. This is intended to ensure a development condition cannot impose requirements on a third party. A development condition cannot require monetary contributions or works for infrastructure other than what is allowed under the provisions related to infrastructure conditioning. This is intended to ensure infrastructure is only funded in the ways established under the Bill.

The clause also establishes that a development condition cannot require an access restriction strip, limit the time a development approval has effect for a use or work formatting part of a network of infrastructure other than for State-owned or controlled transport infrastructure, or be imposed for water infrastructure under the South East Queensland Water Act 2009.

#### **Agreements about conditions**

Clause 64 enables an applicant to enter into an agreement with the assessment manager, referral agency or another person, about a development condition. An agreement may for the purpose of establishing responsibilities or to securing the performance of any party subject to the agreement, in relation to a development condition.

## **Part 5      Development assessment rules**

The purpose of this part is to:

- require the Minister to make development assessment rules for the development assessment process and provide for amendment as required;
- enable the development assessment rules to include requirements for assessing, deciding, approving and changing development applications and approvals.; and
- provide for access to and evidence of the development assessment rules.

Terms used in this part include:

development assessment rules are rules made by the Minister and approved by a regulation that incorporate processes for development assessment and assessment timeframes. The development assessment rules may also incorporate requirements for public notification, referral of development applications, information requests, standard conditions, lapsing and reviving of development applications and changes to approvals.

**amend** where it occurs in the Bill, also means remake.

#### **Development assessment rules**

Clause 65 requires the Minister to make development assessment rules.

The development assessment rules establish the parts of the development assessment system and development assessment process that are not sufficiently provided for in the Bill. The development assessment rules are intended to support a system that is efficient, accountable and coordinated by ensuring the streamlined and effective management of the processes by which development applications are administered and assessed.

The clause lists some of the matters the development assessment rules may establish including the role of pre-lodgement meetings, forms, timeframes, supporting and requested information, process documentation, rules for lapsing and reviving development applications, guidance on changing development approvals and negotiated decisions, and standard conditions for deemed approvals.

However, the clause does not limit what the development assessment rules may include, but does State that they must provide for how public notification of development applications is carried out and how properly made submissions are considered as part of the development assessment process. Public involvement in the planning and development assessment system is an essential component of the system and the development assessment rules will ensure the public is made aware of development likely to impact their community.

The development assessment rules are not subordinate legislation but they are a statutory instrument made by the Minister under the Bill. The inclusion of detailed process in the development assessment rules rather than the Bill assists with clarity and ensures the Minister can more easily adapt the rules to address emerging circumstances as the need arises. However, the clause clarifies that the development assessment rules and any amendment of the rules do not have effect until they are approved under the Regulation.

### **Amending the rules**

Clause 66 enables the Minister to amend or remake the development assessment rules and establishes the process for the amendment or remade instrument to have effect.

To amend or remake the development assessment rules, the chief executive must publish the amendment and development assessment rules as amended or remade on the department's website. The Regulation must also apply the amendment or remade development assessment rules and State the day it was published. This ensures that a development proponent can be aware of the development assessment rules in effect at the time their application is made.

### **Access to and evidence of the rules**

Clause 67 establishes the documents the chief executive is required to keep publicly available and free of charge.

The clause requires the chief executive to make a copy of the development assessment rules in effect available on the department's website and free of charge. The clause also requires the chief executive to keep available endnotes to the development assessment rules, which detail any amendments and the day the amendments took effect. However, failure of the chief executive to comply with these requirements does not invalidate or otherwise affect the development assessment rules.

The clause clarifies that the development assessment rules are subject to the Legislative Standards Act 1992 and the Evidence Act 1977 as if they were Queensland legislation, and as if a reference to the parliamentary counsel was a reference to the chief executive.

## Part 6 Development approvals

The purpose of this part is to:

- establish the effect, duration and lapsing of a development approval;
- enable development approvals to be changed, extended or cancelled; and
- establish rights and responsibilities in relation to a development approval.

Terms used in this part include:

**change representations** are the representations an applicant makes to the assessment manager during the appeal period to change a development approval.

**negotiated decision notice** is a notice that incorporates changes agreed to by both the applicant and assessment manager which replaces the approval or deemed approval for a development application.

**change application** is an application made by an applicant to the responsible entity, either the assessment manager or another entity, to change a development approval. A change application can only be made after the applicant's appeal period has ended. The Bill provides for change applications to be made for minor changes, and for changes other than minor changes, and for assessing and deciding application.

**responsible entity** is a person to which a change application must be made, and is generally the assessment manager. The responsible entity may also be the Minister or referral agency that imposed the condition to be changed or the court, if the development approval was given because of a court order.

**affected entity** is a person that an applicant for a change application may give a copy of the application or proposed application to. Depending on which entity is the responsible entity for the application, an affected entity may be the assessment manager, any referral agency other than the chief executive, the court, or another entity prescribed by regulation.

**pre-request response notice** is a notice the affected entity may give to the person proposing to make a change application that states whether or not the entity objects to the change. A pre-request response notice is given before the development application is made.

**response notice** is the notice given by an affected entity to the responsible entity about an application to make a minor change. The notice must State that the affected entity has no objection to the change, or that the entity objects to the change and the reasons for the objection.

**cancellation application** is an application a person may make to cancel a development approval.

**currency period** is the period for which a development approval is valid and the period after which a development approval will lapse if a particular action for the aspect of development has not taken place.

**extension application** is the application a person may make to extend a part of a development approval that has not yet lapsed.

## **Division 1 Effect of development approval**

### **When development approval has effect**

Clause 68 states when a development approval takes effect and establishes the circumstances that vary when an approval takes effect.

- No eligible submitter or eligible referral agency. If there is no eligible entity for the development application and the applicant does not appeal the decision, the development approval takes effect from the time the development approval is given or taken to have been given to the applicant.
- Eligible submitter or eligible referral agency. If there is an eligible entity for the development application and the applicant or any eligible entity does not appeal the decision, the development approval takes effect from the time the last appeal period ends. However, the development approval may have effect before the appeal period ends if the applicant and all eligible entities notify the assessment manager that they will not be appealing the decision.  
If an appeal has started, the development approval takes effect from the time the appeal ends or is withdrawn.

An eligible submitter is a submitter whose submission was not withdrawn before a decision was made about the relevant development application and who has not given a notice stating they do not intend to appeal. Only eligible submitters have an appeal right.

The clause establishes when a development approval for premises subject to acquisition land when the development application was made, takes effect.

The clause states that the variation approval prevails to the extent of any inconsistency with a local planning instrument applying to the premises. The variation approval applies to the premises for the life of the approval and ceases to apply when the approved development is completed or at the end of the completion period. Failure to complete the approved development before the end of the completion period may result in the development approval lapsing.

The completion period is the period stated in a development condition of a variation approval for development application to be completed. If the completion period is not stated, the period the applicant nominated in the application applies. If no completion period or nominated period applies, the default period of 5 years applies.

### **When development may start**

Clause 69 establishes that development may start when all necessary development permits for the development have been given by each assessment manager and have effect. All development conditions relating to the commencement of development must have also been complied with for development to start.

A planning scheme requires standard assessment for some aspects of building work against stated assessment benchmarks. Under the regulation, the relevant local government is the assessment manager for a development application for these aspects of the building work. The regulation also requires standard assessment for different aspects of the same building work against the building assessment provisions. Under the regulation and the Building Act, the applicant may choose either the relevant local government or a building certifier as assessment manager for these aspects.

If the applicant chooses the relevant local government for both assessments, then only one development permit is necessary. However, if the applicant chooses a building certifier as assessment manager for the aspects of the building work assessable under the building assessment provisions, then development permits from both the local government and the building certifier are necessary development permits for the development, and must both be in effect before the development may start.

The clause clarifies that development may not start if an appeal in relation to a development approval has not started, and may not start until the appeal ends or is withdrawn. However the entity that is hearing the appeal, either the Planning and Environment Court or a development tribunal, may decide to allow all or part of the development to start before the appeal ends.

### **Attachment to the premises**

Clause 70 states that a development approval that is in effect attaches to the land and continues even if a later development is approved. The development approval binds the owner, the owner's successors in title and any occupier of the premises.

The clause clarifies that changes of ownership do not affect the validity of a development approval. By stating that the approval is binding both on the owner and the occupier it makes it clear that if someone other than the owner of the premises is exercising the rights conferred by the approval, they are responsible for complying with the conditions of the approval.

The clause also clarifies that a development approval does not confer or imply any proprietary rights to premises. If an applicant does not own the premises, or has not secured contractual rights or rights to any State resource, they will be unable to benefit from the rights conferred through any approval.

## **Division 2 Changing development approvals**

### **Subdivision 1 Changes during appeal period**

#### **What this subdivision is about**

Clause 71 states that the subdivision applies to a change of a development approval before the applicant's appeal period ends. The subdivision is intended to enable a development applicant and the assessment manager to resolve disputes about conditions and other matters outside the formal appeal system, through a negotiated decision notice.

### **Making change representations**

Clause 72 enables an applicant to make representations seeking changes to a development approval about the matters decided by the assessment manager or the standard conditions applying to a deemed approval. The clause only applies during the applicant's appeal period.

Representations are written submissions about a development approval made by an applicant to the assessment manager during the applicant's appeal period. The making of representations about the development approval does not deny a development applicant the right to appeal the decision.

An applicant may make written representations about for example, the currency period for the approval, a part of a code or a decision to give a preliminary approval instead of a development permit. An applicant can also make written representations to the assessment manager about the standard conditions imposed on a deemed approval in the situation where the assessment manager. This ensures that applicants are able to negotiate with the assessment manager about standard conditions which apply automatically if the assessment manager does not issue a decision notice.

However an applicant may not make written representations about a matter stated in a referral agency response or a development condition imposed under a Ministerial direction. Provisions for representations made by an applicant to a referral agency about its referral agency response for an application will be included in the development assessment rules. Applicants may not make representations to the assessment manager about a refusal of an application. It is more appropriate that a dispute about refusal is resolved through the dispute resolution and appeal process.

At any time within the applicant's appeal period, the applicant may suspend the appeal period to make representations. This enables there is adequate time for an applicant to make representations and for the assessment manager to consider any representations made. However, an applicant may only do this once, and they only have up to 20 business day limit to make representations before the applicant's appeal period restarts.

If representations are made, the balance of the applicant's appeal period when an applicant withdraws the notice to suspend the appeal period, or the day after the assessment manager gives a negotiated decision notice to the applicant or a notice disagreeing with their representations.

### **Deciding change representations**

Clause 73 requires the assessment manager to consider and decide to agree with the representations made by an applicant, or not.

To the extent relevant, the assessment manager is required to have regard to the matters that were applicable to the assessment of development application when making a decision about the representations. The clause establishes the process the assessment manager must follow if they agree to the representations in full or part, or not at all.

- Disagreement with representations. If the assessment manager does not agree all or some of the applicant's representations, the assessment manager must, within 5 business days after the decision is made, give notice of the decision to the applicant.
- Agreement with representations. If the assessment manager agrees with any of the representations, the assessment manager must, within 5 business days give a negotiated decision notice to the applicant. The negotiated decision notice must State the nature of

the agreed changes and comply with the requirements for a decision notice. Where relevant, the assessment manager must also give a copy of the negotiated decision notice to each principal submitter, referral agency and local government for the development application.

The negotiated decision notice replaces the approval or deemed approval for a development application. If the assessment manager is a local government a replacement infrastructure charges notice can also be given to the applicant.

If a negotiated decision notice is given, the balance of the appeal period restarts on the day after the applicant receives the negotiated decision notice. The clause enables the processes and timeframes relating to a development approval to apply to a negotiated decision notice, and with any changes necessary for them to be interpreted.

## **Subdivision 2 Changes after appeal period**

### **What this subdivision is about**

Clause 74 states that the division applies to a change of a development approval, other than a change to the currency period for the approval, after the applicant's appeal period ends. The subdivision is intended to allow for an application to be made for a minor or other change to a development approval, and for assessing and deciding a change application.

### **Making change application**

Clause 75 enables any person to make an application to make a minor change or other change to a development approval. However, for a development approval for infrastructure on designated premises, the person supplying the infrastructure must make the application to change the approval.

A change application is the written application made to the responsible entity, the assessment manager or other entity, to change a development approval. The clause establishes the responsible entity for a change application, which is generally the assessment manager but could also be the Minister, referral agency or Planning and Environment Court, depending on whether the change relates to an approval or a development condition imposed by the assessment manager or another entity.

The clause clarifies that if the Planning and Environment Court or the Minister is the responsible entity, they are required to assess and decide the change application using the process established in this division. However, they are not otherwise bound by the requirements or processes in this division.

### **Requirements for change applications**

Clause 76 establishes the requirements for making a change application for either a minor change or other change to development approval. The clause also requires the responsible entity to accept any properly made change application.

Where applicable, a change application must be in the required form or made by notice, accompanied by the required fee, evidence of the change, the pre-request response notice and owners consent.

The clause clarifies when the consent of the owner is not required, including for acquisition land, servient tenement for an easement, building work for infrastructure on designated premises, and if the change does not materially affect premises, for which consent of the owner has not been able to be obtained. The clause enables a responsible entity to accept a change application even if the application does not include particular supporting information or the consent of the owner, or waive all or some of the required fee. However there is no obligation on the responsible entity to accept and assess a change application that is not properly made.

### **Notifying affected entities of minor change application**

Clause 77 establishes the process for making a change application for a minor change. The clause applies to minor changes only.

A minor change to a development approval is a change that would not result in a substantially different development. A minor change to a development approval may also be a change that if the application were re-made including the change, would not include prohibited development, additional referral other than to the chief executive, or public notification where it was not previously required.

In ascertaining if a change, if the application were re-made to include the change, would be a minor change, the planning instruments or law in effect at the time the change application is made apply. In other words the current, not necessarily the planning instruments and law in effect at the time the development application was made, should be considered to ascertain if the change results in prohibited development, additional referral or public notification. It is the change that should be considered, not the whole application including the change.

The clause does not prevent a change being made simply because a change to a planning instrument or law would now require the development application as it was originally made to include prohibited development, additional referral or public notification. The clause enables a person proposing to make a change application for a minor change to give a copy of the proposal to any affected entity.

An affected entity may in return give the person a pre-request response notice stating whether the entity agrees or objects to the change. This is intended to allow a person to seek agreement of other entities affected by the proposed change, prior to actually making the change application, as a way of making the process more efficient. An affected entity may include the assessment manager, referral agency other than the chief executive, or another entity prescribed by regulation, depending on the responsible entity for the application. The chief executive is not an affected entity, as this process only applies to minor changes to a development approval, which will not result in development that is substantially different to the development that was approved. Therefore, it is not considered necessary for the chief executive, when acting as a referral agency, to be an affected entity and notified of such minor changes to a development approval. Referral agencies, other than the chief executive, will continue to be affected entities and notified of minor changes to a development approval.

If no pre-request response is received, the applicant must give a copy of the change application when made to any affected entity. This must be given as soon as practicable to ensure efficient and effective development assessment practices and allow an affected entity make an appropriate decision. An affected entity must consider the change and give the responsible entity and the applicant a response notice stating whether they entity agree or object to the change and why. If an affected entity fails to provide a response notice within 15 days of receiving the change application, the responsible entity will decide the application as if the affected entity had agreed to the change.

### **Assessing and deciding application for minor changes**

Clause 78 requires the responsible entity to assess and decide a change application for a minor change to a development approval.

- The responsible entity must have regard to the information provided with the change application and where applicable, any submission, pre-request response or response notice. Whilst notification is not required for a minor change, if the development application was publicly notified, the responsible entity will have regard to any submissions made about the original application.
- The responsible entity must have regard to the matters applicable to the assessment of the application, were it a development application in effect at the time the development application was made.
- The responsible entity may also have regard to the matters in effect at the time the change application was made.

After assessing the change application, the responsible entity may approve or refuse the changes or impose conditions or amend the conditions of the development approval, relating to the changes. For example, the responsible entity cannot use the request to impose additional conditions that they omitted to impose on the original development approval. If owners consent is required for the change application, but has not been provided, the responsible entity cannot agree to make a change to a development approval until it is provided, or an easement is granted for a purpose consistent with the change. Conditions imposed on the development approval must also be relevant or reasonable.

The clause establishes timeframes for deciding a change application. If there is no affected entity, the responsible entity must decide the change application within 20 business days after receiving the application. If there is an affected entity, the responsible entity must decide the change application within 25 business days, but not until an affected entity has provided a response notice or until 20 business days have passed. At any time during the 25 day period, the responsible entity and the applicant may agree to extend the period.

### **Assessing and deciding application for other changes**

Clause 79 requires the responsible entity to administer, assess and decide a change application for change other than a minor change, to a development approval.

The clause requires the responsible entity to administer the change application as if it was a development application and the responsible entity was the assessment manager. The processes

relating to assessing and deciding a development application under the Bill and development assessment rules, apply to the change application as if were a development application, and with any changes necessary for them to be interpreted.

The responsible entity must administer the change application as if it were a development application including the change, but made at the time the change application was made. The normal development assessment process will apply to the extent of the change. If public notification would be required for the application including the change because of the change, the change application will be publicly notified and submissions may be made. However, public notification will not be required if the change is for a change other than a minor change, just because additional referral was required.

The clause clarifies that for assessing and deciding the change application, it is the change that should be assessed and decided, not the whole application including the change.

### **Subdivision 3          Notice of decision**

#### **Notice of decision**

Clause 80 requires the responsible entity give notice of their decision on the change application to various entities. These entities may include where relevant, the assessment manager, referral agency, local government, Minister, or Planning and Environment Court, depending on the responsible entity for the application.

The notice must State the day the application was made, the day the development approval was decided and the decision on the change approval. If the change application is approved in full or part, the notice must be accompanied by the changed approval or where applicable, referral agency response including any additional development conditions. If the responsible entity agrees to a change application, the changes have effect at the end of the appeal period, unless an appeal is made against the decision. If there an appeal is started, the changes have effect from the time the appeal ends or is withdrawn.

If the change application is refused, the notice must State the reasons for the refusal, and include the applicants appeal rights.

### **Division 3    Cancelling development approvals**

#### **Cancellation applications**

Clause 81 enables any person to apply to cancel a development approval. However, not if development subject to the approval has started.

The clause only applies if development subject to the approval has not started and no responsibilities under the approval have been undertaken or remain unfulfilled.

The application to cancel a development approval must be made by notice, accompanied by the required fee, and unless consent has been given by the relevant person. If the applicant is not the owner of premises, the application must be accompanied by the owner's consent and in particular circumstances consent of a prospective purchaser of the subject premises and consent of a relevant entity may also be required.

The clause requires the assessment manager to cancel a development approval that complies with the requirements for a cancellation approval and give notice of the cancellation to the applicant and any applicable referral agency. The assessment manager is also required to release any monetary security given in relation to the development approval, if the approval is cancelled.

## **Division 4 Lapsing of and extending development approvals**

### **Lapsing of approval at end of currency period**

Clause 82 clarifies that a development approval lapses at the end of the currency period, if development has not started.

The currency period is either the period stated in the development approval, or where not stated, it is the default period for an aspect of development of a type stated in the clause. The clause is intended to ensure development approvals are subject to lapsing arrangements to ensure that development conforms to current public expectations about the nature and standard of development.

The ability for the assessment manager to vary the currency period as part of the development approval is important, as the nature, scale and staging of development can vary greatly across development approvals. For example, a large, complex residential project may have one or more preliminary approvals for different aspects of the use and require reconfiguration of the premises. In this case it is important that the overarching approvals remain in place for the life of the construction phase of the development, which could be planned to occur over a ten or more year period.

The default currency period of an aspect of development that relates to a material change of use is six years after the approval starts to have effect, unless. For an aspect of development that relates to a reconfiguration of a lot the currency period is four years after the approval starts to have effect. For any other aspect of development the currency period is two years after the approval starts to have effect.

The default period for a material change of use is longer than for a reconfiguration of a lot or for other development, because in many circumstances the establishment of a new use will require other development approvals to be obtained after the material change of use has been approved. For example, the establishment of a new use may also involve the carrying out of building work and it is necessary for the currency period of the material change of use approval to be long enough to cover the work approvals being obtained.

However, a development approval is preserved if the first change of use happens or a plan for the reconfiguration is given to the local government or the development substantially starts within the currency period.

The assessment manager is required to release any monetary security given in relation to an aspect of a development approval, if the aspect lapses.

### **Extension applications**

Clause 83 enables any person to make an extension application to extend the currency period of a development approval, at any time before the currency period ends.

An extension application must be made to the assessment manager. For a development application that was called in, the extension application is made to the original assessment manager.

Where applicable, an extension application must be in the required form or made by notice, accompanied by the required fee, and where relevant accompanied by owners consent. The clause clarifies that the owner's consent is not required for acquisition land, servient tenement for an easement or building work for infrastructure on designated premises. Owners consent is also not required if the assessment manager satisfied that the consent has been unreasonably withheld or is impracticable to obtain.

An extension application that complies with these requirements is considered to be properly made and must be accepted by the assessment manager. The clause enables a responsible entity to accept an extension application even if the application does not include the consent of the owner, or to waive all or some of the required fee. However there is no obligation on the responsible entity to accept an extension application that is not properly made.

### **Assessing and deciding extension applications**

Clause 84 requires the responsible entity to consider an extension application and decide to approve or refuse the extension, or extend the approval for a different period.

The clause establishes timeframes for deciding an extension application. The assessment manager must decide the extension application within twenty business days after receiving the application. However, the assessment manager and the applicant may agree to extend the period.

In deciding an extension application, the assessment manager is not limited to the matters applicable to the assessment of the development application for which the development approval was given. The assessment manager may have regard to any matter the assessment manager considers to be relevant. If owners consent is required for the extension application, but has not been provided, the assessment manager cannot agree to extend the development approval until it is provided. The clause clarifies that the assessment manager decides an extension application, even if the development approval was given because of a Planning and Environment Court order.

The clause requires the assessment manager to give notice of their decision on the extension application to the applicant, and where relevant any referral agency within 5 days after the decision is made. The notice must State the decision and if the extension is refused or approved for a period less than applied for, the notice must include the applicant's appeal rights.

If the assessment manager agrees to the extension to the currency period, the development approval does not lapse until the end of the extended period. If the assessment manager refuses to extend the currency period for the period applied for and no appeal is started, the development approval lapses at the end of the currency period.

If an appeal is started, the development approval lapses the latest of the following days: the currency period ends, the appeal ends or is withdrawn, or a period decided by the Planning and Environment Court.

### **Lapsing of approval for failing to complete development**

Clause 85 establishes when a development approval for a variation approval lapses, if development has started but not been completed.

The clause enables an applicant to nominate a period or periods in their development application for a variation approval. The clause enables an applicant to have the flexibility to nominate different lapsing periods for different stages of development. If the applicant does not nominate a time, a condition of the development approval may State a period within which the development must be completed. An aspect of a variation approval lapses if the development relating to the aspect is not completed either within the period stated in the development approval, or the period stated in the development application.

The clause is intended to ensure the applicant and assessment manager both contribute to establishing a reasonable lapsing period for development approved under a variation approval. Where neither the development approval nor application state a period, the variation approval lapses 5 years after the approval starts to have effect. This ensures that a variation approval does not have indefinite effect once development under the approval substantially starts.

The clause also clarifies a development approval lapses if the approval establishes a completion period for the development, and the development is not completed within the period. However, despite the lapsing the assessment manager is not required to release and may keep the monetary security paid in relation to a development condition to be used in the way stated by the approval, for example to complete the development.

## **Division 5 Noting development approvals on planning scheme**

### **Particular approvals to be noted**

Clause 86 requires a local government to note particular development approvals or decisions on the planning scheme.

A local government must note on the planning scheme any development approval that is substantially different from the planning scheme, and any variation approval given by the local government and any decision to agree to a superseded planning scheme request. This is intended to ensure that the public is aware of any development approvals that are inconsistent with the planning scheme, particularly as due to population changes, a significant portion of the public may not have had an opportunity make a submission on the original development application.

The local government must also give a copy of the notice of the notation and the premises subject to the notation to the chief executive. This ensures that the chief executive can keep current copies of planning scheme information available for public scrutiny.

The clause clarifies that a note does not amend a planning scheme, and failure to note the approval or decision on the planning scheme does not invalidate the approval or decision.

## Part 7 Minister's powers

The purpose of this part is to:

- establish the Minister's powers, and limits on those powers, in relation to the development assessment system;
- enable the Minister to give directions to assessment managers; and
- enable the Minister to call in development applications in certain circumstances.

Terms used in this part include:

**application** (under this part) is an application to which the Minister's powers may apply. This includes a development application, change representation, change application, extension application or a cancellation application.

**decision maker** is either the responsible entity for a change application or the assessment manager.

**call in notice** is the notice given by the Minister in relation to a decision to call in a development application, if a development application involves or is likely to involve a State interest.

**restarting point** is the point in the development assessment process, decided by the Minister, from which the process must restart.

### Division 1 Introduction

#### What this part applies to

Clause 87 establishes the types of applications and the decision makers that this part applies to.

#### Limit on Minister's powers

Clause 88 limits the exercise of the Minister's powers to matters that involve, or are likely to involve, a State interest.

The Minister's powers in relation to the development assessment system are designed to put into place the policy decisions of executive government, and are intended to protect or give effect to the interests to the State in relation to development. The reserve powers of the State government to engage in the development assessment process, are intended to allow a more pro-active and management-based approach to Ministerial involvement in matters of State significance. The Ministerial powers provided in Bill are necessary, even though some are rarely used.

The Minister's powers and exercise of powers are not subject to statutory rights of review or appeal. In other words, a person or entity cannot appeal or seek declarations in relation to a Ministerial power. This is because the Minister's powers are intended to provide finality about decisions regarding State interests, which could be threatened by the potential for ongoing litigation. However the exercise of Ministerial powers is subject to accountability and extensive Parliamentary oversight, primarily through a requirement for the Minister to report to the Legislative Assembly.

### **Minister not required to notify, consult or consider particular material**

Clause 89 clarifies that the Minister, when exercising a power, need not give notice to any person, except when directing the assessment manager or referral agency in relation to a development application. Furthermore the Minister need not consult any person or consider any material when exercising or proposing to exercise a power.

## **Division 2            Minister's directions**

### **Subdivision 1        Directions generally**

#### **Directions generally**

Clause 90 requires a Ministerial direction to state the reasons for the direction and the State interest for which the direction is given. The clause applies in addition to any other requirements for a direction, such as content or a period within which an action must be taken. The clause also requires the recipient of a direction to comply with the direction. Any failure to comply with a Ministerial direction can be considered by the Minister if proposing to exercise another power.

### **Subdivision 2        Directions to decision makers**

#### **Directions to decision makers—future applications**

Clause 91 enables the Minister to direct the decision maker to provide copies of all future development applications for particular development or for a particular area to the Minister.

The intent of the direction power is to enable the Minister to consider whether further action is needed in relation to a development application. For example, the Minister may want to consider calling in an application or issuing a further direction.

A direction to give copies of future applications is given by way of gazette notice to the decision maker. The direction is required to identify the applicable development or area, and State the point in the development assessment process when the development applications are required to be given to the Minister. As with all Ministerial directions, the direction must State the reasons for deciding to give the direction and the State interest giving rise to the direction.

#### **Directions to decision makers—current applications**

Clause 92 enables the Minister to direct the decision maker to take particular actions in relation to a development application.

- The clause enables the Minister to direct the decision maker to take any action under the development process that is their responsibility, or to make a decision about representations and give a negotiated decision notice. The Minister may direct the decision maker to take any or all of these actions.
- The clause also enables the Minister to direct the decision maker to not decide an application, or decide an application if the decision maker has failed to decide the application within the decision-making period. The direction is required to state the period

in which the decision maker must take the action, which must be at least 20 business days after the direction is given.

A direction to not decide an application may also state that the Minister may call in the application or give a further direction at any time before the stated period ends. This direction power may be used, for example, to stop the assessment process to give the Minister time to decide whether to call in the application. However the Minister cannot call in the application after the stated period ends. This ensures that the rights of the applicant are protected, by limiting the number of times the Minister can intervene.

- The clause also enables the Minister to direct the decision maker to decide an application within the decision-making period. If the Minister uses this direction power, the decision maker cannot seek to extend the decision-making period, even with the applicant's agreement. Unlike other direction powers the Minister can give the direction at any time during the development assessment process prior to the application being decided, including for example prior to the decision-making period.
- The clause enables the Minister to direct the decision maker to impose stated development conditions on a development approval, including a deemed approval. However, a direction of this type can only be given if the decision maker has not decided the development application and a deemed approval has not taken effect.

The intent of the direction power in relation to deemed approvals, is to enable the Minister to impose conditions on a development approval, even after an applicant has given a deemed approval notice to the decision maker.

- The clause enables the Minister to direct the decision maker in relation to a change, extension or cancellation application. The Minister can direct the decision maker to impose or amend development conditions on the development approval. This Ministerial power may be exercised for both an application that has been decided or an application has not been decided. As with other Ministerial powers the step in power is intended to allow the Minister to intervene in the development assessment process where State interests are involved.

The development assessment process stops on the day the direction is given and does not restart until does not start until the stated period ends, unless the Minister calls in the application or gives a further direction. If the Minister calls in the application or gives a further direction, the development assessment process restarts on the day the call in or direction is given, subject to any affect the call in notice may have on the process.

The clause requires the Minister, if directing the decision maker to provide copies of all future development applications, to give a copy of the direction to any entity the Minister considers is likely to be the decision maker or referral agency for the particular development application. For any other direction, the Minister must give a copy of the direction to the applicant, decision maker and referral agency, if any is not the recipient of the direction.

### **Report about directions**

Clause 93 requires the Minister to prepare a report about exercising a direction power, including a copy of the direction and the reasons for the decision to give the direction. Within fourteen sitting days after giving a direction to the assessment manager, the Minister must table the report in the Legislative Assembly.

### **Subdivision 3            Directions to referral agencies**

#### **What this subdivision is about**

Clause 94 clarifies that the Ministerial direction powers under this subdivision apply to a referral agency even if the referral agency assessment period for the development application has ended.

#### **Directions to referral agency**

Clause 95 enables the Minister to direct a referral agency to reissue their response or take a particular action in relation to a development application, in particular circumstances.

- Development conditions. If the Minister is satisfied a referral agency's condition does not meet the relevant or reasonable test or is prohibited, the Minister may direct the referral agency to reissue their response to remove or modify the condition.
- Jurisdiction. If the Minister is satisfied a referral agency response is not within its jurisdiction, the Minister may direct the referral agency to reissue their response in a stated way to ensure it is within their jurisdiction.
- Adequate assessment. If the Minister is satisfied a referral agency has not assessed or adequately assessed a development application, the Minister may direct the referral agency to reissue their response in a stated way to ensure adequate assessment of the application.
- Development assessment timeframes. If the Minister is satisfied a referral agency has not completed an action under the development assessment process within the required timeframe, the Minister may direct the referral agency to take the action within a stated period.

#### **Effect of direction**

Clause 96 clarifies that if the Minister gives a referral agency a direction in relation to a development application, the assessment manager must not decide an application until the referral agency response is reissued or the action taken.

### **Division 3    Minister's call in**

#### **What this division is about**

Clause 97 states that this division is about the Minister's power to call in a development application.

#### **Call in notice**

Clause 98 enables the Minister to call in a development application to assess and decide, or reassess and re-decide the development application. A Ministerial call in power may be exercised for both a development application that has been decided and a development application that has not been decided.

As with other Ministerial powers, the call in power is intended to allow the Minister to intervene in the development assessment process, where State interests are involved, and to be the final arbiter on State interest matters. Though not commonly used, occasions may arise where State interests could be severely affected by the implementation of a development approval. In these situations, exercising the reserve power to call the application in and assess and decide, or reassess and re-decide, the application allows the Minister to redress what otherwise could become a serious problem.

A Ministerial call in power is exercised by way of notice to the assessment manager, applicant and where relevant, any referral agency or principal submitter for the application. The notice may be given within 20 business days of either the chief executive receiving a notice of appeal or the end of the appeal period for the development application. The clause sets out the matters the call in notice must State. In particular, reasons for the call in and the State interest for which the call in notice has been given and the Minister's intent to assess and decide, or reassess and re-decide the application.

If a Ministerial call in power is exercised after a development application is decided, the notice must also State the Minister's intent to reassess and re-decide the application and the restarting point. The restarting point is the point in the development assessment process the Minister decides the process for the application must restart. In deciding the restarting point, the Minister may have regard to anything the Minister considers relevant.

If a Ministerial call in power is exercised before a development application is decided, the notice may State that the assessment manager is to assess or continue to assess the development application and refer it back to the Minister for decision.

If a Ministerial call in power is exercised before a development application is decided, the Minister may assess or decide all or part of a development application or direct the assessment manager to assess or continue to assess the application and refer it back for decision. If a Ministerial call in power is exercised after a development application is decided, the Minister may reassess and re-decide the application.

### **Effect of call in notice**

Clause 99 establishes that the Minister is the assessment manager for the development application from the day the Ministerial call in power was exercised until a decision notice is given.

The clause is intended to ensure the development application that is called in is subject to the same development assessment process for assessing and deciding a development application, as other development applications. However, the development assessment process continues from the restarting point stated in the call in notice.

The clause clarifies that for the development application that has been decided, the decision is of no effect and the Minister's decision on the development application is taken to be the original assessment manager's decision. An appeal made before the development application was called in is also of no further effect.

### **Deciding called in application**

Clause 100 establishes that the assessment and decision provisions in this chapter, with the exception of the requirement to give a decision notice, do not apply to the Ministers assessment or decision of a development application that has been called in, or any other decision in relation to a Ministerial call in.

The clause requires the original assessment manager must give the Minister all reasonable assistance to assess and decide, or reassess and re-decide a development application that has been called in, including all available material about the development application.

The Minister may have regard to the common material about the development application and any other matter the Minister considers relevant when making a decision in relation to exercising a Ministerial call in power. The Minister is not bound by any referral agency response.

The requirement to give a decision notice applies to a decision made by the Minister in relation to the call in of a development application, and a copy of the decision notice must be given to all entities that were given the call in notice. Whilst the decision notice given by the Minister, does not have to State some of the matters usually included in a decision notice that not relevant in the case of a call in, the decision notice must State the matters the Minister has considered in making the decision.

A development application that is called in for example, relates to two distinct aspects of development, material change of use and building work. The Minister may decide only one of those aspects, the material change of use, and refer the remaining aspect back to the assessment manager, the building work aspect for assessment under the Building Act.

An undecided part of a development application is referred back to the assessment manager by way of notice. The notice must State the restarting point in the development assessment process the Minister decides the process for the undecided part of the application must restart.

### **Report about call ins**

Clause 101 requires the Minister to prepare a report about deciding all or part of a called in development application, including a copy of the decision notice, and the nature of the decision and matters considered when making the decision. Within fourteen sitting days after deciding the development application, the Minister must table the report in the Legislative Assembly.

## **Part 8      Miscellaneous**

The purpose of this part is to establish provisions regarding miscellaneous matters related to the development assessment system.

### **Valid use or preservation covenants**

Clause 102 states that a use or preservation covenant entered into in relation to a development approval is of no effect unless it is entered into as a requirement of a condition of the approval or under an infrastructure agreement.

The clause is intended to prevent covenants being entered into in anticipation of an approval, and provides applicants with rights of appeal if they consider a requirement for a covenant is unwarranted.

The clause establishes the process if a covenant under a development condition or infrastructure agreement is removed due to the development approval lapsing or the agreement being cancelled. Where applicable, the covenantee must register an instrument releasing the covenant.

The clause establishes a process if a development condition or infrastructure agreement is changed in a way that affects the covenant. Where applicable, the covenantee and covenantor must execute and register an instrument that amends the covenant to reflect the change.

### **Regulation prevails over local categorising instruments whenever made**

Clause 103 clarifies that if any clause in the chapter states that a local categorising instrument must not provide for a matter prescribed in the regulation, the local categorising instrument cannot provide for that matter.

For example, a local categorising instrument cannot make development prohibited development if the regulation does not permit the development to be prohibited development or makes the development accepted or assessable development.

The clause clarifies that irrespective of when a local categorising instrument takes effect, the regulation prevails over a local categorising instrument to the extent of the inconsistency.

### **Power to refund or waive fees**

Clause 104 clarifies that a person requiring a fee for a development application, including the assessment manager or referral agency, has the discretion to refund or waive payment of all or part of the required fee. However there is no obligation for any person to do so.

## Chapter 4 Infrastructure

### Part 1 Introduction

The purpose of this part is to establish interpretive provisions for the infrastructure matters provided for in this chapter.

#### What this chapter is about

Clause 105 provides an outline of the contents of the chapter.

### Part 2 Provisions for local governments

The purpose of this part is to enable:

- a local government to adopt and levy charges for development infrastructure for trunk infrastructure;
- the Regulation to govern local government adopted charges and distributor-retailer charges for trunk infrastructure under the South East Queensland (Distribution and Retail Restructuring) Act 2009; and
- a local government to impose particular conditions about development infrastructure for trunk infrastructure and non-trunk infrastructure.

Terms used in this part include:

**maximum adopted charge** is the maximum charge for the supply of trunk infrastructure adopted in the Regulation and amended over time.

**charges resolution** is the resolution a local government makes to adopt charges for providing trunk infrastructure for development. A charges resolution is the method by which a local government can adopt charges.

**adopted charge** is the charge a local government may adopt, under a charges resolution, for providing trunk infrastructure for development. The adopted charge cannot be more than the maximum adopted charge prescribed by the Regulation.

**automatic increase provision** is a provision that may be included in a charges resolution. An automatic increase provision enables a levied infrastructure charge to be adjusted according to the length of the period between when it was levied to when it is paid. An automatic increase provision is required to State how increases are to be determined.

**3-yearly PPI index average** is the producer price index (PPI) index for Queensland road and bridge construction smoothed in accordance with the 3-year moving average quarterly percentage change between quarters.

**breakup agreement** is an agreement a local government and a distributor-retailer enter into about the proportion of maximum adopted charges each has responsibility for.

**infrastructure charges notice** is the notice given to an applicant by a local government levying an adopted charge for providing trunk infrastructure for development for which a development

approval has been given. The infrastructure charges notice is the notice as originally given, and includes the notice as amended or replaced.

**levied charge** is the amount levied on an applicant for a charge for the supply of development infrastructure worked out by applying the adopted charge. A levied charge is the charge levied by an infrastructure charges notice.

**charges notice** is an infrastructure charges notice or levied charge under the repealed Act.

**infrastructure requirement** is a charges notice, or a condition of a development approval, that requires infrastructure or a payment in relation to demand on trunk infrastructure.

**negotiated notice** is a replacement infrastructure charges notice given by the local government if they agree to change an infrastructure charges notice.

**subject premises** is the premises the subject of a development application. Premises may include a building, other structure or premises. Subject premises relates to the conditioning for necessary trunk infrastructure.

**necessary infrastructure condition** is a development condition that a local government may impose requiring the provision of trunk infrastructure necessary to service premises the subject of a development application. A necessary infrastructure condition may be imposed if trunk infrastructure necessary to service premises the subject of a development application has not been provided, or has been provided but is inadequate.

**additional payment condition** is a development condition that a local government may impose requiring the payment of additional trunk infrastructure costs. However, an additional payment condition can only be imposed if the local government's planning scheme contains a local government infrastructure plan which does not provide for the proposed development or not within the timeframe required by the proposed development.

**payment time** is the time when the payment of additional trunk infrastructure costs become payable.

**conversion application** is an application made to a local government by an applicant given a development approval, where a condition of the development approval requires non-trunk infrastructure to be provided, to convert the non-trunk infrastructure to trunk infrastructure. If the conversion application is approved, the condition requiring the provision of the non-trunk infrastructure no longer has effect.

## **Division 1 Preliminary**

### **Application of pt 2**

Clause 106 states that this part, with the exception of clause 107 and division 5, only applies to a local government if the local government's planning scheme includes an LGIP.

## **Division 2 Charges for trunk infrastructure**

### **Subdivision 1 Power to adopt charges**

### **Regulation prescribing charges**

Clause 107 enables the Regulation to provide a maximum charge for the supply of trunk infrastructure for development under the Bill and under the South East Queensland Water (Distribution and Retail Restructuring) Act 2009.

Trunk infrastructure is higher order infrastructure that is intended primarily to provide network distribution and collection functions. A local government plans for the supply of trunk infrastructure as part of its LGIP.

The clause enables the Minister to index the maximum adopted charges in accordance with the moving three year average of the producer price index for Queensland road and bridge construction available from the Australian Bureau of Statistics.

In addition to providing a maximum charge for the supply of trunk infrastructure, the Regulation may also establish the following:

- Charges breakup. The Regulation may identify a charges breakup between a local government and a water distributor retailer of the local government.
- Application of an adopted charge. The Regulation may identify development under the Bill to which an adopted charge may apply or land uses under the South East Queensland Water (Distribution and Retail Restructuring) Act 2009 to which an adopted charge may apply for trunk infrastructure.
- Parameters for infrastructure offset or refund calculations. The Regulation may identify parameters for working out the cost of infrastructure for offset or refund that are required to be included in a charges resolution.

The clause clarifies that the Regulation may identify a PIA for a local government area. However, this is only until 1 July 2016; the day by when a local government's PIA needs to be included in their planning scheme.

### **Power to adopt charges by resolution**

Clause 108 enables a local government to set infrastructure charges for providing trunk infrastructure for development through a charges resolution.

A charges resolution is a resolution to adopt charges for providing infrastructure for all or part of the local government area; it does not levy an infrastructure charge. A charges resolution is intended to provide information particularly for applicants and industry about the infrastructure costs they would be liable for when undertaking a project.

A charges resolution cannot adopt a charge for work or use of premises authorised under the Greenhouse Gas Storage Act 2009, Mineral Resources Act 1989 or the Petroleum Act 1923 or Petroleum and Gas (Production and Safety) Act 2004. A charges resolution also cannot adopt a charge or for development in a priority development area under the Economic Development Act 2012, or under a designation.

## **Subdivision 2 Charges resolutions**

### **Contents—general**

Clause 109 enables a local government to set an adopted charge, if permitted under the Regulation, at any amount less than or equal to the prescribed maximum adopted charge for the development.

There may be different charges for the same development in different parts of a local government area or no charges for all or part of a local government area. The clause is intended to give a local government the flexibility to use charges to help manage growth and development in their area in line with local community needs and expectations.

The clause allows for the adjustment of infrastructure charges for inflation over time. A charges resolution can include an automatic increase provision which provides for the automatic increase of an infrastructure charge levied in relation to a development approval for the period between the day the charge is levied and the day the charge is paid. The charges resolution is required to include information regarding how an automatic increase to a levied charge is to be calculated.

The indexation cannot be more than the lesser of either:

- the difference between the levied charge and the maximum adopted charge at the time the charge is paid; or
- the increase in the producer price index for Queensland road and bridge construction between the time the charge is levied and the time it is paid.

Use of the producer price index for Queensland road and bridge construction as published by the Australian Bureau of Statistics is consistent with the indexation of the maximum adopted charges. For the indexation of levied charges, the producer price index for Queensland road and bridge construction is to be smoothed in accordance with the 3 year moving average quarterly percentage change between quarters. The intent of smoothing the raw index data in this way is to eliminate short-term fluctuations that may unfairly advantage an applicant that received an infrastructure charges notice or a local government that levied a charge.

### **Provisions for participating local governments and distributor-retailers**

Clause 110 enables a relevant local government and a distributor-retailer to enter into an agreement about the proportion of maximum adopted charges each may levy for trunk infrastructure.

A breakup agreement is an agreement about the charges breakup and it prevails over a charges breakup prescribed under the Regulation. If a breakup agreement exists, a local government is limited, when levying an adopted infrastructure charge, to the agreed proportion of the adopted infrastructure charge. However, if a participating local government and the relevant distributor-retailer have not entered into a breakup agreement, the proportion of the adopted infrastructure charge that may be levied by the local government will be as set under the Regulation.

The clause applies to a local government with a distributor-retailer for their water and wastewater services and the distributor-retailers. A charges resolution of a participating local government must include a charges breakup for all adopted charges. The requirement to State a charges breakup in the charges resolution exists regardless of whether the charges breakup is established under the Regulation or a breakup agreement. This provides greater transparency in terms of the portion of charges an applicant can expect to be levied from a distributor-retailer and a local government.

Neither the local government nor a distributor-retailer may adopt an infrastructure charge that is more than their proportion of the maximum adopted charge under the charges breakup. Additionally, whether the charges breakup is set through a breakup agreement or in the Regulation,

both the local government and the distributor-retailer may decide to charge at any amount equal to or below their proportion under the charges breakup, of the maximum adopted charge.

The clause also establishes the arrangements to apply in the instance where a participating local government has an existing charges resolution and the local government and distributor- retailer then enter into a breakup agreement that specifies a different charges breakup to that in the existing resolution.

### **Working out cost of infrastructure for offset or refund**

Clause 111 requires a charges resolution to include a method for working out the cost of infrastructure subject to an offset or refund.

The method is intended to be used when the value of infrastructure in an LGIP, which is the subject of an offset or refund, is out-dated or incorrect. The method provided in the charges resolution must outline the local government's preferred approach for determining the actual value of the infrastructure at the time of the relevant development approval. It must also be consistent with the parameters prescribed under the Regulation.

### **Criteria for deciding conversion application**

Clause 112 requires a charges resolution to include criteria for assessing and deciding a conversion application. The criteria must be consistent with parameters provided for in a statutory guideline made by the Minister and prescribed in the Regulation.

### **Steps after making charges resolution**

Clause 113 establishes how a charges resolution is to be kept and when it takes effect.

A local government is required to upload and keep a copy of the charges resolution on the local government's website, so that applicants can access the current version of the charges resolution. A local government is also required to attach the charges resolution to all copies of the planning scheme that it publishes or distributes, however a charges resolution is not part of the planning scheme.

A charges resolution will have effect on either the uploading of the document or on a later day stipulated in the charges resolution. The charges resolution is required to include the day it commences.

## **Subdivision 3 Levying charges**

### **When charge may be levied and recovered**

Clause 114 requires a local government to give an infrastructure charges notice if a development approval has been given and if an adopted charge applies to providing the trunk infrastructure for the development.

The clause is intended to enable a local government to levy and recover infrastructure charges, to ensure a local government can adequately recover costs associated with infrastructure works required to accommodate the increases in demand placed on networks from development. The clause also establishes requirements for levying and recovering a levied charge.

Infrastructure charges are levied as a user charge, not a condition on a development approval. However, a local government can impose a necessary infrastructure condition and additional payment condition for trunk infrastructure. Infrastructure charges are intended to be calculated to avoid over-specification and be fairly apportioned among anticipated users.

A local government may only levy an infrastructure charge for development infrastructure, including for public parks, or basic services for an identifiable user, such as water supply, sewerage, roads and parks. A local government is required to identify what it considers to be trunk infrastructure and the provision of this infrastructure in its LGIP.

The clause specifies when a local government is required to give an infrastructure charges notice to the applicant, as follows:

- Local government is assessment manager - as soon as possible after the development approval is given.
- Local government is referral agency - within 10 business days after a copy of the development approval is received.
- Deemed approval - within 20 business days after the deemed approval notice is received.
- All other cases - within 20 business days after a copy of the development approval is received.

An infrastructure charges notice lapses if the development approval to which the infrastructure charges notice applies, stops having effect. This may include the development approval lapsing or being cancelled.

The clause enables the processes outlined in the chapter to apply to a change application or an extension application as if they were a development application, and with any changes necessary for them to apply to a change application or extension application.

The clause states how particular terms used in the chapter should be interpreted:

- The meaning of development application is extended to include a change application and an extension application; so that each type of application does not have to be listed in every provision development application is named.
- The meaning of applicant for a development approval is extended to include an applicant for a change application and or extension application, so that each type of applicant does not have to be listed in every provision applicant for a development approval is named.
- The meaning of development approval is extended to include an approval of a change application and an approval of an extension application, so that each type of approval does not have to be listed in every provision development approval is named.
- The meaning of giving of a development approval is extended to include giving of an approval of a change application and giving of an approval of an extension application; so that each type of approval does not have to be listed in every provision giving of a development approval is named.

It is intended that the extended interpretations apply wherever the terms are used in the chapter and with any changes necessary to enable the provisions to apply to a change application or an extension application.

The clause also clarifies how particular commonly used terms should be interpreted when applying the provisions of the chapter to a change approval or an extension approval, as follows:

- A reference to a power to give infrastructure charges notice is a reference to a power to give or amend an infrastructure charges notice for the changed development approval or development approval to which the extension approval applies.
- A reference to an infrastructure charges notice is a reference to an infrastructure charges notice that has been given or amended.
- A reference to giving a development infrastructure charges notice is a reference to giving a change approval or an extension approval.
- A reference to a power to impose a particular condition on a development approval is a reference to amend the development approval the subject of a change application, to impose or change a particular condition.
- A reference to a development approval or condition of a development approval is a reference to the development approval that has been amended or the condition.

The clause ensures a local government cannot seek to enforce higher charges where a change to the development approval has no impact on the scale of development. A local government can only amend an infrastructure charges notice for a development approval changed under the change approval and to the extent the amendment relates to the change to the development approval.

An amended infrastructure charges notice must be given at the same time or as a soon as practicable after the change approval is given to the applicant, or within 20 business days of the local government receiving a copy of the change approval. The amended infrastructure charges notice replaces the infrastructure charges notice. Similarly, a local government can only amend an infrastructure charges notice for a development approval to which the extension approval relates, to the extent the amendment relates to the extension of the development approval.

A charge (a levied charge) under an infrastructure charges notice is subject to clause 115 and any offset or refund requirements, is payable by the applicant, is attached to the premises and can be subject to an agreement under this chapter.

### **Limitation of levied charge**

Clause 115 ensures that a levied charge is only levied for additional demand placed on trunk infrastructure by a development.

The clause prevents the existing lawful use of a site or the existing rights to develop a site from being considered additional demand, unless an infrastructure requirement that applies or applied to the use or development has not been complied with.

The existing lawful use of a site or the existing rights to develop a site may be recognised by a local government through a discounted infrastructure charge, commonly known as a credit.

### **Requirements for infrastructure charges notice**

Clause 116 establishes the information required to be included in an infrastructure charges notice.

An infrastructure charges notice is required to State the amount the charge, how it has been worked out, the premises, when it is payable and where applicable, details of an automatic increase provision. The clause requires that where an offset or refund is to be provided, information about that offset or refund and when it will be given, are included in the infrastructure charges notice.

#### **Subdivision 4 Payment**

##### **Payment triggers generally**

Clause 117 establishes when levied charges become payable. Each payment trigger is dependent on the type of development approval the infrastructure charges notice relates to.

The aspects of development listed operate in a hierarchical manner on the basis that the infrastructure required to service a development will be required while the works for reconfiguring a lot or building work are being carried out.

- Reconfiguring a lot. For approval for reconfiguring a lot, levied charges become payable when the plan of subdivision is approved.
- Building work. For building work, levied charges become payable when the final inspection notice has been given.
- Material change of use. For approval for material change of use, levied charges become payable when the change happens.
- Other development. For all other development, the levied charges become payable on the day stated in the infrastructure charges notice.

The clause is subject to any agreement about how the levied charge is to be paid including the timing of payment, or providing infrastructure instead of paying all or part of the levied charge.

##### **Agreements about payment or provision instead of payment**

Clause 118 enables an applicant that received an infrastructure charges notice to enter into an infrastructure agreement with the relevant local government about payment or an alternative to paying the charges. An infrastructure agreement may include how the levied charge is to be paid including the timing of payment, or providing infrastructure instead of paying all or part of the levied charge. Enabling development applicants and a local government to enter into an infrastructure agreement provides flexibility for paying infrastructure charges or providing infrastructure.

#### **Subdivision 5 Changing charges during relevant appeal period**

##### **Application of sdiv 5**

Clause 119 states that this subdivision applies to the recipient of an infrastructure charges notice.

### **Representations about infrastructure charges notice**

Clause 120 enables an applicant to make written representations to the local government about an infrastructure charges notice during the relevant appeal period.

A local government must consider the representations and decide to agree with some or all of the representations or decide not to agree to any of the representations. Within 10 business days of making a decision, the local government must either give the applicant a negotiated notice or a notice stating the decision not to agree to a representation or representations.

A local government may only give a negotiated notice once. A negotiated notice must be in the same form as the infrastructure charges notice and State the nature of the changes. The negotiated notice replaces the original infrastructure charges notice.

If a local government gives a notice stating the decision not to agree to a representation or representations, the relevant appeal period for the infrastructure charges notice starts again.

### **Suspension of relevant appeal period**

Clause 121 enables an applicant to suspend the relevant appeal period for an infrastructure charges notice.

An applicant may give a notice to the local government to suspend the relevant appeal period for an infrastructure charges notice if they need more time to make written representations. However, the applicant may only give a notice of suspension once.

The notice of suspension enables the relevant appeal period to be extended for 20 business days, after which time the balance of the relevant appeal period resumes. However, if representations are made before the 20 business days have passed, and the applicant gives a notice to the local government to withdraw the notice of suspension, then the balance can resume the next day.

## **Division 3 Development approval conditions about trunk infrastructure**

### **Subdivision 1 Conditions for necessary trunk infrastructure**

#### **Application and operation of sdiv 1**

Clause 122 states that this subdivision applies if trunk infrastructure necessary to service the premises, the subject of a development application, has not been provided or is inadequate.

#### **Necessary infrastructure condition for LGIP-identified infrastructure**

Clause 123 enables a local government to impose a development condition about the provision of infrastructure, where adequate trunk infrastructure necessary to service the premises the subject of a development application has been identified in the LGIP.

The clause enables a local government to condition the item of infrastructure specified in the LGIP or a different item of infrastructure, provided the infrastructure provides the same standard of service. This allows a local government flexibility to respond practically and to the specifics of the proposed

development, when imposing a development condition on a development approval. At the same time, the clause safeguards the community and persons who have paid infrastructure charges by requiring the same standard of service to be delivered.

### **Necessary infrastructure condition for other infrastructure**

Clause 124 enables a local government to impose a development condition about the provision of infrastructure, where adequate trunk infrastructure necessary to service the subject premises of a development application has not been identified in the LGIP.

The clause enables a local government to mitigate the cost of providing trunk infrastructure to unanticipated or out of sequence development. However, a local government can only impose a development condition if the infrastructure is development infrastructure that is consistent with nature and scale of future development identified in the LGIP. This is because detailed assumptions about the type, location and timing of development required to support such a condition would need to be available.

The premises the subject of the development approval must also be completely inside the priority infrastructure area (PIA), as this is the area for which trunk infrastructure planning must be carried out as part of the plan making process.

The intent of the clause is to enable the local government to calculate the trunk infrastructure necessary for the premises, at the time a development application is considered. This is because it is not always possible for a local government to predict and identify the trunk infrastructure necessary to service all future development.

### **Deemed compliance with relevant or reasonable requirements**

Clause 125 enables a necessary infrastructure condition to be relevant or reasonable requirement consistent with the requirements for a development condition.

A necessary infrastructure condition may be imposed for infrastructure which services the subject premises and other premises in the general area of the subject premises. A necessary infrastructure condition is relevant and reasonable if the infrastructure is necessary to service the development and providing the infrastructure is the most efficient and cost-effective option for servicing the area. Before imposing the condition, a local government must be satisfied requiring construction of the infrastructure specified in the condition is the most efficient and cost effective means of servicing the development, taking into account the likely cost of the non-trunk infrastructure connection which would otherwise have to be supplied to service the premises and any charges which would also be applicable in these circumstances.

If the infrastructure is required to be provided on the subject premises, the infrastructure must also not be an unreasonable imposition on the proposed development or the resulting use of the subject premises.

### **Offset or refund requirements**

Clause 126 requires a local government to give an offset or refund for trunk infrastructure to be provided under a necessary infrastructure condition if the infrastructure will service premises other than the subject premises, and an adopted charge applies to the development.

The clause is intended to enable a local government to require an applicant to supply the required trunk infrastructure, but refund the applicant the cost of the infrastructure not attributable to the premises as infrastructure charges are received for the subsequent development of other premises.

If the cost of the trunk infrastructure to be provided under the condition is equal to or less than the adopted charge that applies to the development, the cost must be offset against the adopted charge. It is intended that the infrastructure charge levied on the development by the local government, take into consideration the cost of the trunk infrastructure provided. The remaining infrastructure charge value is the charge payable by the applicant.

If the establishment cost of the trunk infrastructure to be provided under the condition is valued at more than the adopted charge that applies to the development, the applicant is not required to pay a charge for that network and is entitled to a refund of the difference. There is also no amount payable for the development approval. It is intended that an applicant should be refunded the proportion of the establishment cost of the trunk infrastructure that exceeds the charge that applies to the development. The local government and the applicant agree to the timing of the refund.

### **Subdivision 2 Conditions for additional trunk infrastructure costs**

#### **Power to impose**

Clause 127 enables a local government to impose an additional payment condition requiring the payment of additional trunk infrastructure costs in certain circumstances.

The ability of a local government to impose a condition requiring an applicant to pay the additional costs of supplying trunk infrastructure is dependent on the ability to demonstrate in that there will be additional costs in supplying the infrastructure. A local government can only impose an additional payment condition to the extent a proposed development is inconsistent with the following development assumptions in the LGIP:

- Type or scale of development. If a proposed development is anticipated to generate more trunk infrastructure demand than identified in the LGIP, additional payment may be levied for the costs associated increased demand.
- Timing of development. If a proposed development would require trunk infrastructure to be available earlier than identified in the LGIP, additional payment may be levied for the costs associated with early provision of the infrastructure.
- Development outside the PIA. If the premises for a proposed development are wholly or partly outside of the PIA, additional payment may be levied for the costs associated with development outside of the PIA.

A local government must also take into account infrastructure charges levied for the development and the trunk infrastructure provided or to be provided by the applicant.

The clause prevents a local government imposing an additional payment condition for a supplier of State infrastructure. This is because those State infrastructure providers have their own specific powers to impose conditions about infrastructure.

The clause modifies the requirement for a development condition to ensure an additional payment condition is considered relevant or reasonable to the extent the infrastructure is necessary but not yet available to service the subject development. This applies even if the infrastructure is also intended to service other development.

### **Content of additional payment condition**

Clause 128 establishes the information that must be included in an additional payment condition and when the amount of the payment is payable.

The clause requires a local government to identify the additional costs the development would impose and details for trunk infrastructure for which the payment is required. If the infrastructure the subject of the condition is necessary to service the premises, the payment is required to be made on the day works associated with the development commence.

Paying for necessary infrastructure at the time construction commences is intended to ensure the infrastructure is available by the time construction for the development is completed. Otherwise, the payment must be made prior to plans of subdivision being approved or the use commencing.

### **Restriction if development completely in PIA**

Clause 129 limits the payment a local government can levy under an additional payment condition for development within the PIA.

- Early infrastructure. If additional costs are the result of a local government having to supply trunk infrastructure to service the development earlier than anticipated in the LGIP, the local government can only condition the applicant to pay the additional establishment cost of the infrastructure.
- Additional infrastructure. If the additional costs are the result of development for a different type of use or greater scale than anticipated in the LGIP, the local government can only condition the applicant to pay the establishment cost of the additional infrastructure. These costs would be additional to the amounts levied under the local government's infrastructure charges resolution.

### **Other area restrictions**

Clause 130 limits the payment a local government can levy under an additional payment condition for development outside or partly outside of the PIA.

The payment that can be levied outside the PIA is considerably broader than for development within a PIA, because development outside a PIA is not planned for by the local government through its LGIP. While development in areas where infrastructure is available or planned to meet anticipated future development demands is preferred, the clause does not prevent development occurring outside a PIA or in ways not anticipated in the LGIP. The clause is intended to ensure applicants for

development outside the PIA, not the community as a whole, are responsible for paying the full cost of infrastructure made necessary by the development.

- Necessary infrastructure. If the infrastructure is necessary to service the development and the premises is identified for future urban development, the local government can condition the applicant pay the establishment cost of the infrastructure. That is premises identified for future development other than for rural or rural residential purposes. In these areas the trunk infrastructure made necessary by the development includes the infrastructure necessary to service the balance of the area in which the premises is located.

In some cases it may not be practical or desirable for the infrastructure to be supplied for a single development. In these cases temporary infrastructure may be more appropriate.

- Temporary infrastructure. If the temporary infrastructure is necessary to service the development, the local government can condition the applicant to pay either or both the establishment costs required to ensure the safe and efficient operation of infrastructure needed to service the development and establishment costs of the infrastructure made necessary by the development.

Where temporary infrastructure is required, the clause enables a local government to recover the cost of decommissioning and removing the infrastructure and rehabilitating the site.

Provision is also made for maintenance and operating costs of the necessary and temporary infrastructure costs for a period of up to 5 years. This is to minimise costs for a local government for development occurring in areas that have not necessarily been planned for in terms of the supply of infrastructure. The 5 year maintenance and operating period is a sufficient time for a local government to update its infrastructure planning to take account of development approved outside the PIA.

### **Refund if development in PIA**

Clause 131 requires a local government to refund a proportion of the establishment cost of infrastructure if an additional payment condition has been imposed on development within the PIA.

### **Refund if development approval ceases**

Clause 132 requires a local government to refund the unspent part of a payment paid under an additional payment condition, if the development approval ceases to have effect and construction of the infrastructure has not substantially started.

For an additional cost payment to be repaid, the development approval for which the payment was required must no longer have effect, the additional cost payment must have been made, and the infrastructure for which the payment was made had not been supplied. If however the local government had already supplied or commenced supplying the infrastructure for which the payment was required, it is only required to repay the proportion of the payment not spent on or committed to, through detailed design costs or construction contractual arrangements, supplying the infrastructure.

The timing of the refund is to be determined through an agreement between the local government and the payer.

### **Additional payment condition does not affect other powers**

Clause 133 clarifies that the imposition of an additional payment condition does not affect a local government's ability to adopt and levy a charge for trunk infrastructure, impose a condition for non-trunk infrastructure or impose a necessary infrastructure condition. An additional payment condition applies as well as these other routine infrastructure charges.

### **Subdivision 3 Working out cost for required offset or refunds**

#### **Process**

Clause 134 enables an applicant to require a local government to recalculate the establishment cost of trunk infrastructure, using the method provided for under the relevant charges resolution, for the purpose of determining the value of an offset or refund.

The clause is intended to provide an applicant with a consistent process for confirming the value of trunk infrastructure to be provided, where the applicant is dissatisfied with the planned value of the infrastructure, as identified in the LGIP.

An application for recalculating a charge must be made before the original charge becomes payable. This provides finality for a local government on when these types of applications can be made.

Where an applicant requests the local government use the process identified in its LGIP to determine the value of an offset or refund, the local government must amend the existing infrastructure charges notice to reflect the new valuation.

## **Division 4 Miscellaneous provisions about trunk infrastructure**

### **Subdivision 1 Conversion of particular non-trunk infrastructure before construction starts**

#### **Application of sdiv 1**

Clause 135 states that the subdivision applies to a development condition requiring the provision of non-trunk infrastructure and the construction of the infrastructure has not started.

#### **Application to convert infrastructure to trunk infrastructure**

Clause 136 enables an applicant to apply to the local government to convert non-trunk infrastructure to trunk infrastructure.

An application to convert non-trunk infrastructure to trunk infrastructure is a conversion application. A conversion application can only be made in writing within one year after the development approval starts to have effect and can only be about non-trunk infrastructure that the applicant has been conditioned to provide.

### **Deciding conversion application**

Clause 137 requires a local government to consider and decide a conversion application that it receives.

The clause requires a local government to use criteria, set out in its charges resolution, as the basis for making a decision on a conversion application. The clause is intended to ensure decision making for conversion applications is transparent and consistent.

As part of making a decision about a conversion application, a local government may give a notice to the applicant requiring additional information that is needed to make the decision. The notice must state the information to be provided and a period of at least 10 business days in which to respond. If the additional information is not provided within the period stated in the notice, or a longer period as agreed to by the local government and the applicant; the conversion application lapses.

A local government must decide a conversion application that has not lapsed, within 30 business days from the day the application is made or an information request for the application is complied with.

### **Notice of decision**

Clause 138 requires a local government to notify the applicant of a decision to agree to or refuse a conversion application as soon as possible after making the decision.

If a local government decides to agree to a conversion application to convert the non-trunk infrastructure to trunk infrastructure, the notice must provide details of any applicable offset or refund. If a local government decides to refuse a conversion application, the notice must be an information notice about the reasons for the decision and identify the applicant's appeal rights in relation to the decision.

### **Effect of and action after conversion**

Clause 139 enables a local government to impose a necessary infrastructure condition on a development approval if the local government decides to agree to a conversion application.

If a local government decides to agree to convert non-trunk infrastructure to trunk infrastructure, any development condition requiring non-trunk infrastructure to be provided no longer applies to the development approval.

Instead, the local government can amend the development approval to impose a necessary infrastructure condition for the trunk infrastructure condition the subject of the conversation application. Enabling a local government to impose a new condition for trunk infrastructure ensures that the infrastructure required is not inconsistent with the local government's infrastructure planning.

However, a local government only has 20 business days to amend the development approval after making a decision to agree to a conversion application. If a necessary infrastructure condition for trunk infrastructure is imposed, the local government is required to either give an infrastructure charges notice or amend an existing infrastructure charges notice to reflect any applicable offset or refund requirements.

## **Subdivision 2 Other provisions**

### **Financial provisions**

Clause 140 requires a levied charge paid to a local government to be used to provide trunk infrastructure.

However, the levied charges received do not need to be used to provide infrastructure for a particular trunk infrastructure network or location within the local government's area. The clause clarifies that a payment made to a local government for a levied charge does not need to be held in trust.

### **Levied charge taken to be rates**

Clause 141 states that a levied charge is taken to be rates of the local government, so that a local government can use the powers under the Local Government Act for recovering unpaid rates to recover unpaid infrastructure charges.

The clause clarifies that the classification of a levied charge as rates is subject to the details of any agreement between a local government and an applicant. An agreement may state that the levied charge is a debt owing to the local government and therefore the option of recovering the unpaid charge as a rate is not available.

## **Division 5 Non-trunk infrastructure**

### **Conditions local governments may impose**

Clause 142 enables a local government to impose particular development conditions for non-trunk infrastructure.

Non-trunk infrastructure comprises those elements of an infrastructure network not defined as trunk infrastructure in a local government's LGIP. Generally, it is lower order infrastructure that is primarily intended to provide direct user connections to the infrastructure network, including internal reticulation networks, internal local streets, stormwater quality improvement devices servicing premises and external works to connect to services.

A local government may impose a development condition about providing development infrastructure for an internal network, connection to an external network, or protecting or maintaining a network the non-trunk infrastructure is a part of.

The clause requires a condition for non-trunk infrastructure to specify the infrastructure to be provided and when. If an applicant wants to pay the local government to provide the infrastructure instead, the parties may enter into an infrastructure agreement.

## **Part 3 Provisions for State infrastructure providers**

The purpose of this part is to:

- enable a State infrastructure provider to impose particular infrastructure conditions on development approvals about protecting or maintaining the safety or efficiency of infrastructure; and
- establish requirements for imposing conditions.

Terms used in this part include:

**State-related condition** is a development condition a State infrastructure provider may impose on a development approval about infrastructure and works to protect or maintain infrastructure operation.

**public passenger transport** is the carriage of passengers by a public passenger service using a public passenger vehicle as defined under the Transport Operations (Passenger Transport) Act 1994.

**public passenger transport infrastructure** is infrastructure for, or associated with, the provision of public passenger transport.

**safety or efficiency** (of infrastructure) is the safety of any users of the infrastructure and of others affected by the infrastructure, and the efficiency of the use of the infrastructure. It is the State infrastructure provider's common conditioning power.

#### **Power to impose conditions about infrastructure**

Clause 143 enables a State infrastructure provider to impose a State-related condition on a development approval about infrastructure or works to protect or maintain the operation of infrastructure.

A State infrastructure provider is either the chief executive or a public sector entity, other than a local government or distributor-retailer, which provides State infrastructure or administers a regional plan.

A State-related condition can only be about protecting or maintaining the safety or efficiency of State-owned or controlled transport infrastructure, public passenger transport or transport infrastructure, or infrastructure under the Transport Infrastructure Act 1994. If the chief executive is the State infrastructure provider, the chief executive can impose a State-related condition for another State infrastructure provider.

#### **Content of State-related condition**

Clause 144 requires a State-related condition to State details of the infrastructure or works to be provided or the contribution to be made, and when.

A State infrastructure provider can require the applicant to either provide the infrastructure or works, or make a contribution towards the cost of the infrastructure or works. A State-related condition must the infrastructure to be provided or contribution to be made, and when the infrastructure must be provided or the payment made.

#### **Refund if State-related condition ceases**

Clause 145 requires a public sector entity to refund the unspent part of a payment paid under a State-related condition, if the development approval ceases to have effect and construction of the infrastructure has not substantially started.

The clause applies where a State infrastructure provider imposed a State-related condition under which a payment has been made and the development approval stops having effect and the development does not proceed. The clause makes it clear that the public sector entity responsible for providing the infrastructure must refund the payer any part of the payment not spent, or contracted to be spent, on designing or constructing the infrastructure before being told of the cessation. This is intended to provide for a situation when the chief executive may have imposed the State-related condition but may not be the public sector entity responsible for providing the infrastructure.

### **Reimbursement by local government for replacement infrastructure**

Clause 146 requires a local government to reimburse a State infrastructure provider a levied charge for infrastructure to be used for replacement infrastructure to be provided under a State-related condition.

The clause is limited to situations where the infrastructure required to be provided under a State-related condition replaces infrastructure the local government had intended to supply and to which levied charges for the infrastructure apply. The clause is intended to apply to charges a local government has already received or will receive for the infrastructure the local government had intended to provide.

The infrastructure provided under the State-related condition has to provide at least the same standard of service as the replaced infrastructure, or the local government does not have to reimburse the State infrastructure provider. This is because transferring funds for infrastructure providing a lower standard of service would reduce the standard of service for the funds collected or cause a local government to seek funding from other sources. The local government must pay the levied charge when paid, to the State infrastructure provider that imposed the condition to be used to construct the infrastructure or alternatively reimburse the person who constructed the infrastructure.

## **Part 4      Infrastructure agreements**

The purpose of this part is to:

- provide for infrastructure agreements between public sector entities and others as an alternative to other infrastructure funding mechanisms; and
- establish accountability mechanisms for all infrastructure agreements entered into.

Terms used in this part include:

**infrastructure agreement** is an agreement between a public sector entity, a State infrastructure provider, and another entity about the provision of infrastructure.

**recipient** is a person to whom a proposal to enter into an infrastructure agreement is made. The recipient for a direction, notice or order, means any person who is given the direction, notice or order.

### **Infrastructure agreement**

Clause 147 establishes that an agreement stated in any of the sections listed, is an infrastructure agreement. An infrastructure agreement is an agreement between a public sector entity, a State infrastructure provider, and another entity about the provision of infrastructure and an alternative to other funding mechanisms for infrastructure.

### **Obligation to negotiate in good faith**

Clause 148 requires any entity that proposes or agrees to enter into an infrastructure agreement, to negotiate in good faith. The clause is intended to encourage open, timely and cost effective negotiation of infrastructure agreements.

### **Content of infrastructure agreement**

Clause 149 establishes the information that must be included in an infrastructure agreement and clarifies that an infrastructure agreement may also include other matters.

The clause requires an infrastructure agreement to explain, if relevant, how the responsibilities formed under the agreement would be fulfilled if ownership of the premises, the subject of the agreement, changed. The clause also requires an agreement to State what action would be taken if a planning instrument outside the control of the person required to fulfil the responsibilities of the agreement, was changed.

### **Copy of infrastructure agreement to be given to local government**

Clause 150 requires a distributor-retailer or public sector entity to give a copy of an infrastructure agreement to a local government, if the local government is not a party to the agreement.

The clause is intended to make sure a local government is aware of any infrastructure arrangements within its jurisdiction so that it can efficiently provide and maintain infrastructure to meet local needs.

### **Copy of particular infrastructure agreements to be given to distributor- retailers**

Clause 151 requires a local government to give a copy of an infrastructure agreement to distributor-retailer or public sector entity, if the distributor -retailer or public sector entity is not a party to the agreement.

The clause requires a local government to give a copy of an infrastructure agreement to a distributor-retailer, if the infrastructure agreement relates to a water application or approval under the South East Queensland Water (Distribution and Retail Restructuring) Act 2009.

### **When infrastructure agreement binds successors in title**

Clause 152 provides that an infrastructure agreement attaches to the premises the subject of the agreement and binds the owner, and any subsequent owner, of the premises. The clause is intended to ensure that development responsibilities will be fulfilled despite subsequent changes to the ownership of the premises.

The clause allows for the agreement to release the owner and successors in title from the responsibilities of the infrastructure agreement when the premises are subdivided. This will enable the individual subdivided parcels to be disposed of free of the responsibilities of the agreement. If an applicant was to take advantage of this provision and release the owner and successors in title, the public sector entity requiring or providing the infrastructure, as a party to the agreement, could ensure the agreement protected their interests.

### **Exercise of discretion unaffected by infrastructure agreement**

Clause 153 clarifies that an infrastructure agreement does not bind the discretion or decision making of a public sector entity about a development application.

An agreement may purport to depend on the exercise of particular discretions about an application, but it will not affect or be invalidated by whatever decision the entity makes. This is intended to address concerns that an infrastructure agreement that relies for its fulfilment on a development approval can only be entered into after a development application has been made and before it is decided. This interpretation was not intended, and the new section makes it clear that the application may already have been made, or it may be made in the future.

### **Infrastructure agreement prevails over approval and charges notice**

Clause 154 enables an infrastructure agreement to prevail over a development approval or infrastructure charges notice, to the extent of any inconsistency.

The clause ensures the rights and responsibilities established under an infrastructure agreement prevail over the requirement to pay an infrastructure charge as stated in a notice. However, if a State infrastructure provider other than the chief executive is a party to the agreement, the infrastructure agreement prevails only if the chief executive has approved it.

The approval of the agreement must be given by notice to all parties to the agreement. The development approval may be given before or after the agreement is entered into in.

### **Agreement for infrastructure partnerships**

Clause 155 enables a person to enter into a partnership with a public sector entity about the provision or funding of infrastructure. The clause is intended to provide a broad head of power for infrastructure agreements to be entered into and is not limited to trunk infrastructure.

## **Part 5        Miscellaneous**

The purpose of this part is to establish miscellaneous matters related to infrastructure matters and charging arrangements.

### **Sale of particular local government land held on trust**

Clause 156 states that any land given or taken by a local government for public parks or local community infrastructure must be given or taken in trust as fee simple.

The clause is intended to ensure a transparent process for the sale of premises which is acquired through infrastructure charges or conditions. If a local government sells the land, the land is sold free of the trust. All proceeds from the sale of such premises must be used to provide trunk infrastructure.

## Chapter 5 Offences and enforcement

### Part 1 Introduction

Provisions relating to the establishment and administration of the Planning and Environment Court have been removed to a separate Planning and Development (Planning Court) Bill 2015. Provisions relating to the development tribunals are retained in the Bill.

The purpose of this part is to set out the contents of the chapter under which the offences and remedies are established.

#### What this chapter is about

Clause 157 provides that this chapter sets out development offences and the enforcement mechanisms available to address them.

### Part 2 Development offences

The purpose of this part is to establish the offences that are development offences against the Bill, and the relevant exemptions.

Terms used in this part include:

**development offence** is an offence applicable under the Bill. Development offences include carrying out prohibited development or assessable development without approval, contravening a development approval and the unlawful use of premises.

**emergency circumstances** are the circumstances in which an emergency endangers a person or the safety of a building, structure or the operation of infrastructure.

**emergency** is an event or situation that involves an imminent and definite threat requiring immediate action before or after the event or situation, other than routine maintenance due to wear and tear.

**necessary** relates to the works, development, or use necessary to ensure an emergency does not endanger a person or the safety of a building, structure or the operation of infrastructure.

#### What this part is about

Clause 158 provides that part 2 creates development offences, the commission of which may be subject to relevant exemptions under part 2 or chapter 7, part 1.

There are fewer development offences under the Bill than there currently are under SPA. Redundant offence provisions have not been carried forward into the Bill, for example there is no longer a need for offences relating to compliance assessment.

Section 20 Acts Interpretation Act 1954 provides that the repeal of SPA would not affect penalties incurred in relation to an offence under SPA, such as enforcement proceedings in relation to compliance assessment, which will no longer exist once SPA is repealed.

Whilst there are fewer development offences, the maximum penalty for the more serious offences under Bill (including development offences) has been significantly increased from 1665 penalty units under SPA to 4500 penalty units. This increase brings the maximum penalties for development offences into line with analogous offences under the Regional Planning Interests Act 2014 and the Environmental Protection Act 1994.

The current maximum penalties under SPA were introduced under the now repealed Integrated Planning Act 1997 and have not been reviewed or contemporised since that time, to take into account the increase in market demands, property values and inflation over that period.

The development offences are integral for ensuring compliance with the development assessment regulatory system established under this Bill and will ultimately uphold the integrity of the planning system, so the maximum penalties must adequately deter potential offenders from causing significant and potentially irreparable damage to the State's economic, social and environmental prosperity.

### **Carrying out prohibited development**

Clause 159 provides the offence and maximum penalty for carrying out prohibited development. However, the offence does not apply if the person is carrying out development under a development approval given for a superseded planning scheme application, or if the relevant local government has agreed to apply a superseded planning scheme to the carrying out of development under the superseded planning scheme.

The maximum penalty for committing this offence is 4500 penalty units. This is significantly higher than the maximum penalty for the equivalent offence provision under SPA. However, this increase is justifiable as it contemporises and aligns the maximum penalty to analogous offences across the Queensland Statute book to ensure it provides a deterrent.

### **Carrying out assessable development without permit**

Clause 160 provides the offence and maximum penalty for carrying out assessable development without having all necessary development permits in effect for the development.

To the extent standard assessment is required, more than one development permit may be necessary for the development.

The explanatory note for clause 69 (when development may start) of the Bill gives an example of when more than one development permit may be necessary for the development, and provides for when a development approval starts to have effect.

Subclause (1) (a) provides a high maximum penalty of 17000 penalty units for the if the assessable development, the subject of the offence, is on a Queensland heritage place or local heritage place. This subclause provides the same penalty as in the Queensland Heritage Act 1992 for the demolition of a structure or building nominated in a planning scheme as being of heritage significance.

Subclause (1) (b) provides that, for offences in relation to all other types of assessable development, the maximum penalty is 4500 penalty units. This is significantly higher than the maximum penalty for the equivalent offence provision under SPA. However, this increase is justifiable as it contemporises

and aligns the maximum penalty to analogous offences across the Queensland Statute book to ensure it provides a deterrent.

Subclause (2) and clause 85(3) confirm that security paid in respect of a development approval that lapses under a condition mentioned in clause 62(2)(e) may still be used as stated in the approval or in an agreement about conditions, including for example, to complete the development. This provision ensures that, if security is applied to completing development in this way, a development offence is not committed. These arrangements for applying security to complete the development contrast with that under clause 82(2), which requires that security given for part of an approval must be released if that part of the approval lapses at the end of the currency period.

Currently, section 574 of the SPA provides that it is an offence not to comply with applicable codes for self-assessable development and specifies the maximum penalty for this offence. The term self-assessable development is not being carried forward in this Bill, and clause 245 provides that this type of development will instead form part of accepted development, to the extent that the development complies with all applicable codes. Clause 245 also provides that, to the extent self-assessable development under SPA does not comply with all applicable codes, the development becomes assessable development under the Bill. Therefore, carrying out this type of development without a development permit would be an offence under this clause.

### **Compliance with development approval**

Clause 161 provides the offence and maximum penalty for contravening a development approval. Clause 44(5) (b) provides that a reference to a development approval includes the development conditions imposed on the approval.

For the purposes of this clause, clause 271 of the Bill deems an approval under sections 4.4(5) or 4.7(5) of the repealed Local Government (Planning and Environment) Act 1990 to be a development approval.

The maximum penalty for committing this offence is 4500 penalty units. This is significantly higher than the maximum penalty for the equivalent offence provision under SPA. However, this increase is justifiable as it contemporises and aligns the maximum penalty to analogous offences across the Queensland Statute book to ensure it provides a deterrent.

### **Unlawful use of premises**

Clause 162 specifies the offence and penalty for an unlawful use of premises. The clause requires that a person must not use premises unless the use is a lawful use, or if the premises have been designated for infrastructure, that the use complies with any requirements about the use of the premises, as provided for in the designation.

The maximum penalty for committing this offence is 4500 penalty units. This is significantly higher than the maximum penalty for the equivalent offence provision under SPA. However, this increase is justifiable as it contemporises and aligns the maximum penalty to analogous offences across the Queensland Statute book to ensure it provides a deterrent.

### **Exemptions if emergency causing safety concern**

Clause 163 provides exemptions to development offences in part 2 of chapter 5 in certain emergency circumstances. The exemptions apply if a development permit is ordinarily required for works, development or use, and an emergency endangers:

- a person's life or health;
- the structural safety of a building;
- the operation or safety of infrastructure, other than a building; or
- for tidal works – the structural safety of an existing structure for which there is a development permit for operational work that is tidal works.

The clause includes a definition of what constitutes an emergency for the purposes of the exemptions. The current emergency exemption provisions for development offences in SPA (sections 584 to 586) lack clarity about what constitutes an emergency. It is intended that the emergency exemption provisions are only to be relied upon where people or structures are under imminent and definite threat requiring immediate action (before or after the event or situation), other than routine maintenance due to wear and tear. An emergency would not include circumstances, for example, where preparations are being made for a forthcoming cyclone season months into the future.

The exemptions in subclauses (2), (3) and (4) only apply to 'necessary' works, development or use, meaning the works, development or use is necessary to ensure the emergency does not, or is not likely to; endanger someone or something mentioned in subclause (1). Subclause (2) applies to a person who, in an emergency, is carrying out necessary operational work that is tidal works.

Under this exemption, the development offences in clauses 160, 161 and 162 do not apply if the person has made, and complies with, a safety management plan for the tidal works, and meets the other requirements in subclause (2), including by giving a copy of the safety management plan to the enforcement authority as soon as reasonably practicable after starting the works. The person must also comply with subclause (6), including by making a development application for the tidal works as soon as reasonably practicable after starting the works.

Subclause (3) applies to a person who, in an emergency, is carrying out necessary building work on a Queensland heritage place or a local heritage place. Under this exemption, the development offences in clauses 160, 161 and 162 do not apply if the person gets the advice of a registered professional engineer before starting the work, unless it is not practicable to do so; and if the person takes all reasonable steps to ensure the work is reversible, or if this is not possible, then to ensure the impact of the work on the place's cultural heritage significance is minimised. The person must also comply with subclause (6); including by making a development application for the building work as soon as reasonably practicable after starting the work.

Subclause (4) provides a general exemption for a person who, in an emergency, carries out other necessary work, development or use not covered by the exemptions in subclauses (2) and (3). The exemption applies, provided the person gives notice of the work, development or use to the enforcement authority as soon as is reasonably practicable after starting the work, development or use. Whilst there is no requirement to make a development application for the work, development or use covered by this exemption, depending on the circumstances, the enforcement authority may reasonably request a development application to be made, after receiving notice of the work, development or use.

Subclause (5) provides that the exemptions in subclauses (2), (3) and (4) will cease to apply if the person is required by an enforcement notice or enforcement order to stop carrying out the emergency work, development or use.

Subclause (6) provides that, as soon as reasonably practicable after starting works under the exemptions in subclauses (2) or (3), the person must make a development application that would otherwise be required for the works and give the enforcement authority written notice of the work. The exemptions will cease to apply if these requirements are not carried out, or if the person's development application is refused.

Subclause (7) provides that, if the development application is refused, the person must then restore, as far as practicable, the premises to the condition they were in immediately before the work, development or use was carried out. It is an offence to fail to restore the premises.

The maximum penalty for committing this offence is 4500 penalty units. This is significantly higher than the maximum penalty for the equivalent offence provision under SPA. However, this increase is justifiable as it contemporises and aligns the maximum penalty to analogous offences across the Queensland Statute book to ensure it provides a deterrent.

### **Part 3      Enforcement notices**

The purpose of this part is to enable an enforcement authority to give both a show cause notice and an enforcement notice.

Terms used in this part include:

**show cause notice** is a notice from an enforcement authority notifying a person that the enforcement authority is considering giving an enforcement notice. The show cause notice must also state the reasons for giving the notice. A show cause notice can be given if the enforcement authority reasonable believes the person has committed or is committing a development offence. The Bill allows an enforcement authority to progress directly to issuing an enforcement notice in particular limited circumstances.

**enforcement notice** is a notice from an enforcement authority requiring a person to refrain from committing a development offence or to remedy the commission of a development offence in a particular way.

#### **Show cause notices**

Clause 164 provides that an enforcement authority must, before giving an enforcement notice, give a person a show cause notice if the enforcement authority reasonably believes the person has committed or is committing a development offence, and is considering giving an enforcement notice for the offence.

Show cause notices and enforcement notices are mechanisms to assist enforcement authorities to stop unlawful development and secure compliance without having to go to court. Show cause notices are intended to prevent the indiscriminate use of enforcement notices. However, the requirement to give a show cause notice can also create extra red tape and lengthen enforcement processes. To allow compliance issues to be resolved more quickly and effectively, this Bill is

intended to give enforcement authorities greater flexibility to proceed directly to issuing an enforcement notice, if the circumstances warrant this.

Subclause (2) sets out the general requirements for a show cause notice, including stating how the recipient can make representations about the notice. The enforcement authority can specify whether representations can be made in writing or in person.

Subclause (3) provides that the day or period for making representations must be at least 20 business days after the show cause notice is given.

Subclause (4) provides that the enforcement authority may give the enforcement notice only if, after considering all representations made by the person in accordance with the show cause notice, the authority still considers it is appropriate to give the enforcement notice.

Subclause (5) provides exceptions to the general rule in subclause (1) about the requirement to give a show cause notice before issuing an enforcement notice. These exceptions generally relate to development offences that involve action of immediate, irreversible effect, and which may pose a threat to public health and safety or the environment. The list of exceptions in subclause (5) (a) provides greater certainty to local governments than the current general exemption in section 588(3) SPA. However, an equivalent provision has also been retained in subclause (5) (b) to provide local governments with continued flexibility.

Subclause (5)(b) provides that, if the enforcement authority reasonably believes it is not appropriate in the circumstances to give a show cause notice, then the enforcement authority may proceed directly to issuing an enforcement notice. For example, if the giving of a show cause notice is likely to adversely affect the effectiveness of the enforcement notice as an enforcement tool.

### **Enforcement notices**

Clause 165 allows an enforcement authority to give an enforcement notice to a person if the authority reasonably believes the person has committed, or is committing a development offence. If the offence involves premises and the person is not the owner of the premises, then the enforcement authority is also permitted to also give an enforcement notice to the owner of the premises.

Subclause (2) provides that an enforcement notice is a notice requiring a person to do either or both of the following: refrain from committing a development offence, or to remedy the commission of a development offence in a way stated in the notice. The examples under subclause (2) provide a list of the types of requirements which may be included in an enforcement notice. This list is not exhaustive and the notice may require other reasonable types of action to be carried out before a stated time or within a stated period.

Subclause (3) specifies the general requirements of an enforcement notice. It provides that if the notice is to require a person to refrain from doing something, it must include a period of time for which the requirement applies, or state that the requirement applies until further notice. In the event the notice requires the person to take action, the notice must include details of the work to be performed and the period within which it must be done. The notice must also state that the person has a right of appeal against the giving of the notice. This appeal right is set out in schedule 1 of the Bill.

Subclause (4) is a limitation on a notice requiring the demolition or removal of a work. The effect of this subclause is to require an enforcement authority to consider reasonable alternatives before ordering demolition or removal of a building or work in which there may be significant investment.

Subclause (5) specifies the offence and penalty for not complying with an enforcement notice. The maximum penalty for committing this offence is 4500 penalty units. This is significantly higher than the maximum penalty for the equivalent offence provision under SPA.

However, this increase is justifiable as it contemporises and aligns the maximum penalty to analogous offences across the Queensland Statute book to ensure it provides a deterrent.

Subclause (6) provides that, for an enforcement notice requiring development to stop being carried out, the notice may be given by fixing it to or on the premises in a way that a person entering the premises would normally see the notice, for example fixing it on a gate or door at eye level.

Subclause (7) specifies the offence and penalty for interfering with an enforcement notice given under subclause (6), for example by defacing or removing the notice. The maximum penalty for committing this offence is also 4500 penalty units.

### **Consulting private certifier about enforcement notice**

Clause 166 applies if a private certifier is engaged in relation to development. The enforcement authority must not give an enforcement notice for the part of the development for which the private certifier is engaged, until the enforcement authority has consulted with the private certifier about the giving of the enforcement notice.

If the enforcement authority is the private certifier, then the private certifier must consult with the assessment manager before giving an enforcement notice. The consultation required under this clause may be carried out in the way the enforcement authority considers appropriate.

If the enforcement authority reasonably believes the work for which the enforcement notice is to be given is dangerous, then the enforcement authority need not consult with the private certifier or assessment manager in accordance with subclause (2). If the enforcement authority is a private certifier, it cannot delegate power to give an enforcement notice requiring the demolition of a building.

Under SPA, there are restrictions on local government powers of delegation for enforcement notices requiring the demolition of a building. This restriction has been removed in the Bill, as it is considered appropriate for such delegations to be at the discretion of each local government. Restrictions on delegations are already placed on local governments under the Local Government Act 2009 and City of Brisbane Act 2010.

### **Notifying local government about enforcement notice**

Clause 167 provides that, if the enforcement authority reasonably believes a development offence, the subject of an enforcement notice, is occurring in a local government area and the enforcement authority is not the local government for that area, then the enforcement authority must give a copy of the enforcement notice to the local government.

The clause provides that a failure to give a copy of the enforcement notice to the local government does not invalidate or otherwise affect the enforcement notice. If the enforcement notice is withdrawn, the local government must also be notified of the withdrawal. This provision ensures that the relevant local government is kept informed of offences and enforcement in the local government area.

### **Stay of enforcement notice**

Clause 168 states that lodging an appeal against the giving of an enforcement notice stays the operation of the notice until the appeal is withdrawn or dismissed, or the Planning and Environment Court or development tribunal decides otherwise.

However, the operation of certain enforcement notices is not stayed by an appeal. These circumstances are the same as those mentioned in clause 164(5) (a) of the Bill in relation to the ability to issue an enforcement notice without first giving a show cause notice. These circumstances generally relate to development offences that involve action of immediate, irreversible effect, and which may pose a threat to public health and safety or the environment. Failure to stay the operation of an enforcement notice in these circumstances may render the outcome of the appeal meaningless or irreversible.

The Bill adds to the list of circumstances in section 474 of the existing SPA for which an appeal does not stay the operation of the enforcement notice, by the inclusion of work to or on a Queensland heritage place or a local heritage place.

### **Application in response to show cause or enforcement notice**

Clause 169 provides that, if a person applies for a development permit in response to a show cause notice, or as required by an enforcement notice, the person must take all necessary and reasonable steps to enable the application to be decided, and failure to do so is an offence.

The maximum penalty for committing this offence is 4500 penalty units. This is significantly higher than the maximum penalty for the equivalent offence provision under SPA. However, this increase is justifiable as it contemporises and aligns the maximum penalty to analogous offences across the Queensland Statute book to ensure it provides a deterrent.

### **Enforcement authority may remedy contravention**

Clause 170 allows the enforcement authority (other than a local government) that issued the enforcement notice to do anything necessary to ensure the notice is complied with, for example perform an action if a person contravenes the notice by not taking that action. The clause allows the enforcement authority to recover any reasonable costs and expenses incurred in taking the action, as a debt owing by the recipient of the notice to the enforcement authority. If the enforcement authority is a local government, it has similar powers under the Local Government Act 2009 and the City of Brisbane Act 2010.

## **Part 4      Offence proceedings in Magistrates Court**

The purpose of this part is to enable proceedings in a Magistrates Court for development offences and offences against the Bill.

Terms used in this part include:

**offence proceeding** is a proceeding for an offence against the Bill.

### **Proceeding for offences**

Clause 171 provides that a proceeding for an offence against this Bill may be instituted in a summary way under the Justices Act 1886. Summary offences are heard in the Magistrates Court. Offences against the Bill include development offences in chapter 5, part 2, and any other offences, such as those in chapter 5, part 6, and those in chapter 7.

Subclause (2) specifies that a prosecution for an offence against this Bill must be commenced within 1 year after the commission of the offence, or at any later time, but no later than 1 year after the offence comes to the complainant's knowledge. This provides an additional 6 months to commence proceedings after the offence comes to the complainant's knowledge than is available under SPA (currently 6 months). The Bill instead provides a consistent 1 year period to commence proceedings, irrespective of when the offence comes to the complainant's knowledge. This extended period for allows a more reasonable amount of time to commencing offence proceedings, including for example after unsuccessful attempts to use other enforcement tools available in the Bill (such as show cause notices and enforcement notices). However, an enforcement authority need not give an enforcement notice first in order to prosecute for a development offence.

Subclause (3) provides that a statement about when a matter came to a complainant's knowledge is evidence of the matter.

Current section 597 of the SPA places limits on the right of open standing to prosecute for certain development offences under the Act. The Bill removes these restrictions, and instead relies on section 42 of the Acts Interpretation Act 1954 to provide open standing for any person in the community to prosecute for an offence under the Bill.

### **Proceedings brought in a representative capacity**

Clause 172 allows an offence proceeding to be brought by a representative of a person (including an individual, corporation, or unincorporated body) if appropriate consent is first obtained.

Subclause (2) allows for the payment of costs and expenses to the representative. This clause clarifies that the common law principles relating to maintenance (i.e. the support of litigation by a person with no personal interest in the proceeding) do not apply.

For proceedings started by a local government, section 237 of the Local Government Act 2009 or section 218 of the City of Brisbane Act 2010 are applicable. These sections were amended in 2012 following the Court of Appeal decision in Ipswich City Council v Dixonbuild P/L [2012] QCA 98, in order to clarify that a local government may start a proceeding in either the name of the local government or under the Justices Act 1886 in the name of a local government employee who is a

public officer within the meaning of the Justices Act. This clarification was relevant for issues of costs and ex parte hearings under the Justices Act.

### **Enforcement orders**

Clause 173 allows a Magistrates Court to issue an order on the defendant it considers appropriate after a hearing. The order must state a time or period for compliance with the order. If appropriate, the court can make orders under this provision without the defendant being found guilty, for example the court may need to make orders before making a final determination as to penalty. This clause also permits the court to make other interlocutory orders the court considers appropriate.

This clause gives the court wide powers to make orders requiring action that the court considers appropriate in the circumstances. The examples under subclause (1) identify the sorts of orders the court may make, including to stop carrying out development, to restore premises, or to apply for a development permit.

Subclause (2) provides that the order may be in the terms the court considers appropriate to secure compliance with the Bill. This could include, for example, ordering the defendant to provide sufficient security for the reasonable cost of taking the actions required by the order, so that the enforcement authority may carry out the actions in the event that the order is not complied with.

Subclause (3) provides that an enforcement order may be made under this section in addition to the imposition of a penalty and any other order under this Act.

Subclause (4) makes it an offence for a person to contravene the court's order and sets out the maximum penalty for committing this offence, which is 4500 penalty units or 2 year's imprisonment. This is significantly higher than the maximum penalty for the equivalent offence provision under SPA. However, this increase is justifiable as it contemporises and aligns the maximum penalty to analogous offences across the Queensland Statute book to ensure it provides a deterrent.

Subclause (6) provides that an enforcement order of the Magistrates Court attaches to the premises and binds the owner, the owner's successors in title and any occupier of the premises. To ensure future potential owners or occupiers are made aware of the order, subclause (5) requires the defendant to give the registrar of titles a notice, in the approved form, requesting the registrar to record the order on the title for the premises.

Subclause (7) provides that the defendant may apply to the court for an order stating the defendant has complied with the enforcement order.

Subclause (8) provides that on receiving a compliance order from the defendant, the registrar of titles must remove the enforcement order from the appropriate register for the premises to which the enforcement order relates.

Subclause (9) provides that if the defendant does not comply with the enforcement order within the period stated in the order, the enforcement authority may:

- take the action; and
- recover the reasonable cost of taking the action as a debt owing to the authority from the defendant.

The powers of the Magistrates Court under this clause are significantly widened and strengthened in comparison to those powers currently available under SPA.

### **Order for compensation**

Clause 174 allows the court to order a person convicted of an offence under the Bill to compensate other affected persons, if appropriate, for loss of income or reduction in the value of or damage to property, or for expenses incurred. However, the clause does not entitle the affected person to become a party to the proceeding. These orders can be in addition to the imposition of a penalty and any other order under this Bill.

This clause is similar to section 613 SPA but has been expanded to apply to all offences, not just development offences. In particular, this will allow the court to make an order for compensation against a person convicted of an offence under clause 181 (Executive officer must ensure corporation complies with Act). Furthermore, this clause no longer includes powers to make orders requiring remedial action, as section 613 SPA currently provides. These remedial or enforcement order powers for the Magistrates Court have been consolidated in clause 173.

### **Order for investigation expenses**

Clause 175 allows the court to order a person convicted of an offence against this Bill to pay the expenses reasonably incurred by an enforcement authority if the authority applies for such an order and the court considers it appropriate to order in the circumstances. The reasonably incurred expenses may include, for example, legal costs and expenses in conducting an inspection or test to investigate the offence.

## **Part 5 Enforcement orders in P&E Court**

The purpose of this part is to enable:

- a person to start a proceeding in the Planning and Environment Court for an enforcement order; and
- the Planning and Environment Court to make an enforcement order.

Terms used in this part include:

**enforcement order** is an order given by the Planning and Environment Court requiring a person to refrain from committing a development offence or to remedy the commission of a development offence in a particular way.

**interim enforcement order** is an enforcement order the Planning and Environment Court may make pending a decision in a proceeding for an alleged development offence.

### **Enforcement orders**

Clauses 176 and 177 allow for open standing to bring a proceeding to have the Planning and Environment Court order an action to remedy or restrain the commission of a development offence.

Clause 176 provides that any person may start proceedings in the P&E Court for an enforcement order.

Clause 177 Subclause (1) provides that an enforcement order is an order that requires a person to do either or both of the following:

- (a) refrain from committing a development offence;
- (b) remedy the effect of a development offence in a stated way, for example, by paying compensation to a person who, because of the offence, has:
  - (i) suffered loss of income; or
  - (ii) suffered a reduction in the value of, or damage to, property; or
  - (iii) incurred expenses to replace or repair property or prevent or minimise, or attempt to prevent or minimise, the loss, reduction or damage.

Subclause (2) provides that the Planning and Environment Court may make an enforcement order if satisfied the development offence—

- (a) has been committed; or
- (b) will be committed unless the order is made.

Subclause (3) provides that the Planning and Environment Court may make an enforcement order pending a decision in proceedings for the enforcement order.

Subclause (4) provides that an enforcement order or interim enforcement order may direct the respondent:

- (a) to stop an activity that constitutes a development offence; or
- (b) not to start an activity that constitutes a development offence; or
- (c) to do anything required to stop committing a development offence; or
- (d) to return anything to a condition as close as practicable to the condition the thing was in immediately before a development offence was committed; or
- (e) to do anything to comply with this Act.

For example, a respondent may be directed to repair, demolish or remove a building; to rehabilitate or restore vegetation cleared from land; or if rehabilitation or restoration of cleared vegetation is not possible, to plant and nurture stated vegetation on a stated area of land of an equivalent size.

Subclause (5) provides that an enforcement order or interim enforcement order may be in terms the Planning and Environment Court considers appropriate to secure compliance with the Bill

Subclause (6) provides that an enforcement order or interim enforcement order must state the period within which the order must be complied with.

Subclause (7) makes it an offence for a person to contravene the court's order and sets out the maximum penalty for committing this offence, which is 4500 penalty units or 2 year's imprisonment. This is a new provision providing consistency in the relief available in both the Planning and Environment Court and the Magistrates Court for enforcement orders.

Subclause (8) provides that the respondent must give the registrar of titles a notice, in the form approved by the registrar, asking the registrar to record the order on the appropriate register for the premises to which the order relates.

Subclause (9) provides that an order under this section attaches to the premises and binds the owner, the owner's successors in title and any occupier of the premises.

Subclause (10) provides that the respondent may apply to the court for an order stating the respondent has complied with the enforcement order.

Subclause (11) provides that on receiving a compliance order from the respondent, the registrar of titles must remove the enforcement order from the appropriate register for the premises to which the enforcement order relates.

Subclause (12) provides that if the defendant does not comply with the enforcement order within the period stated in the order, the enforcement authority may:

- take the action; and
- recover the reasonable cost of taking the action as a debt owing to the authority from the defendant.

### **P&E Court's powers about enforcement orders**

Clause 178 specifies the Planning and Environment Court's powers about enforcement orders and interim enforcement orders.

Subclause (1) clarifies that it is not necessary for there to be a prosecution (in the Magistrate's Court) for an offence prior to an enforcement order or interim enforcement order being issued by the Planning and Environment Court.

Subclause (2) provides the court broad powers to order a person to stop, or not to start, an activity. The court is allowed to disregard a person's previous actions or activity.

Subclause (3) provides that the power of the court to order a person to do anything may be exercised regardless of the person's past or present actions or activities.

Subclause (4) provides that a person may apply to the Planning and Environment Court to cancel or change either an enforcement order or interim enforcement order.

Subclause (5) provides that the power of the Planning and Environment Court under this clause exists concurrently with other powers of the court.

## **Part 6      Miscellaneous**

The purpose of this part is to establish miscellaneous matters related to offences and enforcement.

Terms used in this part include:

**official** (for this part) could either be an assessment manager, referral agency, responsible entity, the chief executive, enforcement authority or a prescribed person.

**executive liability provision** is the provisions of the Bill which impose liability on executive officers. conduct (under this part) is an act or omission.

**representative** is for a corporation, an executive officer, employee or agent of the corporation. For an individual, a representative is an employee or agent of the individual.

**state of mind** (of a person for this part) includes a person's knowledge, intention, opinion, belief or purpose. It also includes reasons for the intention, opinion, belief or purpose.

### **Application of other Acts**

Clause 179 lists specific circumstances where provisions in another Act may be in conflict or inconsistent with the provisions of this chapter. In such a situation, the provisions of the other Act will prevail or have precedence.

The intention of this provision is to allow other Acts to either add to or vary provisions of this chapter in recognition of the specific requirements for enforcement in relation to individual forms of development.

The clause also provides that, if a person is nominated by the chief executive as an enforcement authority (for example the chief executive administering the Environmental Protection Act 1994 or the Fisheries Act 1994), and that person has functions of an investigative or enforcement nature under another Act, the person may perform those functions in relation to a development approval.

The clause also clarifies that this chapter does not limit a court's powers under the Penalties and Sentences Act 1992 or another law. For example, section 12(4) of the Penalties and Sentences Act 1992 provides that a decision not to record a conviction does not stop a court from making any other order which the court could make under that Act or any other Act because of the conviction.

### **False or misleading documents**

Clause 180 states the penalty and offence for giving an official a document containing information that the person knows is false or misleading in a material particular. In the proceeding for an offence against this clause, it is enough to state the information was 'false or misleading' without specifying which information was false or misleading.

However, a person does not commit an offence under this clause if the person informs the official about how the information is false or misleading and gives the correct information if the person has, or can reasonable get the correct information.

The clause defines an official to mean an assessment manager, a referral agency, a responsible entity for a change application, the chief executive administering the Bill, an enforcement authority, or another person prescribed by regulation.

The maximum penalty for committing this offence is 4500 penalty units. This is significantly higher than the maximum penalty for the equivalent offence provision under SPA. However, this increase is justifiable as it contemporises and aligns the maximum penalty to analogous offences across the Queensland Statute book to ensure it provides a deterrent.

### **Executive officer must ensure corporation complies with Act**

Clause 181 provides that an executive officer of a corporation commits an offence if:

- a) the corporation commits an offence against an executive liability provision; and
- b) the officer did not take all reasonable steps to ensure the corporation did not engage in the conduct constituting the offence.

In doing so, this clause imposes executive liability (standard) provisions (type 1) on executive officers; which consider whether an executive officer took all reasonable steps to prevent corporate offending.

The balance of offences under the Bill, attract accessorial liability by virtue of the operation of section 7 of the Criminal Code Act 1899, should it be established that an executive officer assisted in the commission of the offence.

These executive liability (standard) provisions are provided in the bill for the following reasons:

- committing these offences would have the potential to result in significant public harm, including environmental harm or injury to persons;
- the offences are not in relation to simple day to day operations of the business, which the director may have no involvement in;
- there are reasonable steps a director could take in order to ensure compliance by the corporation;
- liability of the corporation on its own may not sufficiently promote compliance; for example, if the corporation is a shelf company with no assets, and the offence results in a risk to the environment or public health and safety that has to be rectified, it may be justifiable to prosecute the director; and
- the penalties applying to these offences are significant.

The provisions proposed do not reverse the onus of proof; they do not require a director or executive officer to prove that he or she did not authorise or permit the conduct of the corporation that constituted the corporation's offence. Where corporations are involved in such offences, it is appropriate that there is effective accountability at a corporate level. Further the process of development of a particular site can involve many individuals acting in a representative or contractual capacity. It would not be appropriate to prosecute only the individual directly responsible for the offence, if that person was acting under instructions of another.

As the Bill does not propose to reverse the onus of proof, the fundamental legislative principles are not infringed.

### **Responsibility for representative**

Clause 182 provides that, if it is relevant in an offence proceeding to prove a person's state of mind about particular conduct, it is enough to show that a representative was acting within the scope of the representative's actual or apparent authority and that the representative had the relevant state of mind.

The clause provides that in the instances of a representative acting within the scope of the representative's authority, any acts or omissions are considered to be those also of the person being represented unless the person can prove that the person could not have prevented the act or

omission by exercising reasonable diligence. The clause also gives the meaning of conduct, representative and state of mind for this clause.

## Chapter 6 Dispute resolution

### Part 1 Introduction

The purpose of this part is to set out the contents of the chapter under which rights of appeal and the remedies for development assessment disputes are established.

#### What this chapter is about

Clause 183 provides that this chapter is about resolving disputes between persons involved in the development assessment process. Part 2 of this chapter, along with Schedule 1, establish rights of appeal to the Planning and Environment Court and the development tribunals (tribunal). Part 3 of this chapter provides for the establishment, administration and powers of tribunals, including that the tribunals help the parties to a dispute, the subject of proceedings, to achieve an affordable and timely resolution of the dispute.

Provisions relating to the establishment, administration and powers of the Planning and Environment Court have been removed to a separate Planning and Development (Planning Court) Bill 2015.

The name of the Building and Development Dispute Resolution Committees (committees) has changed to tribunals under the Bill. Under the Integrated Planning Act 1997, the Committees were referred to as a Tribunal. However between July 2008 and March 2009, an independent review of Queensland Government boards, committees and statutory authorities was conducted. Following this review, it was determined that the nomenclature be changed to Committees, stating that the 'terminology is misleading as the entity does not take, nor seeks to take, the form or legal style of a tribunal'.

However, like a Tribunal, the Committees functions as they exist under SPA are congruent and consistent with the traditional concept of a tribunal. Its services are independent and impartial, efficient, expert, accessible, flexible and inexpensive. The jurisdiction of the committee and its registrar is established under statute, and remuneration is available to the committee members, consistent with that of a tribunal. It makes decisions (not advisory, recommendations or otherwise), which are legally binding and appealable to a superior appellate jurisdiction.

Other benefits suggest that it will re-raise the profile of the present committees and avoid confusion amongst users of the system of what the tribunal's purpose and functions comprise.

### Part 2 Appeal rights

The purpose of this part is to establish:

- ways development assessment disputes can be resolved; and
- the rights of appeal to the Planning and Environment Court and to a development tribunal.

Terms used in this part include:

**appeal period** is the period within which an appeal can be made to the Planning and Environment Court or a development tribunal. The Planning and Environment Court has a power to extend an appeal period.

**decision** (under this part) is the purported decision or deemed refusal of a development application, and also includes the conduct for the purpose of and relating to the making of a decision and the making or failure to make a decision.

**non-appealable** is for a decision, the final and conclusive decision that may not be challenged, appealed against, reviewed, quashed, set aside or called into question.

### **Appeals to tribunal or P&E Court**

Clause 184 establishes rights of appeal under the Bill and provides certain limitations on those rights. Schedule 1 of the Bill sets out the appeal rights to both the Planning and Environment Court and the development tribunals. The schedule also sets out the relevant parties for each appeal type (appellant, respondent, co-respondent and co-respondent by election where relevant), and provisions relating to the giving of notices of appeal to various persons.

Subclause (2) provides for the appeal periods relevant to the appeal rights set out in Schedule 1 of the Bill. The appeal period generally is 20 business days after a person is given a notice of a decision for the matter. However for an appeal by a building advisory agency for a deemed approval of a development application for which a decision notice has not been given, the appeal period is 20 business days after the applicant gives the agency a copy of the deemed approval notice; or otherwise the appeal period is 10 business days after the agency is given notice of a decision for the matter.

There is no appeal period for an appeal against a deemed refusal under the Bill; meaning an appeal can be started at any time after the last day a decision on the matter should have been made.

The clause provides that a person starts an appeal by lodging a notice of appeal that succinctly states the grounds of the appeal with the registrar of the Development tribunal or Planning and Environment Court.

Where a person starts an appeal in the Planning and Environment Court, the person must, provide a copy of the notice to appeal to the relevant parties for the appeal; the respondent, each co-respondent, any person eligible to become a co-respondent (by election) and the chief executive.

Where a person starts an appeal in the development tribunals, the registrar must, also within the service period (as detailed in this clause), provide a copy of the notice of appeal to the relevant parties for the appeal; the respondent, each co-respondent, any person eligible to become a co-respondent (by election), and for an appeal to a development tribunal under another Act, any other person who the registrar considers appropriate.

The notice of appeal given to any person eligible to become a co-respondent (by election) must provide details how that person can elect to elect to join the proceeding as a co-respondent. To join the proceedings as a co-respondent, the person may do so, within 10 business days after the notice of appeal is given to the person, by filing a notice of election in the approved form.

If a chosen assessment manager is a respondent, the prescribed assessment manager may elect to become a co-respondent. Each respondent and co-respondent for an appeal is entitled to be heard in the appeal.

### **Other appeals**

Clause 185 provides that a person who is aggrieved by a decision made under the Bill may apply to the Supreme Court for a review of the decision on the ground of jurisdictional error.

It is considered necessary to include such an express provision in the Bill given the broad privative clause ousting review under the Judicial Review Act 1991 and also following the decision of the High Court in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1.

Subclause (2) provides that, other than a review on the ground of jurisdictional error or in relation to a decision under chapter 7, part 4 (urban encroachment) a decision of the Minister under the Bill is non-appealable, meaning that the decision is final and conclusive and may not be challenged, appealed against, reviewed, quashed, set aside or called into question in any other way.

Subclause (3) provides that the Judicial Review Act 1991, other than Part 4, does not apply to decision making under the Bill. In particular, the Supreme Court does not have jurisdiction to hear and determine applications made to it under part 3 or 5 of the Judicial Review Act 1991 (dealing with statutory orders of review, and prerogative orders and injunctions respectively). However, Part 4 of the Judicial Review Act 1991, which still applies, provides that a person may apply for a statement of reasons in relation to a decision made under the Bill.

The Bill provides broad appeal rights for administrative decision making under the development assessment system, and the Planning and Development (Planning Court) Bill 2015 provides comprehensive declaratory powers in respect of other administrative decisions under the Bill. Both appeals and declaratory proceedings can be brought in the Planning and Environment Court and in the development tribunals.

These comprehensive appeal, declarations and orders powers are, for the matters they cover, intended to provide a complete alternative to judicial review under the Judicial Review Act 1991. The Planning and Environment Court is a specialist jurisdiction with expertise in planning and development assessment matters, and can consequently deal with declaratory proceedings concerning these matters more efficiently than the Supreme Court could deal with them under the Judicial Review Act 1991, without sacrificing the quality of decision making.

Section 12 of the Judicial Review Act 1991 provides that the Supreme Court may dismiss an application for judicial review if another law makes adequate provision for a review of the matter. This clause effectively confirms that this Bill does provide an appropriate alternative avenue of review, thereby removing confusion, and preventing applicants making costly, time consuming and unsuccessful applications under the Judicial Review Act 1991. This clause does not curtail the rights of persons to have administrative decisions reviewed judicially. In fact, by expanding the declaratory jurisdiction of the Planning and Environment Court, persons seeking a review of administrative decisions under the Bill have been given greater access to a cost effective, specialist jurisdiction.

### **Rules of the P&E Court**

Clause 186 provides that a person who is appealing to the Planning and Environment court must comply with the rules of the Planning and Environment Court applying to the appeal. However, subclause (2) states that the Planning and Environment Court may hear and decide an appeal if the person has not complied with the rules of the Planning and Environment Court.

The Planning and Environment Court rules aim to facilitate the fair and expeditious resolution of Planning and Environment Court proceedings at minimal cost. The P&E Court rules are not exhaustive, and where the P&E Court rules do not provide for a matter in relation to proceedings and the rules of the District Court (the Uniform Civil Procedure Rules) would provide for the matter, then the rules of the District Court are taken to apply with the necessary changes.

The ability for the Planning and Environment Court to hear and decide an appeal if the person has not complied with the Planning and Environment Rules is necessary to ensure the Court is not unduly restricted, for example where the Court considers that strict compliance with the Planning and Environment Rules would be likely to cause injustice, unreasonable expense or inconvenience. This ability also extends to the excusal of the Planning and Environment Court fees.

The Planning and Environment Court fees are currently listed in Schedule 20 of the Sustainable Planning Regulation 2009 and made under the regulation power in SPA. It is proposed that the Planning and Environment Court fees will transfer to the Uniform Civil Procedure (Fees) Regulation 1999 as part of a future consequential regulation amendments package. This will ensure that the fees attributed to the Planning and Environment Court sit alongside the fees of other courts, such as the District Court.

Conversely, the Planning and Environment Court can also impose appropriate sanctions if a person does not comply with the Planning and Environment Court rules.

## **Part 3      Tribunals**

The purpose of this part is to:

- establish a development tribunal; and
- enable a proceeding to be brought before a development tribunal.

Terms used in this part include:

**tribunal** is a development tribunal established by the chief executive that can determine a range of disputes and proceedings under the Bill. A tribunal provides an accessible, affordable and timely alternative to determinations made by the Planning and Environment Court.

**respondent** (for a declaration about the making of a development application) is the party that did not start the proceeding; either the assessment manager or the applicant.

**respondent** (for a declaration about a change to a development application) is the party that did not start the proceeding; either the responsible entity or the applicant.

### **Division 1    General**

#### **Appointment of referees**

Clause 187 provides that the Minister may, by gazette notice, appoint referees if they have the qualifications, the experience, or the qualifications and experience prescribed under a regulation.

This establishes a pool of people who are then available for nomination to development tribunals. The nomination of a referee as a member of a development tribunal will depend on the matters before the tribunal and the particular qualifications and expertise of the referee.

Subclause (2) provides that the chief executive may appoint persons to be referees if the chief executive is satisfied each person has the qualifications, the experience, or the qualifications and experience to be a referee, as prescribed under a regulation.

This ability for the chief executive to appoint referees provides an efficient and flexible approach to ensuring that appropriate skills and expertise are readily available to hear issues in dispute in development tribunal proceedings.

Subclause (3) allows the Minister or chief executive to set the term of appointment for a referee. The term of appointment cannot be greater than three years and must be set out in the notice of appointment. Subclause (4) provides that a referee may be reappointed for further terms.

Subclause (5) provides that an appointment can be cancelled at the discretion of whoever appointed the referee – either the Minister or the chief executive. In order to cancel the appointment, the appointer must give signed written notice to the referee.

Subclause (6) specifies that a referee can resign from their appointment by providing notice to whoever appointed the referee – either the Minister or the chief executive.

Subclauses (7) and (8) provide that a public service officer may be appointed as a referee, and in which case, the appointment is to be held concurrently with any other appointment the officer holds in the public service.

Subclauses (9) and (10) requires all appointed referees to sign and send a declaration in the approved form to the chief executive administering the development tribunals. This declaration is only required to be given once at the beginning of the term of the appointment, but must be given in order for the referee to be eligible to sit as a tribunal member.

### **Referee with conflict of interest**

Clause 188 provides that a referee must not act as a member of a development tribunal if the member has a conflict of interest.

Subclause (1) establishes conflict of interest criteria for referees appointed to development tribunals. Subclause (2) clarifies that subclause (1) does not apply merely because a referee has previously acted in relation to the preparation of a relevant local planning instrument. For example, a conflict may not arise where a professional is involved in the preparation of a local government planning instrument that does not provide detailed information about the premises which are the subject of the appeal. A determination about whether there is a conflict of interest must be made on a case-by-case basis.

Subclause (3) provides that if the referee has a conflict of interest, they must notify the chief executive, and the chief executive must not appoint the person to the development tribunal.

Subclause (4) requires a referee to cease acting as a member of a development tribunal if they become aware they should not have been appointed to the development tribunal. Practically, this would ordinarily involve relevant discussions with the registrar of the development tribunal and notification to the chief executive of the referee's inability to act. In such situations the chief

executive may decide to suspend the proceedings and establish another tribunal or alternatively on a case by case basis dependant on the circumstances of the matter, decide to end the proceeding.

### **Establishing tribunals**

Clause 189 provides for the establishment of development tribunals by the chief executive. Members of the development tribunal are appointed from a pool of referees. In establishing a development tribunal the chief executive must have regard to the matter with which the tribunal must deal.

Subclause (2) provides that after a development tribunal is established, the membership must not be changed.

Subclause (3) provides that a development tribunal can consist of up to 5 referees. This allows the chief executive to establish development tribunals comprising of members with a wide range of expertise if required for the proceeding. Appeals to development tribunals deal with a range of highly technical as well as legal matters. Requiring multiple referees, each with different expertise, ensures that the appropriate expertise is available to hear and decide the proceeding and ensure the confidence in the resulting decision.

Subclauses (4) and (5) provides that the chief executive may appoint a referee(s) to a development tribunal if the person has the qualifications, the experience, or the qualifications and experience that is required for a particular matter and that these qualifications, the experience, or the qualifications and experience may be prescribed under a regulation. This may include the qualifications, the experience, or the qualifications and experience specific to particular matters.

Subclause (6) specifies that the chief executive must appoint a chairperson for each development tribunal. Practically, the chairperson has responsibility for determining the way in which the proceedings are conducted (see Clause 202) and for signing the final decision of the development tribunal.

### **Remuneration**

Clause 190 provides for the payment of development tribunal members to be determined by the Governor in Council. If a member is a public service officer, the member is not entitled to remuneration for serving on the development tribunal during the ordinary times of the member's public service duty, however may be entitled to be reimbursed for incidental expenses incurred while serving as a member. This may include for example, motor vehicle running costs to and from the hearing venue.

### **Tribunal proceedings**

Clause 191 provides for how development tribunal proceedings operate. Development tribunal proceedings are meant to be less formal than those before the Planning and Environment Court.

Subclauses (1) and (2) provide that all persons appearing before a development tribunal must be afforded natural justice and that a tribunal must make its decision in a timely manner. This includes those rights established at common law such as the right to be given a fair hearing and the

opportunity to present one's case; the right to have a decision made by an unbiased or disinterested decision maker, and the right to have a decision based on logical evidence.

Subclause (3) provides that a development tribunal may conduct its business as it considers appropriate subject to a regulation; sit at times and places it decides; and hear 2 or more appeals or applications for declarations together. This allows development tribunals some discretion in conducting proceedings, if a regulation does not prescribe a certain manner or procedure.

Subclause (4) provides that a regulation can specify the way in which a development tribunal can operate including the required application fees for proceedings. It also provides that a regulation may prescribe who is to be the chairperson for particular proceedings. Subclause (4) also enables a guideline to be made setting out for example, the way in which the development tribunal may conduct its proceedings. Any guideline must be made by the Minister and prescribed by regulation.

### **Registrar and other officers**

Clause 192 provides for the appointment of a registrar and other officers to help development tribunals perform their functions. Appointments are made by the chief executive. Notice of any appointments must be published in the gazette. Public service officers appointed under this clause may hold the appointment or assist concurrently with any other appointment the officer holds in the public service.

## **Division 2 Applications for declarations**

### **Starting proceedings for declarations**

Clause 193 provides that a person may start a development tribunal proceeding for a declaration by lodging an application with the development tribunal registrar in the approved form, which must be accompanied by the required fee prescribed under a regulation.

### **Application for declaration about making of development application**

Clause 194 provides for an applicant who has made a development application, or the assessment manager for the application, to bring a proceeding before a development tribunal for a declaration about whether the application is a properly made.

However, subclause (2) provides that a declaration cannot be sought in relation to a dispute about whether a development application includes, or is supported by; the written consent of the owner of the premises the subject of the application.

This reflects an acknowledgment that issues affecting rights of private land owners or impact on State resources are more significant than other matters which arise about the form or content of an application, and ought to be judicially determined by the P&E Court.

Subclause (3) states that a proceeding must be started by an applicant within 20 business days after receiving notice from the assessment manager that the development application is not properly made. The assessment manager must start a proceeding within 10 days after receiving the development application. The assessment manager has been given the right to bring this proceeding

because it may not be sure whether the application is properly made and may wish to have the matter determined by a development tribunal as this is an easier, more accessible and timely means of resolving disputes particularly in cases where the assessment manager is limited by its capacity and resources.

The differential in the time between the applicant and the assessment manager for starting proceedings is to ensure development applications can continue to be facilitated through the development assessment process as efficiently and effectively as practical.

Subclause (4) states that the registrar must, within give notice of the proceedings to the respondent as a party to the proceedings within 10 days.

Subclause (5) provides that the development tribunal must give an information notice about its decision on the application to the parties to the proceedings. The information notice must state the decision, the reasons for the decision and any appeal rights for the recipient of the notice.

### **Application for declaration about change to development approval**

Clause 195 provides for a person to bring proceedings before a development tribunal for a declaration in relation to a change application for a development approval, if the approval is for a material change of use involving the use of a classified building. The person may seek a declaration about whether a proposed change to the approval is a minor change as defined under the Bill.

A classified building is defined in schedule 2 to mean a building classified under the Building Code as a class 1 building; or a class 10 building, other than one that is incidental or subordinate to the use, or proposed use, of a building classified under the Building Code as a class 2, 3, 4, 5, 6, 7, 8 or 9 building.

However, a proceeding cannot be brought under this clause if the responsible entity for making the change is the Minister or the Planning and Environment Court.

Subclause (4) states that the registrar must, within give notice of the proceedings to the respondent as a party to the proceedings within 10 days.

Subclause (5) provides that the development tribunal must give an information notice about its decision on the application to the parties to the proceedings. The information notice must state the decision, the reasons for the decision and any appeal rights for the recipient of the notice.

## **Division 3 Tribunal proceedings**

### **Action when proceedings start**

Clause 196 provides the process for the establishment of a development tribunal by the chief executive once tribunal proceedings have been started. The chief executive must appoint one of the referees as the chairperson of the development tribunal in accordance with any requirements of a regulation. The regulation may specify that the chairperson of the development tribunal may require specific qualifications and/or experience for particular proceedings. The chief executive must give each party to the proceeding written notice that a development tribunal has been established.

However, subclause (2) allows the chief executive to end a proceeding without establishing a development tribunal if satisfied it is not reasonably practicable to do so. While every effort is taken by the chief executive to choose a suitable development tribunal when it is formed, in certain limited circumstances, for example if there are no qualified referees or insufficiently qualified referees; if the referees available have a conflict of interest; or if the referees available are not able to decide the proceeding in a timely manner, it may be appropriate to end the proceeding.

Subclauses (3) and (4) provide that if the chief executive decides to end a proceeding without establishing a development tribunal it must give an information notice about its decision on the application to the parties to the proceedings. The information notice must state the decision, the reasons for the decision and any appeal rights for the recipient of the notice, which in this case would include the ability to start proceedings in the Planning and Environment Court for the matter that is subject of the ended proceedings.

In this event, subclause (4) provides that the period for starting any court proceeding (e.g. 20 day appeal period) starts again from the date the applicant is given the information notice by the chief executive under subclause (3).

Subclause (5) provides discretion for the chief executive to decide if it is appropriate to refund all or part of the fee paid to start the proceeding. This discretion is necessary because a part or full fee refund will be dependent on the circumstances of each proceeding. For example, in order to determine whether a referee is suitable or available for a particular proceeding, communication and correspondence will be necessary with, in some cases, a number of referees. Costs will be incurred in such cases.

### **Power of chief executive to excuse noncompliance**

Clause 197 allows the chief executive to decide whether or not to excuse noncompliance where an application or notice or appeal purporting to start development tribunal proceedings does not comply with the requirements under this Bill for validly starting a proceeding of that type.

For example, the ability for the chief executive to excuse the late filing of a document purporting to start a proceeding, if the applicant was on international leave during the appeal period and had supporting relevant documents and affidavit material; or where a notice of appeal may contain an incorrect real property description of the premises the subject of the appeal whilst a supporting document provided for the same appeal contains the correct description.

Subclause (2) requires the chief executive to consider the document (application or notice of appeal) and decide whether it is reasonable in all the circumstances to excuse the noncompliance. The chief executive may consider it reasonable to excuse the noncompliance if it would not cause substantial injustice to any person who would be a party to the proceeding, for example, in situations where the noncompliance would not result in the denial of a fair hearing.

Subclauses (3) and (4) state that if the chief executive decides not to excuse the noncompliance then notice must be given to the person who filed the document stating that the document is of no effect because of the noncompliance. This notice must be given by the chief executive within 10 days after the chief executive is given the document.

Subsection (5) states that if the chief executive does excuse the noncompliance then the proceeding can continue under section 196 (Action when proceedings start), as if the noncompliance had not happened.

### **Power to establish new tribunal or end tribunal proceedings**

Clause 198 provides the chief executive with the power to suspend development tribunal proceedings and establish another development tribunal to re-hear the proceedings; or if satisfied it is not reasonably practicable to establish another development tribunal, then to end the proceedings.

When a development tribunal is formed, every effort is taken by the chief executive to choose a suitable development tribunal, comprising of between one and five referees drawn from a pool of appointed referees with appropriate qualifications and experience to hear the matter. The issues in dispute, as identified in the original documents lodged in support of the appeal, are used to help identify the appropriate qualifications and experience required by referees in order to form a development tribunal.

While every effort is taken by the chief executive to choose a suitable committee when the committee is formed, in certain limited circumstances, it may become evident after a committee has been formed that it does not have the appropriate qualifications and experience to hear the issues in dispute. For example, the issues in dispute, ordinarily identified at the hearing, may differ from those within the appeal documentation, or new issues may come to light during the hearing that requires resolution). The development tribunal formed to hear the appeal may no longer have the appropriate qualifications and experience to hear the matter unless its membership is modified or alternatively some members might notify a conflict of interest or become unavailable due to ill health.

In some circumstances, it may result in the chief executive ending the proceeding. Ultimately the clause enables the chief executive to have some flexibility to change the committee membership to ensure the appropriate expertise is available to hear and decide the proceeding and ensure the confidence in the resulting decision.

Subclauses (3) and (4) provide that if the chief executive decides to end a proceeding then a notice must give an information notice about its decision on the application to the parties to the proceedings. The information notice must state the decision, the reasons for the decision and any appeal rights for the recipient of the notice, which in this case would include the ability to start proceedings in the Planning and Environment Court for the matter that is subject of the ended proceedings. In this event, subclause (4) provides that the period for starting any court proceeding (e.g. 20 day appeal period) starts again from the date the applicant is given the information notice by the chief executive under subclause (3).

Subsection (5) provides discretion for the chief executive to decide if it is appropriate to refund all or part of the fee paid to start the proceeding. This discretion is necessary because a part or full fee refund will be dependent on the circumstances of each proceeding. This discretion is necessary because a part or full fee refund will be dependent on the circumstances of each proceeding. For example, in order to determine whether a referee is suitable or available for a particular proceeding, communication and correspondence will be necessary with, in some cases, a number of referees. Costs will be incurred in such cases.

### **Further material for tribunal proceedings**

Clause 199 enables the registrar of the development tribunals to request any person to give the registrar any information that the registrar reasonably requires for the proceedings.

For example, the registrar may require plans and specifications of the development the subject of the proceedings. The registrar may also require additional information to assist the chief executive in deciding whether to excuse noncompliance under clause 197, such as affidavit material.

For a deemed refusal, the registrar may require information including a statement of the reasons the assessment manager had not decided the application during the period for deciding the application. The person must comply with the registrar's request within 10 business days.

### **Representation of Minister if State interest involved**

Clause 200 provides for the Minister to be represented in a development tribunal proceedings for a declaration or appeal if, before the proceeding is decided, the Minister is satisfied the proceeding involves a State interest. There will be occasions when decisions are made affecting State interests and a State entity is not the assessment manager or a referral agency.

### **Representation of parties at hearing**

Clause 201 states that a party to an appeal or a proceeding for declaration may appear in person or be represented by an agent. However, a person may not be represented by an agent who is a lawyer. This is designed to ensure the informality of development tribunal hearings and recognises that matters before a development tribunal are of a less complex nature than those before the Planning and Environment Court. This clause does not prevent any party from seeking legal advice to assist them during the proceeding.

### **Conduct of tribunal proceedings**

Clause 202 allows the chairperson of the development tribunal to decide how the proceedings are to be conducted. This provides flexibility for the development tribunals to deal with proceedings as cost effectively and efficiently as practical given the circumstances, taking into account the need to afford all parties natural justice, as required under clause 191.

The clause provides specific guidance about the way tribunals are to conduct hearing proceedings including that the development tribunal need not proceed in a formal way and is not bound by the rules of evidence. The development tribunal may inform itself in the way it considers appropriate and may seek the views of any person. The development tribunal must ensure all persons appearing before it have a reasonable opportunity to be heard, but may prohibit or regulate questioning at the hearing, again, taking into account the need to afford all parties natural justice.

If the parties to the proceedings agree, the development tribunal may decide to conduct the proceedings on written submissions, and if so, the development tribunal must give all parties a notice asking for the submissions to be made to the development tribunal within a stated period.

The time period for giving written submissions must be reasonable. The development tribunal may decide the proceedings without written submissions from a party if they are not received within the time period stated in the notice.

If the proceedings are to be decided by oral hearing, then the development tribunal must give notice to all parties of the time and place of the hearing. If a person, or a person's agent, does not appear at the hearing, the development tribunal may decide the proceedings without representations from the person. If a person does not have an opportunity to be heard, or fully heard, the person may make submissions to the development tribunal.

### **Tribunal directions or orders**

Clause 203 provides that the development tribunal may, at any time during proceedings, make any direction or order that the development tribunal considers appropriate. This includes for example, a direction to an applicant about how to change their application to make the application comply with the Bill or direct an assessment manager to assess an application, even though the referral agency response was to refuse the application.

### **Matters tribunal may consider**

Clause 204 applies if a development tribunal proceeding is about a development application, including about a development approval given for a development application. The clause provides that the development tribunal must decide the appeal or application for a declaration based on the laws and policies applying when the application was properly made, but may give the weight the tribunal considers appropriate, in all the circumstances, to any new laws.

### **Deciding no jurisdiction for tribunal proceedings**

Clause 205 provides that at any time before the development tribunal proceeding is decided, the development tribunal may decide that the committee has no jurisdiction to hear and decide the proceeding. Such a decision can be made on the tribunal's own initiative, or following a party to the proceeding bringing an application.

Subclauses (2) and (3) provide that if the development tribunal decides it has no jurisdiction, the development tribunal must give a notice about its decision, and the reasons for the decision, to all parties to the proceedings. When the tribunal gives the notice to the applicant, the period for starting proceedings for the matter in the Planning and Environment Court, starts again.

Subsection (4) provides that if the development tribunal decides to end proceedings, the fee paid to start the proceedings is not refundable. This is because a number of costs will be incurred in such circumstances, for example the development tribunal will have been established, the parties will have had the opportunity to be heard either at a hearing or on written submissions and reasonably considered by the development tribunal and significant time would have been expended by the development tribunal in writing and delivering its decision.

Existing SPA does not include a similar provision to this clause. It was determined that such a provision is required to address issues that have arisen in several development tribunal proceedings,

whereby after a development tribunal has been formed, a member of the development tribunal realises one or more of the issues in dispute are outside its jurisdiction.

The existing provisions in SPA currently compel the development tribunal to continue to hear and decide the proceeding, resulting in a decision of no jurisdiction. In these circumstances, time and resources can be wasted without resolving the dispute between the parties. This clause seeks to enable the development tribunal to end the proceeding, as soon as it comes to the attention of the development tribunal that it has no jurisdiction to hear the matter.

### **Conduct of appeals**

Clause 206 applies to appeal proceedings before the committees.

Subclause (2) provides that it is for the applicant in the appeal to establish that the appeal should be upheld; however subclause (3) states that for an appeal by the recipient of an enforcement notice, the enforcement authority that gave the notice must establish the appeal should be dismissed.

Subclause (4) states that appeals about development applications are heard by way of a reconsideration of the evidence that was before the entity that made the decision appealed against. Unlike the court, the jurisdiction of the committee is not a hearing anew. The informality of the current process is one of the main benefits of a development tribunal proceeding because it allows mediation of mutually acceptable outcomes between the parties in an informal environment. This results in the majority of decisions being finalised within 5 weeks of the hearing. If fresh evidence (hearing anew) was allowed in development tribunal proceedings it would result in an increase in the legal formality and complexity of proceedings including for example, the cost of an appeal due to the amount and extent of documentation filed. A hearing anew would also likely require the introduction of the rules of evidence to the hearing; and therefore likely increase the length of time from hearing to final decision.

However, subclause (5) provides that the tribunal may, but need not, receive and consider other evidence presented by a party to the appeal with leave of the tribunal. This is so that, in conducting the proceeding, the tribunal can use its discretion to provide parties a reasonable opportunity to be heard and are afforded natural justice pursuant to clause 210, to efficiently present a parties case.

### **Deciding appeals to tribunal**

Clause 207 describes the methods in which a development tribunal can make its decision in relation to an appeal. The development tribunal must decide the proceeding by doing one of the following: confirm the decision; change the decision; replacing the decision with another decision; set aside the decision and order the person who made the decision by a stated time; for a deemed refusal of a development application, ordering the assessment manager to decide the application by a stated time, and if the assessment manager does not comply with the order, decide the application or decide the application.

However, the tribunal must not make a change, other than a minor change, to a development application. The tribunal's decision takes the place of the decision appealed against.

### **Notice of tribunal's decision**

Clause 208 requires the development tribunal to give all parties to the tribunal proceedings an information notice stating the tribunal's decision, including any directions and orders given by the tribunal, the reasons for the decision, and relevant appeal rights for the recipient of the notice.

The decision of the development tribunal starts to have effect at the end of the appeal period if a party to the proceedings does not appeal the decision, or when the appeal ends if a party appeals the decision.

### **No costs orders**

Clause 209 provides that a development tribunal does not have the power to award costs in any proceeding. Each party to a proceeding must bear their own costs.

### **Recipient's notice of compliance with direction or order**

Clause 210 requires that, if a development tribunal directs or orders a party to a proceeding to do something, then the party must provide the registrar of the development tribunals with notification when the direction or order has been carried out.

### **Tribunal may extend period to take action**

Clause 211 allows a development tribunal to grant an extension of time for an action if appropriate. The power available to a development tribunal under this clause is only available after a tribunal has been formed, which occurs after the registrar has received a document purporting to start a proceeding, pursuant to clauses 184 and 193. Therefore, the power is not applicable to circumstances where the notice of appeal or application for a declaration is not received within the prescribed timeframe for starting the proceeding. Noncompliance with these timeframes may instead be excused by the chief executive under clause 197 as appropriate to the circumstances of the matter.

### **Publication of tribunal decisions**

Clause 212 provides that the registrar of the development tribunals must publish the decisions of the development tribunals under arrangements, and in the way approved, by the chief executive. Ensuring the decisions of the development tribunals are publicly available ensures its decision making is transparent and safeguards confidence in its processes. Having its decisions being made publicly available also provides valuable guidance to potential applicants and provides a resource for the referees for the development tribunals.

## **Chapter 7 Miscellaneous**

### **Part 1 Existing uses and rights protected**

The purpose of this part is to protect:

- existing, lawfully established uses, buildings and works after the commencement of the Bill; and
- existing rights to commence or continue using premises and rights, associated with lawfully constructed buildings or works, from a new or amended planning instrument.

#### **Existing lawful uses, work and approvals**

Clause 213 ensures existing lawful uses, buildings or works, and use rights remain lawful after an amendment to, or introduction of, a planning instrument.

The clause protects an existing lawful use of premises from an amendment of a planning instrument or introduction of a new planning instrument, which may stop, change or further regulate the use. A change to a planning instrument cannot impose new requirements on the lawful existing use; planning instruments do not apply retrospectively. If a use is established with a development permit, and operates in accordance with that permit, a subsequent amendment of a planning instrument cannot require the existing use to change or cease. However, this does not apply where there is a material change of use of premises.

The clause protects buildings or works that have been lawfully constructed and completed from an amendment of a planning instrument or introduction of a new planning instrument. The subclause establishes that a change to a planning instrument cannot require an existing lawful building or works to be altered or removed.

The clause protects rights acquired under existing and current development permits which have not been acted upon from an amendment of a planning instrument or introduction of a new planning instrument, which may stop or further regulate the development. Once a development permit has been obtained, development may be carried out in accordance with the permit regardless of any changes to a planning instrument. This applies even where the permit has not yet been acted upon, so long as the permit has not lapsed.

#### **Implied and uncommenced right to use**

Clause 214 ensures existing implied use rights that have not yet started, remain lawful for a period of time after an amendment to or introduction of a planning instrument, which may make the implied use assessable development instead of accepted development.

An implied use right is a proposed change of use inferred by a development application for particular premises that is given approval, but for which no development permit is required to establish the new use. In other words, the new use is 'as of right'; there is a legal right to carry out the use without a development approval. When the development is carried out in accordance with the development permit for the premises, the premises can be used for the new purpose.

The clause establishes that the implied use right remains lawful provided the development approval has not lapsed and the use commences within 5 years of the completion of the development authorised by the development permit.

### **Prospective categorising regulations unaffected**

Clause 215 clarifies that protection of existing lawful uses provided under this part does not affect the operation of the Regulation to prescribe levels of assessment for new development associated with the existing lawful use. New development starting on or after the day of commencement of the Regulation is still subject to any applicable provision of the Regulation.

## **Part 2 Taking or purchasing land for planning purposes**

The purpose of this part is to enable a local government to take or purchase land to:

- achieve the strategic outcomes of the planning scheme; and
- allow development, the subject of a development approval, to proceed.

### **Taking or purchasing land for planning purposes**

Clause 216 enables a local government to take or purchase land for two purposes: to achieve the outcomes of the planning scheme; or to allow development the subject of a development approval to proceed.

The clause enables a local government to take or purchase land that may not be able to be taken using the processes under the Acquisition of Land Act 1967. A local government may take or purchase land for the purpose of facilitating private development if the development is in accordance with the strategic outcomes of the planning scheme. A local government may also take or purchase land for the purpose of facilitating private development to be carried out by some other party, in particular circumstances.

The circumstances include if the development the subject of a development approval necessitates the construction of infrastructure on land or carrying drainage over land and cannot proceed without it, and the agreement of the affected land owner has not been able to be obtained. The clause is intended to facilitate the purchase or taking of land for downstream drainage purposes by a local government if an applicant for a development approval has been unsuccessful in negotiating appropriate drainage arrangements with downstream owners.

The local government may take land for the purpose of facilitating private development even if an applicant for a development approval benefits from the taking of land. It is not the intention that only land which is the subject of the development approval can be acquired by local government as this would be too limiting; rather the clause applies to land generally.

The Governor in Council's approval is required for a local government to take or purchase land under the clause. With approval, the local government is taken to be a constructing authority under the Acquisition of Land Act 1967 and may take the land under that Act. This approval is separate to any requirements a local government may have under the Acquisition of Land Act 1967. The clause

clarifies that for the purposes of the clause; the local government as constructing authority under the Acquisition of Land Act 1967 may also take or purchase an easement under that Act.

### **Part 3      Public access to information**

The purpose of this part is to:

- establish access rules that ensure particular planning and development assessment documents are publicly available for inspection and purchase;
- ensure the access rules provide for planning and development certificates and their effect; and
- preserve the public's rights to access information.

Terms used in this part include:

**access rules** are rules made by the Minister that establish the information that is to be publicly available.

**appropriate** is, for publicly available information, information that adequately informs those accessing the information about their rights and responsibilities relating to the matter.

**main office** is the office where documents that are publicly available are kept for inspection and purchase. The appropriate office may include a person's office or the department's State office, or any other place the person or chief executive decides.

**material** (for this part) is the documents or register the access rules require or permit a person to keep.

#### **Rules to ensure appropriate public access**

Clause 217 requires the Minister to make access rules that establish the information that is to be publicly available.

The access rules will direct entities with statutory responsibilities for development assessment to make a high level of information publicly available. They will incorporate requirements for public access to documents and information held by various entities in the planning and development system. The access rules will also include public access requirements for draft planning instruments that are publicly notified.

The access rules are not subordinate legislation. The access rules are a statutory guideline made by the Minister and approved by regulation. This allows more flexibility to incorporate descriptive and contextual information related to the documents to be publicly available. The clause requires the chief executive to keep current access rules freely available to the public on the department's website.

### **Access rules for certain documents**

Clause 218 enables the access rules to require or permit any entity with a planning instrument, designation, development assessment system, or infrastructure charging function under the Bill, to keep particular documents publicly available.

If the access rules require a person to keep or make specific documents or information available in a particular way, the person must comply. However, if the access rules permit a person to make specific documents or information available, the person has the discretion to decide whether to make them available or not.

The access rules may also require or permit a person to keep documents available at the appropriate office or on a website or both, and if they are to be kept available for inspection and purchase, or inspection only. The privacy principles under the Information Privacy Act do not affect the operation of the Bill. The access rules can permit particular personal information to be publicly available.

Unless otherwise stated in the access rules, documents may be kept in either hard copy or electronic format and different types of documents and information may be kept in separate registers.

Certified copy is a copy of the document certified as being an unaltered copy of the document by the relevant entity or individual. The relevant entity could either be the Minister, chief executive, local government, individual, department's or body corporate's chief executive, depending on the document being certified.

### **Public access rights**

Clause 219 establishes how the public may access information that a person is required or permitted to keep available for inspection and purchase under the access rules.

The person that keeps the material is required to have the material available for inspection free of charge during the ordinary business hours of where it is kept and where applicable, have a copy of the material or any part, available for purchase. A person may charge for the copying of the material, however the cost must be reasonable and no more than the actual cost of supplying the copy, including costs of postage if relevant.

It is noted that the Copyright Act 1968 (Commonwealth) overrides the Bill and may restrict the copying of the material, or any part of it, subject to copyright. If the material is to be available for inspection only, a copy of it may not be supplied. Inspecting the material at the person's office may be undertaken by viewing the material in hard copy or digital form. If the material is to be made available on a person's website, any person is able to view the material free of charge on the website and download it.

The clause establishes some limitations on the public's access right to inspect the material: the private information exemption, for information of a purely private nature, such as a person's residential address, phone number, email or other personal contact details; and the security exemption for sensitive security information.

The clause establishes that material is only required to be kept for the period of time the Bill states the material must be kept. A person is not required to make available a submitters name, address or signature. However, the person is also not prevented from publicly disclosing this information.

### **Planning and development certificates**

Clause 220 establishes that any person may apply to a local government for any of three types of planning and development certificate for premises.

The clause establishes that the three types of planning and development certificate are: limited, standard or full. The access rules prescribe the contents of the different types of planning and development certificates. The purpose of the certificate is to provide relevant planning and development information applicable to specific premises.

An application for a planning and development certificate must also be accompanied by the fee required by the local government to issue the certificates.

The clause establishes the time within which each type of planning and development certificate must be given.

- Limited certificate. A limited certificate must be given within 5 business days after the application was made.
- Standard certificate. A standard certificate must be given within ten business days after the application was made.
- Full certificate. A full certificate must be given within 30 business days after the application was made.

In a proceeding, a planning and development certificate is evidence of the information contained in the certificate. This is intended to clarify the status of planning and development certificates and recognises a potential function as the basis of private planning and development decisions which may later be a matter in a proceeding.

The clause establishes that reasonable compensation may be claimed if a person suffers financial loss because of an error or omission in a planning and development certificate.

The claimant need not be the owner of the subject premises or the person that obtained the certificate. They need only demonstrate they relied on the planning certificate in making a decision or taking an action and they have suffered some loss which would not have been suffered if the certificate had been correct.

The clause establishes a time limit of six years from when the financial loss was first suffered, within which a claim for compensation under the clause must be made to the local government. The six year period is consistent with the ordinary six year limit for the commencement of civil proceedings.

The provisions under the Bill which relate to how a local government decides, pays and records a claim for compensation, also apply to a compensation claim for an erroneous planning and development certificate.

### **Application of Information Privacy Act 2009**

Clause 221 clarifies that the Information Privacy Act 2009 applies to this part of the Bill.

The privacy principles under that Act do not affect the operation of the provisions of the Bill relating to information, including personal information, which is required or permitted under the access rules to be made publicly available.

Requirements or permission under the access rules to make personal information publicly available, apply to corporations as well as individuals. The access rules permit a person to keep and make available documents that contain private or personal information of corporations as well as individuals.

## **Part 4      Urban encroachment**

The purpose of this part is to:

- establish a process to protect existing uses of premises from legal action by new encroaching development;
- provide for the registration of existing premises and establishment of an affected area;
- establish the rights and responsibilities of particular persons in the affected area; and
- restrict particular processing in connection with registered premises.

Terms used in this part include:

affected area is the area to which the registration premises relates, and the area in which a person's rights in relation to taking civil and criminal proceedings for nuisance against the registered premises, may be limited.

decision notice is a notice that states the decision of the Minister in relation to an application for the registration or renewal of registration of premises. It may also be a notice that states the decision of the Minister in relation to a proposed amendment or cancellation of a registration.

lease is an agreement under which the owner of premises gives a person the right to occupy the premises in exchange for money or other valuable consideration.

buyer the person that has entered into an agreement to buy all or part of the premises. Milton rail precinct is the area called the Milton rail precinct shown on the map in the repealed Planning (Urban Encroachment –Milton Brewery) Act 2009.

relevant act is an activity undertaken at registered premises that is approved by a development approval and involves the emission of aerosols, fumes, light, noise, odour, particles or smoke.

affected person is the owner, occupier, or lessee of premises in an affected area to which the limitation on taking civil or criminal proceedings applies.

environmental value is an environmental value under the Environmental Protection Act.

new or amended authority is a new or amended, development approval, registration to carry out environmentally relevant development, or code of environmental compliance applying to the registered premises.

original authority is the development approval, registration, or code of environmental compliance applying to the premises at the time of registration of premises.

### **What this part is about**

Clause 222 states that this part is intended to protect existing uses of premises from new encroaching users taking particular legal action. The part also establishes the other rights and responsibilities of particular persons affected by the registration of the existing use of premises.

### **Making or renewing registrations**

Clause 223 establishes that the owner of premises may apply to the Minister for the registration of the premises or to renew the registration of premises. The clause is intended to enable an existing use of premises to register for protection from particular civil proceedings for nuisance, and particular criminal proceedings in relation to an emissions-based nuisance complaint.

This is intended to allow for the continued lawful use of particular premises and the carrying out of relevant activity within the determined acceptable levels of emissions. As the clause limits a person's rights to take action or seek remedy for particular nuisances is restrictive, the clause only applies to an existing use of premises that has a development approval for an activity that involves the emission of aerosols, fumes, light, noise, odour, particles or smoke.

After consideration of an application for the registration or renewal of registration of premises, the Minister may decide to approve the registration or renewal with or without conditions, or refuse to register the premises or refuse the renewal. In making a decision on the application, the Minister must be satisfied that the existing use of premises and the associated emissions are in accordance with the development approval and comply with any applicable code of environmental compliance or prescribed matter.

An application to renew the registration of premises must be made before the registration expires. Where renewal is applied for, the registration continues in effect from the day it would have ended until the Minister decides the renewal application, unless the application is withdrawn or taken to be withdrawn.

The Minister must give notice of the decision to the applicant, after making a decision to either approve or refuse the registration or renewal of registration of premises. The decision notice must identify the affected area for which the premises are registered, and where applicable any conditions imposed on the registration. The Minister must also notify each applicable local government in whose local government area the registered premises and affected area is located. The local government must note the registration of premises on its planning scheme and on any new planning schemes made during the life of the registration. As with other notations, the note about the registration of premises is not an amendment of the planning scheme.

The registration of premises lasts for a period of 10 years commencing on the day the decision notice is given, or a later day as stated in the notice. If the application was to renew a registration of premises, the renewal also lasts for a period of 10 years commencing from the day after the current registration ends. This ensures the continuity of the registration.

### **Amending or cancelling registrations**

Clause 224 enables the Minister to amend the conditions of a registration, or cancel the registration of premises in particular circumstances.

A registration of premises can be cancelled where the level of emissions of aerosols, fumes, light, noise, odour, particles or smoke at the registered premises is not in compliance with the development approval, an applicable code of environmental compliance or other regulated matter or if a condition of the registration is contravened.

Where the Minister proposes or amends conditions of a registration or cancels the registration, the Minister must follow a process for seeking written representations from the owner or owners of the premises.

After consideration of any representations from the owner, the Minister may decide to amend conditions or cancel the registration, and must notify the owner of their decision. The amendment or cancellation commences the day the decision notice is given, or a later day as stated in the notice.

The clause clarifies that the owner of registered premises may cancel the registration at any time, by giving notice to the Minister to end the registration of the premises. If the owner of the registered premises takes this action, the registration ends from the day the Minister receives the notification, or a later day nominated by the owner in the notice.

### **Responsibilities of owners of registered premises**

Clause 225 requires the owner of registered premises to record the registration or renewal or a registration in the appropriate register. The clause also requires the owner to publicly notify the registration.

The owner of the registered premises must give the registrar of titles a notice, within 20 business days of the premises being registered, of the registration. This will enable the registrar to record the area affected by the registration in the relevant register.

Within 20 business days of the premises being registered or renewed, the owner of the registered premises is also required to publish a notification of the registration in a newspaper which circulates in the affected area for which the premises is registered. Where relevant, the owner is also required to publish details about the registration and registered premises on the website for the premises.

After complying with all or any of these requirements the owner of the registered premises must notify the Minister. While the premises are registered, the owner of the registered premises is required to keep available information about the registration, including any conditions imposed by the Minister and details about the approved activities and the associated levels of emissions.

When the registration of premises ends or is cancelled the owner of the registered premises is required to notify the registrar to remove the affected area notation from the register. This will enable the registrar to remove a record of the area affected by the registration from the register.

The clause clarifies that if the owner of the registered premises fails to fulfil any of their relevant requirements, a penalty may be applied.

### **Responsibilities of owners of affected premises**

Clause 226 requires the owner of premises in the affected area, to notify any potential lessee of the retractions to a person occupying the premises.

Before entering into a letting agreement for premises within an affected area the owner or the owner's agent, must notify the intending lessee that their rights in relation to taking civil or criminal proceedings against the registered premises may be limited.

The clause clarifies that if the owner of the affected premises fails to fulfil this requirement, a penalty may be applied.

### **Responsibilities on applicants**

Clause 227 requires an applicant for a development application in an affected area to record that the premises the subject to the application is affected by a registration.

The clause applies to a development application for a material change of use or reconfiguring a lot in the affected area. However the Regulation exempts particular development applications from being subject to this requirement. The Regulation establishes that a development application on developed land is exempt from this requirement if the proposed development is for or relates to a class 1a or 1b building or a class 10 building or structure. The Regulation also establishes that a development application on undeveloped land is exempt from this requirement if the proposed development is for or relates to a class 10 building or structure. This is because the protection for the registered premises and the corresponding limitation on a person's rights to take civil or criminal proceedings does not extend to this particular development.

Within 20 business days of the application being made, the applicant must give the registrar of titles a notice about the material change of use or reconfiguration of a lot development application. This will enable the registrar to record the premises or lots affected by the registration in the appropriate register. If the application lapses, is refused or withdrawn the applicant must request the registrar remove the notice from the register. If the development applicant fails to fulfil this requirement, a penalty may be applied.

### **Rights of buyers in Milton rail precinct**

Clause 228 establishes an additional consequence for an applicant for a development application in the Milton rail precinct, if the applicant fails to record that the premises the subject to the application is affected by a registration.

The clause provides that if the development applicant enters into a contract with someone else to buy all or part of the premises the subject of the application, and the affected area is not recorded in the appropriate register at the time of entering into the contract, the buyer may end the contract by written notification at any time before the contract is completed.

If the buyer ends the contract in this way, the applicant is required to, within 10 days of receiving the written notification, refund to the buyer any deposit paid to the supplicant under the contract. If the applicant fails to refund to the buyer any deposit paid under the contract, a penalty may apply.

The clause clarifies that the requirement to refund the buyer applies despite anything to the contrary stipulated in the contract of sale, and regardless of whether the seller is the applicant for the relevant development application, or how many times the property has been sold since the development application was made.

### **Responsibilities of registrar of titles**

Clause 229 requires the registrar of titles to keep a record of any notice provided to the registrar from an owner of registered preemies, owner of affected premises or a development applicant. After receiving notification that a registration has ended or has been cancelled, or that a development application has lapsed, been refused or withdrawn, the registrar is also required to remove the record from the register.

### **Restriction on legal proceedings**

Clause 230 prevents an affected person from taking civil proceedings for nuisance, and particular criminal proceedings in relation to a local law, against a registered premises.

The clause is intended to protect registered premises from civil proceedings for nuisance, and particular criminal proceedings in relation to an emissions-based nuisance complaint. The clause applies to a nuisance complaint for an activity undertaken at the registered premises, which is unreasonable or likely interference with an environmental value. However, the clause only applies to an existing use of premises that has a development approval for an activity that involves the emission of aerosols, fumes, light, noise, odour, particles or smoke.

An affected person cannot take civil or criminal proceedings relating to a local law in relation to the claim against registered premises, where the relevant act complies with the development approval for the registered premises or any code of environmental compliance. However, the clause does not limit the right to take action for other contraventions under the Environmental Protection Act 1994 (EPA) or other Act.

An affected person is the owner, occupier or lessee of premises that are or were the subject of development application made after the Bill commences, or for a development application made but not decided before the Bill commences. Similarly, An affected person is the owner, occupier or lessee of premises that are or were the subject of development application, for which a development approval has been given for but a certificate of classification has not been given before commencement.

The limitation on proceedings and the immunity for registered premises are removed where the development approval, or registration certificate, for the registered premises is amended and new approval or registration certificate authorises greater emissions than the original authority of the same type for the premises.

### **Regulation may prescribe additional matters**

Clause 231 establishes that the Regulation may prescribe additional matters related to this part of the Bill. The Regulation may include, but is not limited to, requirements or processes relating to the making or deciding of an application to register premises or the requirements relating to the notification of registered premises.

## Part 5 Other provisions

The purpose of this part is to:

- enable a local government planning scheme or TLPI to regulate development for a party house;
- enable a notice or document relating to an application or submission to be provided electronically;
- establish interpretive provisions for persons or matters related to a development application, approval or condition;
- establish interpretive provisions for a matter related to a call in, change or extension application, enforcement notice, infrastructure charge or function;
- enable the chief executive to approve forms;
- enable the Minister to delegate functions; and
- other administrative matters.

Terms used in this part include:

**party house** is a residential dwelling regularly leased, hired or rented on a short-term basis for hosting parties, for example, bucks nights and weddings, with unwanted behavioural and noise impacts on neighbouring communities.

**planning instrument** (under this part) is a local government's planning scheme or TLPI.

**residential dwelling** is an umbrella term that captures premises used for a self-contained residence that is a dual occupancy, dwelling house, dwelling unit or multiple dwelling.

**residential dwelling development** is a material change of use for a residential dwelling.

**information-giver** is a person, applicant or submitter giving a notice or document electronically.

**other party** is the recipient of a notice or document given electronically.

**communication** is the electronic transmission of a notice or document.

**sending time** is the time the notice or document was electronically transmitted.

**application** (for electronic service) includes a request, such as for change applications or extension applications.

**applied law** is another provision of the Bill, another law or a provision of another law applied by a provision of the Bill.

### Party houses

Clause 232 enables a local government to regulate development for a material change of use for a party house.

The clause is intended to enable local government to regulate party houses as a specific land use in planning schemes. This is because, from a land use planning perspective, it was never envisaged that a residential dwelling would be used in such a way that the primary use of the premises is more consistent with an event venue rather than residential accommodation.

The clause provides a definition of a party house. The definition includes premises, or any part of premises, that is regularly used for parties where the accommodation or facilities are provided for a period of less than 10 days. Examples of the types of parties are provided in the definition. In addition, the definition provides that the accommodation or facilities are provided for a fee and the owner is not present for the duration of that use. The intent of the definition is not to capture lawful ancillary uses of residential dwellings.

The clause enables a planning scheme or TLPI to state that a material change of use for a party house is assessable development in all or part of the planning scheme area. A planning scheme or TLPI may include assessment benchmarks for assessing development for a material change of use for a party house. It is envisaged that since the party house use may be similar to other land uses for the provision of accommodation, entertainment, functions and receptions, a party house development assessment may be informed by those development assessment frameworks. However, this is a matter for local government consideration and determination.

The clause also enables a local government to identify a party house restriction area. The clause clarifies that the use of a residential dwelling in the area as a party house is not, and has never been, a natural and ordinary consequence of an MCU for a residential dwelling as part of the residential dwelling development.

The clause also clarifies that a development permit for a residential dwelling development did not and has never authorised a material change of use for a party house as part of the residential dwelling development. Consequently, a party house is not a lawful use of that premises under a development permit for residential dwelling development.

A party house is also not a lawful use of premises just because a planning scheme or temporary local planning instrument provides or provided that a residential dwelling development is accepted development. However, if the residential dwelling had development approval to undertake activities consistent with the new party house definition, it is intended that those development rights are not removed.

### **Application of P&E Court Act evidentiary provisions**

Clause 233 states that the Planning and Environment Court Act, part 5, division 2 applies to a proceeding under the Bill started in a court other than the Planning and Environment Court or in a tribunal and to any person else acting judicially.

### **Electronic service**

Clause 234 enables an applicant, person or submitter to give an application, document, notice or submission electronically, if the relevant form, application or notice states that it may be given electronically.

The intent of the clause is to facilitate the use of electronic forms of communication in planning and development assessment. An applicant, person or submitter may give their respective application, document, notice or submission electronically, if acceptable to the recipient and an electronic address for service is provided. An electronic address may include email address, an internet protocol (IP) address or the address of a digital mailbox.

An applicant, person or submitter may provide either the document itself or a message including a hyperlink at which a document is available to be viewed or downloaded. This is referred to as the communication in the clause. The recipient of the message is taken to have been served the document if it was able to be viewed at the stated hyperlink at the time the message was transmitted. The document must be available for reading or downloading at the hyperlink for a reasonable period after the message was transmitted.

A reasonable period for the document to be available is relative to the functions of the recipient of the document, under the Bill. The applicant, person or submitter is taken to have been served with the document whether or not the hyperlink was opened. A certificate, signed by an appropriately qualified officer of the person, may be used in a proceeding as evidence of the sending time, and the availability of the document at the stated hyperlink.

The clause does not limit the application of the Acts Interpretation Act and the Electronic Transactions Act to the Bill. The clause applies to requests, such as for change applications or extension applications, in the same way it applies to applications.

### **References in Act to particular terms**

Clause 235 establishes how terms used in the Bill are to be interpreted. The clause clarifies the meaning of particular terms in particular contexts and enables the use of less complex wording throughout the main text of the Bill.

### **Applied provisions apply with necessary changes**

Clause 236 clarifies that where a requirement, process or provision under the Bill or another law applies to a requirement, process or provision under the Bill, the matter should be read and interpreted logically, making any changes necessary to achieve the intended meaning or purpose.

### **Delegation**

Clause 237 enables the Minister to delegate any power or function, including the forming of an opinion, to an appropriately qualified officer or another Minister.

### **Approved forms**

Clause 238 enables the chief executive to approve forms for use under the Bill. The chief executive can approve a form that is combined with or used together with a form that is approved under another Act.

### **Guideline-making power**

Clause 239 enables the Minister or chief executive to make guidelines about the matters to be considered by a person performing a function or exercising a power under the Bill, or for any other

matter related to the administration of the Bill. The clause also establishes how a guideline is made and when it comes into effect. Regulation-making power

**Regulation – making power**

Clause 240 enables the Governor in Council to make a regulation under the Bill. The clause also establishes what a regulation may prescribe.

## Chapter 8 Transitional provisions and repeal

### Part 1 Transitional provisions for repeal of Sustainable Planning Act 2009

The purpose of this part is to establish:

- a framework for transitional arrangements in relation to the Bill;
- general provisions about the treatment and interpretation of documents, processes and other matters; and
- specific additions, qualifications or exceptions to the general provisions.

Terms used in this part include:

**old Act** is the repealed Sustainable Planning Act 2009.

**applied provision** is a provision of the old Act applied by this part.

**document** (under this part) is any document and includes an instrument.

**transitional regulation** is a regulation that makes provision to allow or facilitate the transition of the repealed Act to the commencement of the Bill or the Planning and Environment Court Bill, or anything the Bill does not make sufficient provision for.

**LGP&E Act** is the repealed Local Government (Planning and Environment) Act 1990.

### Division 1 Introduction

#### What this part is about

Clause 241 states that this part is about the transition from the old Act to this Act, and provides that if this part applies a provision of the old Act to a thing, any other provision of the old Act mentioned in the applied provision also applies, as well as any definition from the old Act necessary to interpret the other provisions.

The clause provides that division 2 applies subject to the other divisions of this part. This is because division 2 contains provisions of general application, while divisions 3 – 7 include specific provisions in relation to specific matters that add to, or apply despite the general provisions in division 2.

For example:

- Section 242 provides that a document, such as a development approval, continues to have effect as if it were made under this Act. However division 4 includes a provision that the lapsing arrangements under section 341 of the old Act apply instead of those under section 82 of this Act to a development approval given under the old Act before or after commencement.
- Section 242 provides that a notice, such as an infrastructure charges notice, continues to have effect as if it were made under this Act. However section 255 provides for the old Act to continue to apply for some notices about infrastructure.

## **Division 2 General provisions**

### **Documents**

Clause 242 is a provision of general application relating to the continuation of documents under this Act.

The intent of the section is that a document under the old Act effectively “becomes” a document of the same name (or where the document does not have the same name, the name provide for in the table under subclause (6)) under this Act, even if its terms or conditions could not be imposed under this Act.

However the document is taken to have been made, given or received when it was made, given or received under the old Act. For example:

- A development approval in effect immediately before the commencement continues in effect as a development approval, and the provision of this Act relating to changing, extending or cancelling the approval apply to it. However for determining when the approval would lapse if development under the approval is not substantially started, the approval is taken to have had effect when it had effect under the old Act.
- A superseded planning scheme created before the commencement continues to be a superseded planning scheme under this Act, but for determining the period within which a superseded planning scheme request may be made in relation to the superseded planning scheme under this Act, the superseded planning scheme is taken to have been created when it was created under the old Act.

Document is defined very broadly and inclusively in subsection (7) (a). However section 7(b) provides for the exclusion of:

- any guidelines made by the Minister or chief executive;
- any regulation, such as the Sustainable Planning Regulation 2009;
- documents specifically excluded elsewhere in this part, such as State planning regulatory provisions and the standard planning scheme provisions mentioned in section 247.

These are intended to stop having effect on the commencement, and statutory instruments in the process of being made upon the commencement, which under section 243 will be subject to the provisions of the old Act until they are made, upon which they will effectively become a document of the corresponding type under this Act.

### **Statutory instruments**

Clause 243 provides for the old Act to continue to apply to processes for making statutory instruments under the old Act underway at the commencement.

However once the instrument is made, this Act applies to the statutory instrument in the same way that documents made under the old Act continue under section 242.

The clause provides for a regulation to identify a statutory instrument as a statutory instrument to which this section applies. This is intended to address any circumstances under the old Act in which it may be unclear as to when a process ‘started’.

### **Applications generally**

Clause 244 enables the repealed Act to continue to apply to an undecided application, or an appeal or a negotiated decision notice in relation to an undecided application. The repealed Act remains in force when dealing with and deciding an application under the repealed Act and carrying out the stated actions under the other Act relating to the application.

However once any approval is given this Act applies to the approval in the same way that documents made under the old Act continue under section 242.

The clause provides for the electronic service arrangements under this Act to apply to the resulting approval.

The clause provides that any resulting approval is taken to have been made under this Act.

The clause excludes compensation claims from the effect of this clause, as they are dealt with specifically under clause 250.

### **References to the old Act or provisions of the old Act**

Clause 245 states that a reference to the repealed Act in another Act or document is a reference to this Act to the extent the context allows.

Further, a reference to a particular provision in the repealed Act in another Act or document is a reference to the provision in the Bill that corresponds, or most closely corresponds, to the provision in the Bill.

Clause 245 also contains a table providing guidance about the translation of particular terms used under the old Act to their corresponding terms under this Act. This is particularly intended to provide guidance about the interpretation and application of planning instruments transitioned under sections 242 and 243.

It is intended that planning instruments be capable of being effectively interpreted and applied upon the commencement of the Bill without the need to amend them.

For any terms not covered by the table, a transitional regulation made under section 273 may be used to provide additional guidance.

### **Lawful uses of premises**

Clause 246 establishes that if an existing use of premises was lawful prior to the commencement of the Bill, then the use will remain lawful upon commencement.

The clause does not provide for the lawfulness of a use that did not have a necessary approval under another Act and was unlawful under that Act. This clause is similar in its effect to section 681 of the old Act.

### **State planning regulatory and standard planning scheme provisions**

Clause 247 clarifies that State planning regulatory provisions and standard planning scheme provisions under the repealed Act stop having effect upon the commencement. This compliments clause 242(7) (b) which provides that these instruments do not continue having effect under that clause.

Some provisions of the standard planning scheme provisions may be carried forward as “required contents” of the regulation under clause 14, and the regulation also may reflect some of the matters currently regulated under State planning regulatory provisions.

### **Declaration for certain continued provisions**

Clause 248 states that the Acts Interpretation Act 1954, section 20A applies to provisions of the repealed Act specified in that clause, so that their effect continues but are not duplicated in the Bill.

Section 20A (2) of the Acts Interpretation Act 1954 provides that a saving, validating or transitional effect under an Act does not end merely because of the repeal of the Act.

Furthermore section 20A(3) provides for an Act to declare a law to which that section applies, whether or not the law is consistent with the general principle under section 20A(2).

The clause contains references to provisions of the old Act declared for the purpose of section 20A (3).

Section 20A (5) confirms that the absence of a declaration mentioned in subsection (3) does not imply that the general principles in subsection (2) do not apply to provisions of an Act not specifically declared under that subsection. The provisions declared under clause 248 are generally those which may be read as applying in the context of the Bill without substantial interpretive assistance.

Provisions requiring interpretive assistance are dealt with in other transitional provisions of the Bill, such as sections 242 and 245.

## **Division 3 Planning**

### **Local planning instruments requiring code assessment**

Clause 249 enables a local government to amend a local planning instrument for the purposes of requiring merit assessment instead of standard assessment and for making necessary amendments to interpret the transition of code assessment under the repealed Act to merit assessment.

However, the clause only applies to development for which code assessment applied before the Bill commences.

The clause establishes a process for a local government to make an amendment of a local planning scheme for the purposes of requiring merit assessment instead of standard assessment.

The clause only applies for one year from when the clause commences, after which time a local government will have to follow the process provided in chapter 2 of proposing to amend a local planning instrument.

The table in section 245 provides that a reference to code assessment under a document made before the commencement is taken to be a reference to standard assessment. This reflects the fact that a substantial majority of code assessments under existing local planning instruments are for relatively straightforward matters for which the standard assessment and decision rules under the Bill are well suited.

However in limited instances, applying the standard assessment rules to previously code assessable development may prove difficult, for example because:

- there are multiple codes applying to the development with potentially conflicting outcomes; or
- some referral agency responses may typically require development to conform to the response in a way that directly contradicts the outcomes sought through a code.

Section 17 of the Acts Interpretation Act 1954 allows for the making or amendment of instruments provided for under an Act between the time of its enactment or commencement. This facility could be used by a local government before the commencement to ensure that amendments provided for under this clause could be made in order to be ready to take effect upon the commencement.

### **Compensation claims**

Clause 250 provides for transitional arrangements in relation to claims for compensation.

For a claim for compensation made before the repeal of the old Act, the claim, and any appeal in relation to the claim, may proceed under the old Act.

For a right to claim compensation that existed under the old Act, but had not been exercised before the commencement, the claim may be made under the Bill, however for establishing the time within which the claim must be made section 708 of the old Act continues to apply instead of clause 25(6).

## **Division 4 Development assessment**

### **Categorising development under designations**

Clause 251 provides for the assessment category for development for infrastructure designated under the old Act.

Under clause 245 a designation of land for community infrastructure under the old Act becomes a designation under the Bill.

Under clause 39(6)(b) of the Bill, development under a designation, other than for building work assessed under the building assessment provisions, is accepted development. This contrasts with the old Act, under which development for a community infrastructure designation was only exempt development under a local planning instrument, and development approvals may still have been required for development made assessable under a regulation.

Consequently the matters considered by a designating Minister under the old Act before making the designation may not have included matters that would have been considered for a subsequent development application. For transitioned designations, the clause substitutes categories of assessment more consistent with those under the old Act for those under section 39(6)(b), ensuring

development approvals will still be needed in relation to those designations, so that key considerations about the environmental impacts of the designations are not overlooked.

### **Water infrastructure applications**

Clause 252 provides for the continuation of particular development assessment arrangements introduced under the Water Supply Services Legislation Amendment Act 2014 in relation to the water infrastructure of distributor retailers.

The clause provides that a distributor retailer or its delegate will continue to be a referral agency for development applications related to earlier development applications for which the distributor retailer or delegate also exercised a referral jurisdiction. This is intended to reflect the continuing effect of section 959C of the old Act.

The clause also preserves arrangements under the old Act in relation to the SEQ design and construction code, and the giving of notices of appeal to distributor retailers respectively, for applications to which subclause (2) applies.

These transitional provisions are complimented by provisions contained in the Planning and Development (Planning for Prosperity – Consequential Amendments) and Other Legislation Amendment Bill 2015, which insert transitional arrangements into the South East Queensland Water (Distribution and Retail Restructuring) Act 2009, dealing with matters such as the giving of infrastructure charges notices under that Act by distributor retailers in relation to development approvals for development applications.

### **Development approvals and compliance permits**

Clause 253 enables a person that was the assessment manager or referral agency for a development application under the repealed Act, to continue in that capacity under the Bill, for example for dealing with subsequent change applications.

However, for a development approval to which section 944A of the repealed Act applied, the chief executive is taken to be the responsible entity for a change application. For an application to cancel a development approval or an extension application the chief executive is taken to have been the assessment manager.

### **Change applications for designated infrastructure**

Clause 254 continues the effect of section 369(4) of the old Act, which limits the persons who may seek to make changes to development approvals in relation to designated infrastructure.

For infrastructure designated after the commencement, further development approvals, other than for building work assessed under the building assessment provisions, will not be required.

Consequently there is no need to limit the persons who may make a change application under clause 75, as there will be no change applications in relation to infrastructure designated after the commencement.

However there may be development approvals in relation to designations made under the old Act before the commencement, and it would be inappropriate for someone other than the infrastructure provider to seek to change these approvals.

## **Division 5 Infrastructure**

### **Infrastructure charges notices**

Clause 255 enables the repealed Act to continue to apply to the specified notices about infrastructure under the old Act as if the Bill had not commenced.

Infrastructure charges notices given after the commencement of the Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Act 2014 will transition to infrastructure charges notices under the Bill under section 242.

However this clause acts as an exception to the general rule in section 242, by continuing to apply the old Act to notices given before the commencement of Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Act 2014. (See clause 241(3), which provides that a provision in division (2) is subject to a provision in any subsequent divisions under this chapter).

However, if a change approval or an extension approval is given for a development approval to which a notice mentioned above, and given by a local government relates, the local government may amend the notice under chapter 4 as if it were an infrastructure charges notice.

### **Levied charges**

Clause 256 enables a levied charge under the repealed Act to be taken to be a levied charge under the Bill.

The levied charge complies with chapter 4 to the extent the charge complied with the repealed Act and is taken to have been levied on the day the charge was levied under the repealed Act.

The repealed Act continues to apply to an infrastructure charge, a regulated infrastructure charge and an adopted infrastructure charge.

This clause makes specific reference to charges levied, or payable, under repealed legislation, because a charge is not in itself a “document”, so would not be covered by section 242.

### **Infrastructure charges**

Clause 257 is similar in character to section 256 and preserves charges adopted (but not yet levied) under repealed legislation.

### **Infrastructure charges resolutions**

Clause 258 continues the effect of relevant parts of section 979 of the old Act.

Some of the arrangements under that section, in particular the requirement for local governments to have made a new infrastructure charges resolution by 1 July 2015, will have expired before the commencement, and so have not been reflected in this clause.

The new resolutions will be continued in effect under section 242 of the Bill. However section 979 provides for infrastructure charges resolutions to continue to perform some functions of an LGIP until 1 July 2016, after which local governments will be prevented from carrying out several charging functions unless their planning schemes include an LGIP. Subclauses (2) – (4) continue the effect of these arrangements, until either a local government’s planning scheme includes an LGIP, or 1 July 2016, whichever is the earlier.

### **Infrastructure charges in declared master plan area**

Clause 259 continues the effect of section 925 of the old Act, which prevents an infrastructure charge being levied in a master planned area, unless the local government’s infrastructure charges resolution specifically provides for it.

### **Infrastructure conditions**

Clause 260 continues the effect of the parts of section 848 of the old Act, allowing infrastructure contributions under a condition of a development approval under that section to continue to be collected and disbursed in accordance with that section.

Subclauses (3) and (4) provide for infrastructure charges notices to be given in relation to any approval for a change or extension application for a development approval to which this clause applies.

This is consistent with the approach introduced under the Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Act 2014, whereby new or amended infrastructure charges notices may now be given in relation to approvals of requests to change or extend development approvals given before the commencement of that amendment Act.

### **Infrastructure agreements**

Clause 261 ensures section 154(2) (which provides for an infrastructure agreement to which a State infrastructure provider is a party to prevail over a development approval or charges notice only if the chief executive approves the agreement) does not apply to an infrastructure agreement that is taken to have been entered into before 4 July 2014.

## **Division 6 Enforcement and appeals**

### **Tribunals**

Clause 262 provides for a building and development dispute resolution committee under the old Act to become a development tribunal under the Bill.

### **Proceedings**

Clause 263 enables a person that had a right to start a SPA proceeding on commencement of the Bill, but that had not started the proceeding, to commence a proceeding as if the Bill and the Planning and Environment Court had not commenced.

The proposed proceeding may be started, and the started proceeding must be continued under the repealed Act. If the proposed proceeding or started proceeding was to a building and development dispute resolution committee under the repealed Act and no committee had been established, the Bill applies to proceedings.

## **Division 7 Miscellaneous**

### **Structure plans**

Clause 264 includes a declaratory provision, and continues in effect particular requirements in relation to, structure plans.

Structure plans under the old Act form part of the relevant local government's planning scheme (see the old Act, section 141(1) (a) as it was before the commencement of the Sustainable Planning and Other Legislation Amendment Act (No. 2) 2012, and section 898).

Arrangements for structure plans and master plans were removed from the old Act under the Sustainable Planning and Other Legislation Amendment Act (No. 2) 2012. However:

Substantial transitional arrangements were included in the old Act to ensure processes underway, and rights and obligations obtained under, the arrangements were preserved; and

Arrangements were inserted in the old Act (section 761A) to ensure that structure plans proposed or made under the repealed arrangements were appropriately reflected in the relevant local governments' planning schemes.

The only local government yet to have made or amended its planning scheme to comply with the former section 761A is the Sunshine Coast Regional Council. Consequently subclause (1) seeks to put beyond doubt that the Council's planning scheme no longer includes a structure plan.

Of the remaining four local governments which had started processes under the repealed arrangements to make a structure plan, two (Gold Coast City council and Redland City Council) had structure plans in effect by the time the arrangements were repealed, and two (Cairns Regional Council and Moreton Regional Council) did not.

Subclauses (2) and (3) provide that the existing structure plans for Gold Coast City council and Redland City Council will cease to have effect when each council makes a new planning scheme, and the Minister notifies the council that the Minister is satisfied that the scheme is consistent with the

structure plan, and does not affect development entitlements or responsibilities under the structure plan in an adverse and material way.

Subclause (4) provides that the Cairns Regional Council and Moreton Regional Council may make a planning scheme if the Minister notifies the council that the planning scheme addresses the matters mentioned in section 761A of the old Act.

Subclauses (5) and (6) continue the effect of any agreements entered into under the repealed provisions of the old Act about the funding of structure plans, and the application of funds under the agreements.

### **Master plans**

Clause 265 continues in effect any master plan in force on the commencement until the time provided for under the old Act for the master plan to lapse.

Subclauses (3) to (6) preserve the functions of a master plan, and its relationships with other instruments, as they were under the old Act.

Subclause (7) provides for continuation of master plan agreements.

Subclause (8) treats certified copies of master plans in the same way as local planning instruments in relation to their acceptance as evidence.

Subclause (9) provides for the amendment or cancellation of a master plan using the processes under the repealed provisions of the old Act, chapter 4, part 3, divisions 3 and 4. Division 3 establishes the process for making master plans; however division 4 “calls up” that process for their amendment.

### **Development control plans**

Clause 266 continues provisions under the old Act for the progressive adoption of development control plans under planning schemes, and preserves the validating and transitional effect of the old Act, section 857 in relation to development control plans.

These provisions apply to three development control plans made before the commencement of the Integrated Planning Act 1997. These plans included processes for making of plans by development proponents, approval of the plans by the relevant local governments, and appeal rights in relation to the local governments’ decisions about the plans.

As these processes and appeal rights were not authorised by the Integrated Planning Act 1997 or legislation preceding it, validating and transitional arrangements were included in the Integrated Planning Act 1997 and carried through to section 857 of the old Act.

The Integrated Planning Act 1997 also provided for the inclusion of the development control plans in local government planning schemes as they were made under that Act, however these arrangements were initially not carried through into the old Act.

The old Act was subsequently amended to include section 86, which provided for planning schemes made under the old Act to adopt development control plans, but not to incorporate them within the text of the scheme.

Since this amendment, the Sunshine Coast Regional Council has made a new planning scheme which references the development control plan for Kawana Waters. Section 86 states that the transitional arrangements in section 857 continue to apply to a development control plan adopted in this way. Section 857(1) continues to apply the balance of section 857 to the remaining two development control plans.

Subclauses (1) and (2) continue the combined effect of sections 86 and 857(1) of the old Act, allowing the remaining two development control plans to be adopted under a planning scheme made under the Bill, and continuing to apply the validating and transitional effect of section 857 of the old Act to all three development control plans. Subclause (3) contains interpretive provisions allowing section 857 of the old Act to be read in the context of the Bill.

Subclause (4) is a new provision providing for an application under a plan approval process under section 857(5) to be subject to a direction of call in under chapter 3, part 7, as if it were a development application for which the relevant local government were the assessment manager.

### **Rezoning approval conditions**

Clause 267 continues the effect of section 852 of the old Act and allows for rezoning conditions under legislation preceding the Integrated Planning Act 1997 to be changed through an application process. However whereas section 852 of the old Act provided for the conditions to be changed through a development application, clause 267 provides for a change application to be made. This is because the introduction under the Bill of the possibility of change applications for both minor and non-minor changes allows for a change to a condition to be achieved through this process instead of a full development application process.

### **Rezoning approval agreements**

Clause 268 continues the effect of the old Act, section 856 in validating and transitioning agreements about rezoning conditions that did not attach to land under legislation preceding the Integrated Planning Act 1997.

### **Compliance assessment of documents or work**

Clause 269 continues the effect of the old Act in relation to documents or works requiring compliance assessment under a development approval or local planning instrument.

Under the old Act there were two types of instrument which may have resulted from compliance assessment – a compliance permit or a compliance certificate.

A compliance permit authorises development and is taken to be a development permit under section 242. However there is no equivalent instrument under the Bill for a compliance certificate, which certifies documents or works in relation to, or resulting from development, rather than the development itself.

Some local governments made use of the compliance certificate arrangements under their planning schemes or development approvals.

Consequently this clause preserves the effect of the old Act in relation to these certificates, for example allowing for a document or work to continue to be assessed, and a compliance certificate issued, under the arrangements under the old Act.

### **Public housing development**

Clause 270 preserves the effect of the old Act in relation to processes for public housing started under section 721(2)(a), but not completed on the commencement. The Bill does not provide for arrangements in relation to public housing similar to those under chapter 9, part 5 of the old Act. It is anticipated that the effect of those arrangements (which is to exempt public housing development from the need for development approvals if particular procedures have been undertaken) will be reflected instead under the accepted development arrangements in the regulation. However this clause allows for procedures commenced under the old Act to be completed, and for any resulting public housing development to be accepted development.

### **LGP&E Act approvals**

Clause 271 extends the offence of contravening a development approval to rezoning approvals under the repealed LGP&E Act.

### **Milton XXXX brewery**

Clause 272 continues the registration of the Milton Brewery under the urban encroachment arrangements of chapter 7, part 4, subject to the same exceptions and variations as applied to the registration of the brewery under chapter 10, part 5, division 2 of the old Act. The Milton rail precinct is taken to be the “affected area” for the registration.

### **Transitional regulation-making power**

Clause 273 enables a regulation to make provision for any matter necessary to allow or facilitate the transition of the repealed Act to the commencement of the Bill or the Planning and Environment Court Bill, or anything the Bill does not make sufficient provision for.

## **Part 2      Repeal provision**

The purpose of this part is to repeal the Sustainable Planning Act 2009.

### **Act repealed**

Clause 274 repeals the Sustainable Planning Act 2009.

## **Schedule 1**

This schedule describes appeal rights arising in relation to appeals to the Planning and Environment Court and the Building and Development Dispute Resolution Committees. In addition to the rights of appeal, each clause under this part also details the parties for the respective appeal.

### **Part 1 Appeals to tribunals**

#### **Division 1 Development applications and approvals**

##### **Particular development applications**

Clause 1 provides a right of appeal to a development tribunal in relation to a development application, where the development application relates to a material change of use of premises that involves the use of a classified building, or operational work associated with building work or a retaining wall or tennis court.

The person who made the development application can appeal against a refusal, including a deemed refusal, a provision of a development approval or a decision to give a preliminary approval when a development permit was applied for.

The clause does not apply if the development application required merit assessment for which notification was required and the assessment manager received any properly made submissions.

##### **Extension applications**

Clause 2 provides a right of appeal to a development tribunal for a person who made an extension application relating to a development approval for a material change of use of a classified building, against an assessment manager's decision for the application.

##### **Change applications for minor changes**

Clause 3 provides a right of appeal to a development tribunal against a decision on a change application for a minor change, other than a deemed refusal, but only where the development approval is for a material change of use of a classified building.

##### **Development conditions**

Clause 4 provides a right of appeal to a development tribunal against a development condition for an applicant who made a development application for a material change of use of premises that involves the use of a building classified under the Building Code as a class 2 building; and the proposed development is for no more than 3 storeys and for not more than 60 sole occupancy units. However, the clause does not apply if the development application required merit assessment for which notification was required and the assessment manager received any properly made submissions.

## **Division 2 Building, plumbing and drainage matters**

### **Applicant appeals**

Clause 5 applies to a tribunal appeal matter and provides that a person who made a development application may appeal to a development tribunal against the refusal, or deemed refusal, of all or part of the application; a provision of the development approval; and the decision to give a preliminary approval when a development permit was applied for.

### **Building advisory agency appeals**

Clause 6 applies to a tribunal appeal matter and provides a right of appeal to a development tribunal for a building advisory agency about the giving of a development approval for a development application that involves standard assessment for the part of building work to be assessed against the Building Act.

### **Extension applications**

Clause 7 applies to a tribunal appeal matter and provides that a person given a notice of decision for an extension application in relation to a development approval has a right of appeal to a development tribunal against the decision.

### **Change applications for minor changes**

Clause 8 applies to a tribunal appeal matter and provides a right of appeal against a decision on a change application for a minor change to a development approval (other than a deemed refusal) to the person who made the change application; or if the responsible entity for making the change is the assessment manager for the development application, an affected entity that gave a pre-request response notice or a response notice.

### **Building and plumbing and drainage matters**

Clause 9 applies to a tribunal appeal matter and provides a person that was an applicant for a building development approval a right of appeal to a development tribunal about a decision under the Building Act by either a building certifier or a referral agency about inspection of building work the subject of the building development approval.

The clause also provides a right of appeal to development tribunal for a person that has received any other decision under the building Act other than a decision made by the Queensland Building and Construction Commission; or a decision under part 4 or 5 of the Plumbing and Drainage Act, about such a decision.

Also that a person may appeal to a development tribunal about a local government's failure to decide an application under the Building Act, other than a building development application, within the period required under that Act.

### **Enforcement notices**

Clause 10 provides a right of appeal to a development tribunal for a person who is given an enforcement notice relating to a tribunal matter, about the decision to give the notice.

## **Division 3 Charges**

### **Infrastructure charges notices**

Clause 11 provides the grounds for which a person who is given an infrastructure charges notice under the Bill may appeal to a development tribunal about the decision to give the notice. Subsection (2) clarifies that the appeal must not be about the adopted charge itself; or for a decision about an offset or refund, the establishment cost of infrastructure in an LGIP, or the cost of infrastructure decided using the method included in the local government's charges resolution.

### **Conversion applications**

Clause 12 provides that an applicant for a conversion application under the Bill may appeal to a development tribunal against a refusal or deemed refusal of the application (to make the conversion of non-trunk infrastructure into trunk infrastructure).

## **Part 2 Appeals to P&E Court**

### **Division 1 Development applications and approvals**

#### **Appeals from tribunals**

Clause 13 provides the grounds for a party to proceedings decided by a development tribunal to appeal against the tribunal's decision. This right of appeal is limited to those issues based on points of law as opposed to issues involving the merits of a matter considered by the Development Tribunal. An appeal may also be brought contesting the jurisdiction of the Development Tribunal to hear the matter or make a decision.

#### **Development applications**

Clause 14 lists the matters about which an applicant for a development application may appeal to the Planning and Environment Court. These are appeals about determinative decisions made about development applications under the development assessment process.

#### **Eligible submitter appeals**

Clause 15 describes the appeal rights of submitters concerning the part of a development approval requiring merit assessment or the part of the approval relating to a decision about a variation request. This clause affords appeal rights to submitters who made a properly made submission

during the notification period, provided that the submission was not withdrawn (known as 'eligible submitters').

### **Extension applications**

Clause 16 provides a right of appeal to the Planning and Environment Court for a person who made an extension application, against the assessment manager's decision on the application or the deemed refusal of the application.

### **Change applications**

Clause 17 outlines the persons who may appeal to the Planning and Environment Court against a decision on a change application. A person who made a change application may also appeal to the Planning and Environment Court against a deemed refusal of the application. However, this section does not apply to a decision on a change application made by the Planning and Environment Court.

## **Division 2 Other matters**

### **Enforcement notices**

Clause 18 provides that the recipient of an enforcement notice may appeal to the Planning and Environment Court against the giving of the notice.

### **Local laws**

Clause 19 provides that a person who is dissatisfied with a decision of a local government or the conditions applied under a local law about the use of premises or erection of a building or structure, can appeal to the Planning and Environment Court against the decision or the conditions applied; providing the use is not prohibited development under the planning scheme or TLPI for the planning scheme area.

### **Registered premises**

Clause 20 provides that a person who is given an information notice about a decision of the Minister in response to an application to register, or renew the registration of premises for the purposes of Chapter 7, Part 4 of the Bill, may appeal to the Planning and Environment Court about the decision. And also, that where the Minister decides, under chapter 7, part 4 to register premises or to renew the registration of premises, an owner or occupier of affected premises who is dissatisfied with the decision may appeal to the Planning and Environment Court against the decision.

### **Compensation claims**

Clause 21 provides that a person who is dissatisfied with the decision of a compensation claim under the Bill may appeal to the Planning and Environment Court against the decision, including a deemed refusal of the claim.

### **Infrastructure charges notice**

Clause 22 provides clarity in regards to what an infrastructure charges appeal to the Planning and Environment Court may and may not be about.

Subsection (1)(a)(i) allows appeals about the application of the relevant adopted charges resolution in determining a levied charge. This might include matters such as:

- the calculation of gross floor area (GFA) for a proposed development and converting the GFA into an adopted infrastructure charge;
- applying an incorrect use category to the type of development proposed in the development application (for example, imposing a charge based on the ‘commercial – bulky goods’ adopted charge rate when the development application is for a ‘commercial – retail’ development);
- levying a charge where a charge is not appropriate (e.g. imposing a charge where the development does not result in additional demand on the infrastructure networks); and
- errors in the mathematical calculation of the charge.

Subsection (1)(a)(ii) allows appeals about the working out, for section 115, of additional demand. This might include matters such as:

- the calculation of additional demand when the demand for the existing lawful uses have been subtracted (e.g. where an applicant is reconfiguring one lot into three and there was an existing house on the original lot, the levied charge must be for the two new lots only); and
- where there is a development approval for a site however the development approval has not been acted on and a new development approval is issued for the site, in working out the infrastructure charge it must be assumed that the development the subject of the original approval exists on the site.

Subsection (1)(a)(iii) allows appeals about a decision on offsets and refunds and subsection(1)(b) allows for an appeal where a decision about an offset or refund has not been made.

Subsection (1)(c) allows appeals against the timing of a refund stipulated by a local government in an infrastructure charges notice, and subsection (1)(d) allows appeals against a charge in the notice on the basis that the charge is so unreasonable that no reasonable relevant local government could have imposed it.

Subsection (2) clarifies the scope of appeal rights under this clause confirming that an appeal must not be about the value of the infrastructure charge adopted by a local government in its resolution. Local governments have the ability to adopt infrastructure charges at any amount equal to or less than the maximum. For a decision about an offset or refund, subsection (2)(b) confirms the appeal cannot be about the establishment cost of infrastructure in a LGIP or the value of the infrastructure determined using a methodology included in a charges resolution.

### **Conversion applications**

Clause 23 This clause provides that an applicant for a conversion application under the Bill may appeal to the Planning and Environment Court against a refusal or deemed refusal of the application (to make the conversion of non-trunk infrastructure into trunk infrastructure).

## **Schedule 2**

Schedule 2 establishes definitions to be used in interpreting terms in the Bill.

Key terms are explained at the commencement of the part in which the term is first used. The remainder of the terms are explained in the following.

### **access rules**

Access rules refer to the rules made by the Minister to ensure there is appropriate public information, including a person's rights and obligations, about the planning and assessment system. The access rules can require a local government or another entity to retain and make available information or documents relating to the entities functions under the Bill, including the preparation of planning instruments or assessing and deciding development applications.

### **Acquisition Act**

Acquisition Act is an abbreviation of the Acquisition of Land Act 1967.

### **acquisition land**

Acquisition land refers to land:

- proposed to be taken or acquired under the Acquisition of Land Act 1967 or the State Development and Public Works Organisation Act 1971;
- for which a notice of intention to resume under the Acquisition of Land Act 1967 has been served, and the proposed taking or acquisition has not been discontinued; and
- that has not yet been taken or acquired.

The term is defined to identify particular land in respect of which owners' consent is not required for the making of a development application or a request to change an approval. Acquisition land is also relevant to when a development approval takes effect.

### **affected local government**

Affected local government refers to a local government whose local government area the Minister considers will be affected by a proposed State planning instrument.

**agreement**

Agreement refers to a written agreement wherever the term is mentioned in the Bill.

**appeal rights**

Appeal rights refer to the rights set out in Schedule 1, that allow entities or individuals to appeal about particular matters relating to development assessment to the Planning and Environment Court or a development tribunal.

**appellant**

Appellant refers to a person who starts an appeal to the Planning and Environment Court or a development tribunal.

**applicant**

Applicant for an appeal in relation to a development application refers to the applicant and includes a person that will benefit from the development application. This accommodates the possibility that premises may change ownership in the course of dispute resolution.

**approved form**

Approved form refers to any form that the chief executive has approved for use under the Bill.

**assessment**

Assessment refers to development assessment wherever the term is mentioned in the Bill.

**authorised electricity entity**

Authorised electricity entity refers to an entity authorised to acquire land under the Electricity Act 1994.

**building**

Building refers to a fixed structure that is wholly or partly enclosed by walls and is roofed, and includes a floating building and any part of a building.

**Building Act**

Building Act is an abbreviation of the Building Act 1975.

**building assessment provisions**

Building assessment provisions refer to the provisions of the Building Act 1975 that require building work to be carried out under specified laws and documents.

**building certifier**

Building certifier refers to an individual who is licensed as a building certifier under the Building Act 1975. The term includes a reference to a private certifier.

**Building Code**

Building Code refers to the parts of the national construction code that form the building code of Australia, including the Queensland appendix, published by the Australian building codes board. Building code refers to edition that is current at the relevant time, and the edition as amended from time to time by amendments published by the board.

**building development application**

Building development application refers to a development application to the extent it is for building work.

**building work**

Building work refers to development involving the building, repairing, altering, underpinning, moving or demolishing of buildings, and associated incidental earthworks. Building work includes excavation in connection with building work, or that may affect the stability of a building or other structure. However other excavation is operational work.

Building work is defined specifically in relation to a Queensland heritage place under the Queensland Heritage Act 1992. Building work for a Queensland heritage place includes matters which may not be building work for other purposes under the Bill, such as painting, or altering, repairing or moving historic artefacts.

Building works does not refer to an operation or construction for the purposes of taking or interfering with water under the Water Act 2000. It also does not include tidal work or work for the purpose of reconfiguring a lot.

**business day**

Business day refers to a day other than a weekend, public holiday and the period between the 26 December and 1 January of the following year.

**canal**

Canal refers to the definition of canal in the Coastal Protection and Management Act 1995.

**cancellation application**

Cancellation application refers to an application to cancel a development approval.

**categorised**

Categorised refers to categorised by a categorising instrument. A categorising instrument can assign a category of development to development.

**chairperson**

Chairperson refers to the chair of a development tribunal established for the proceeding.

**change**

Change to an instrument refers to an amendment or the replacement or repeal of an instrument.

**change representations**

Change representations refer to request made by an applicant to the assessment manager, before the end of the applicant's appeal period, to change a development approval.

**charges breakup**

Charges breakup refers to the proportion of the maximum adopted charges under the Bill and under the SEQ Water Act that is attributed to the local government and a distributor-retailer of the local government.

**classified building**

Classified building refers to a building classified under the Building Code as a class 1 building. A classified building may also be a class 10 building under the Building Code, other than one that is incidental or subordinate to the use, or proposed use, of a building classified as a class 2 to 9 building.

**clearing**

Clear refers to the clearing of vegetation for a range of purposes under the Bill, including removing, cutting down, ringbarking, pushing over, poisoning or destroying vegetation in any way. However, it does not include destroying standing vegetation by stock, or lopping a tree.

**Coastal Act**

Coastal Act is an abbreviation of the Coastal Protection and Management Act 1995.

**commission**

Commission refers to the Queensland Building and Construction Commission.

**compensation claim**

Compensation claim refers to the claim for compensation an affected owner may make to the local government in particular circumstances.

**consent**

Consent refers to a written consent wherever the term is mentioned in the Bill.

**constructing authority**

Constructing authority refers to the definition of constructing authority in the Acquisition of Land Act 1967.

**decision maker**

Decision maker refers to the responsible entity for a change application, or the assessment manager.

**decision-making period**

Decision-making period for a development application refers to the period fixed under the development assessment rules for deciding an application, including any extension of the period under the rules.

**deemed refusal**

Deemed refusal refers to a refusal that is taken to have happened if a decision has not been made before a particular period ends. A deemed refusal relates to matters that may be the subject of an appeal to the Planning and Environment Court or to a development tribunal.

**designated class 2 building**

Designated class 2 building refers to a building classified under the Building Code as a class 2 building of no more than 3 storey's and 60 sole-occupancy units.

**designated premises**

Designated premises refer to the premises the subject of an infrastructure designation.

**development**

Development refers to is a broad concept covering a wide range of actions affecting the physical environment, including carrying out building work, carrying out plumbing and drainage work, carrying out operation work, reconfiguring a lot or making a material change of use of premises.

Development is defined to be an action rather than the result of an action. For example, development is the carrying out of building work and the making of a material change of use rather than the results of those actions, which are a building and a use of premises.

**development application**

Development application refers to an application for a development approval for either a development permit or a preliminary approval.

**development assessment process**

Development assessment process refers to the process for administering, assessing and deciding development applications.

**development infrastructure**

Development infrastructure refers to either or both land or works for particular types of infrastructure, including for water cycle management infrastructure, transport infrastructure, public parks infrastructure. Development infrastructure also refers to land and works required to ensure land is suitable for development for local community facilities.

**distributor-retailer**

Distributor-retailer refers to the definition of distributor-retailer in the South East Queensland Water (Distribution and Retail Restructuring) Act 2009.

**document**

Document refers to a document including information.

**drainage work**

Drainage work refers to the definition of drainage work in the Plumbing and Drainage Act 2002.

**eligible referral agency (advice)**

Eligible advisory referral agency for a development application refers to an advisory referral agency that has not given a notice stating the agency will not be appealing before the appeal period ends for the application.

**enforcement authority**

Enforcement authority refers to the authority responsible for enforcing matters relating to a variety of circumstances throughout the Bill.

Section (a)(ii) of the definition provides that the chief executive, where imposing or recommending conditions on a development approval as either the assessment manager or a referral agency for a development application, may nominate an entity to be the assessing authority for a development for which the development approval relates. This means the entity nominated to be the assessing authority will have jurisdiction for the administration and enforcement of matters relating to a particular condition of the development approval.

The purpose of this is to allow for the efficient and cost-effective operation of the single State assessment and referral agency. The Chief executive can manage its workload by nominating assessing authorities with the technical expertise to ensure compliance with the State's decision, while continuing to focus on the core function of responding to referred development applications.

**environment**

Environment refers to the definition of environment under the Environmental Protection Act 1994.

**environmental nuisance**

Environmental nuisance refers to the definition of environmental nuisance under the Environmental Protection Act 1994.

**Environmental Protection Act**

Environmental Protection Act is an abbreviation of the Environmental Protection Act 1994.

**establishment cost**

Establishment cost, for trunk infrastructure refers, for existing infrastructure to the current replacement cost of the infrastructure as reflected in the relevant local government's asset register;

and the current value of the land acquired for the infrastructure. For future infrastructure, establishment cost refers to all costs of land acquisition, financing, and design and construction, for the infrastructure.

### **Excluded premises**

Excluded premises for a development application, and also for a change application or extension application is used throughout the Bill for instances where such applications do not require the owner's consent.

For a development application, 'excluded premises' includes the following.

- Premises owned by the State. This is intended to remove what would otherwise be a time-consuming step in the process and clarify that owner's consent is not State resource allocation process.
- A servient tenement for an easement where the development the subject of the application is not inconsistent with the terms of the easement. This is intended for example, to ensure that the proprietors of premises subject to an access easement cannot unreasonably prevent the lodgement of a development application over premises including the easement.
- Acquisition land, to the extent the application relates to the purpose for which the premises are to be taken or acquired. This builds on other circumstances in the Bill where the owner's consent is not required for a development application.

For a change application or extension application, 'excluded premises' means a servient tenement for an easement or acquisition land, if the owner's consent was not required in relation to the tenement or acquisition land for the original development application. For example, for a servient tenement for an easement, where the development the subject of the application is not inconsistent with the terms of the easement; and for acquisition land, to the extent the application relates to the purpose for which the premises is to be taken or acquired.

Using 'excluded premises' as a term for these instances throughout the Bill; assists the Bills legibility.

### **executive officer**

Executive officer of a corporation, refers to a person who is concerned with or takes part in the management of the corporation, whether or not the person is a director or the person's position is given the title of executive officer.

### **extension application**

Extension application refers to an application to extend the currency period of a development approval.

### **finds a defendant guilty**

Finds a defendant guilty includes accept a plea of guilty, whether or not a conviction is recorded.

### **Heritage Act**

Heritage Act is an abbreviation of the Queensland Heritage Act 1992.

### **impose**

Impose for a development condition also refers to attaching a condition to a development approval.

### **information notice**

Information notice about a decision refers to a notice stating the decision and the reasons for the decision. An information notice must also state that the recipient of the notice may appeal against the decision.

### **information request**

Information request refers to a notice given under the development assessment rules which can be given by either an assessment manager or a referral agency requiring the applicant for a development application to give further information for the application.

### **infrastructure**

The definition of 'infrastructure' differs from that in the repealed Act. That definition was an extremely broad, inclusive definition that could arguably be applied to mean a range of matters not normally falling within the ordinary meaning of the term 'infrastructure'.

Under the repealed Act, it was unclear whether the reference in the definition of infrastructure to 'land, facilities, services and works used for supporting economic activity...' could be applied to mean commercial or industrial development, as opposed to land, facilities, services or works merely supporting such development.

The definition under the Bill is specific and exclusive in character. It is intended that the ordinary meaning of the term 'infrastructure' be applied to its use throughout the Bill. The definition serves merely to clarify that 'infrastructure' does not include land, facilities, services or works for an environmental offset.

This is intended to address uncertainty under the repealed Act about the lawfulness of environmental offset conditions, on the basis that they did not conform to the allowable scope of infrastructure conditioning under the repealed Act (chapter 4 of the Bill).

### **Interpretation Act**

Interpretation Act is an abbreviation of the Acts Interpretation Act 1954.

**land**

Land refers to any estate in, on, over or under land; and the airspace above the surface of land and any estate in the airspace; and the subsoil of land and any estate in the subsoil.

**Land Act**

Land Act is an abbreviation of the Land Act 1994.

**Land Title Act**

Land Title Act is an abbreviation of the Land Title Act 1994.

**lawful use**

Lawful use of premises refers to the use of premises that is a natural and ordinary consequence of making a material change of use of the premises in compliance with the Bill.

**LGIP**

LGIP is an abbreviation of a local government infrastructure plan.

**local government infrastructure plan**

Local government infrastructure plan refers to the part of a local governments planning scheme that identifies the local government's plans for trunk infrastructure that are necessary to service urban development at the desired standard of service in a coordinated, efficient and financially sustainable manner.

**local government road**

Local government road refers to a road under the control of a local government.

**local heritage place**

Local heritage place refers to the definition of local heritage place in the Queensland Heritage Act 1992.

**lot**

Lot refers to either a lot under the Land Title Act 1994; or a separate, distinct parcel of land for which an interest is recorded in a register under the Land Act; or common property for a community titles scheme under the Body Corporate and Community Management Act 1997; or a lot or common

property to which the Building Units and Group Titles Act 1980 continues to apply; or a community or precinct thoroughfare under the Mixed Use Development Act 1993; or a primary or secondary thoroughfare under the Integrated Resort Development Act 1987 or the Sanctuary Cove Resort Act 1985.

### **material change of use**

The definition of ‘material change of use’ is the same under the Bill as under the repealed Act.

The material change of use concept reflects the principle of ‘primary’ uses supported by an ‘expected’ or ‘normal’ range of ancillary uses (e.g. swimming pools and garage associated with residential uses; storage associated with industrial and commercial uses). See also discussion under ‘ancillary use’.

The Bill provides for the regulation of ‘material’ land use changes that do not necessarily involve any building or other work. Building and other work are not material changes of use, and should not be described as such, even though material changes of use can often only occur after such work has been carried out. For example:

- A change in building set-back for a residential allotment, a change in building height, or an extension to a residential dwelling is building work, not a material change of use. The use was and remains residential with no material change in the intensity of the use (see for example *Martin & Ors V. Whitsunday Shire Council & Anor (2001), QLD.*). Similarly, erecting a TV satellite dish on a residential property is building work and not a material change of use.
- A lawn bowls club erects a shade structure over its bowling greens. There is no associated change in the intensity or scale of the use. The development is building work only.
- A farm dam or similar on a residential property requires operational work, but is not a material change of use where the primary use of farm or residential remains unchanged.
- Reconfiguring a lot (which is no more than a change in land title) does not in itself involve a change of use, despite any underlying intention to do so.
- A new hard rock quarry on former agricultural land would comprise a material change of use and the extraction of the rock would entail operational work.

Planning schemes have in the past often characterised development that is in fact only building work as a material change of use, either in error, or in the expectation that this allows for the regulation of an aspect of building work that is in fact regulated under the building assessment provisions, so is unavailable to the local government to regulate independently.

Characterising building work under a planning scheme as a material change of use does not turn the building work into a material change of use. The test of whether something is a material change of use is an objective test under the Bill, and cannot be changed under a planning scheme.

The term ‘material’ in the context of this definition is intended to mean ‘of substantial import or much consequence’. Therefore, a change of use must comprise a significant change in the character and potential impacts of the use to be regarded as ‘development’. The issue of what is ‘material’ is addressed further below.

The test of whether something is a material change of use is an objective test of ‘fact and degree’ under the Bill which must first be addressed before deciding whether to apply a categorizing

instrument to the regulation of the activity. A categorizing instrument such as a planning scheme cannot determine an activity to be a material change of use independently of the definition under the Bill. If an activity is found to be a material change of use, it is then a separate consideration whether the effects of the change warrant assessment under a categorizing instrument.

Consequently it is important to differentiate between determining whether a material change of use is proposed or has occurred, and the assessment of that development. There are three distinct steps:

- Decide whether the change involves the use of the premises.
- If a use is involved, compare the impacts of the 'before' situation and the existing or likely impacts of the 'after' use in deciding whether the change is material.
- If there is a material change of use that is potentially assessable and lies outside the scope of any existing development permit or existing use rights, the particular circumstances of the proposal/site concerned in terms of the development impacts are potentially matters for development assessment (in the case of a proposed material change of use) or for commencing enforcement procedures (in the case of an unlawful use).

This approach ensures that all material changes of use are addressed in a consistent way. These three steps are upon below.

Consideration of some aspects of 'material' change of use involves some judgement, particularly in cases of intensification, and uses that evolve into 'new' uses.

Local categorising instruments play a key role in guiding what are material changes of use through definitions of differing uses and possibly setting thresholds such as for intensification. However, a local planning instrument is not ultimately determinative. While planning scheme definitions will for the most part be compatible with the 'facts and circumstances' of what constitutes a use, ancillary use and material changes of use, this might not always be so, as it is the objective test under the Bill that will be ultimately determinative.

Consequently identifying material changes of use must rely on applying logical, workable and consistent principles. Past judicial authority under both Queensland and other Australian and international jurisdictions provides an instructive basis for achieving consistent and defensible decisions.

The definition of material change of use of premises has three distinct parts:

- The start of a new use of premises;
- The re-establishment on the premises of a use that has been abandoned;
- A material increase in the intensity or scale of the use of premises.

The discussion below identifies key matters for identifying "premises" in relation to a use or material change of use, then discusses each of the three parts of the definition.

### **Identifying 'premises'**

The 'premises' defines the boundaries of the area (i.e. land, buildings and structures) occupied by a particular primary use, together with any ancillary uses. Defining the premises involves identifying a 'unit of occupation' and any functional and physical separation of the uses. The concept of premises

is essentially the same as the concept of a 'development unit' developed by British courts as a basis for determining the extent of a use or material change of use.

As a starting point, the owners or occupier's 'unit of occupation', such as the boundaries of the owner's lot provides a convenient 'first test' for identifying the premises, because it is normally the largest unit within which there is a set of functionally and physically interdependent activities. Often an owner or operator will use the full extent of their lot to carry out a use. For example, the 'premises' for a dwelling house on a conventional suburban lot can normally be taken to be the full extent of the lot on which the dwelling is located, because while the residential function can be seen as being confined to the dwelling, the rest of the lot is typically taken up with a range of ancillary uses, such as recreational activities, and the garaging of vehicles.

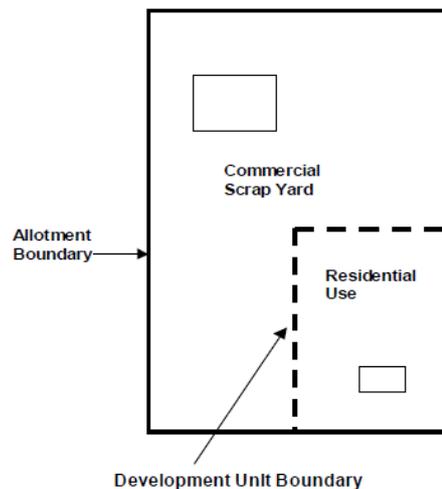
However, it is often possible to identify a smaller development unit within which a functionally and physically separate primary use is located. For example:

- A shopping mall in single ownership comprises a series of premises corresponding with each shop unit. (see for example *Church Commissioners v Secretary of State for the Environment* (1995;1999) UK). If this were not so and the development unit was the whole shopping mall, each of the individual shop units would be ancillary and could undergo a significant change of use without each being regarded as a material change to the whole shopping mall.
- In contrast, a single primary use might extend to a number of allotments in one or more ownerships (see for example *Rawlins v Secretary of State for the Environment* (1990) UK).

Also, the premises may extend beyond an owner's unit of occupation. For example if the owner or occupier uses an easement, or some other form of agreement with a neighbouring owner to gain access to the premises, or carry out some other aspect of the use (See for example *Pioneer Concrete v Brisbane City Council* (1980 145 CLR 485).

As the premises identifies the physical extent of the primary use irrespective of ownership boundaries, the premises does not necessarily coincide with unit of occupation.

### Example of two development units within one allotment and unit of occupation



Not all of a unit of occupation needs to have activity on it to be included in the premises for a use. For example, land used (or clearly intended to be used) for an extractive industry cannot all be worked at once. Often an extractive industry will be the subject of a development approval which clearly identifies the extent of future extraction. However an old long established operation may not have any form of approval, and it is necessary to determine the premises in relation to existing lawful use rights using other means, such as the extent of the unit of occupation, the extent of winnable resource, and past patterns of extraction.

### **Functional and Physical Separation**

Premises may comprise several separate buildings, provided the uses of those buildings retain the primary/ancillary relationship. However, if an ancillary use loses its ancillary status, new premises are created. For example:

- Within a department store, a small area used for ancillary offices is part of the premises occupied by the department store. If the department store leases that office space for general office use, the ancillary relationship ceases and the area occupied by those offices becomes a separate premises from that of the department store. As the former primary use was 'retail' and the new primary use is 'offices', a material change of use has occurred.
- If that same department store leases a small area to another totally independent retailer, the leased area becomes separate premises, but no material change of use occurs because a retail use continues.

Any ancillary uses must generally be carried out within the same premises as the primary use. This ensures that an ancillary relationship cannot be used to allow premises physically removed from the primary use to change use outside any regulation by the planning scheme. For example:

- An auto components factory supplying only the parent manufacturing plant many kilometres away is proposed on formerly rural land. Despite the functional relationship, the proposal is a clearly a material change of use.
- A staff hostel owned by a hotel separated by 150 metres (and possibly other uses) from the hotel where the staff worked has been held to be part of a different premises, and consequently the hostel could not change to the hotel use without there being a material change of use (see for example *Duffy v. Secretary of State for the Environment (1981) UK*)

An exception to this may occur where an ancillary use is separate from, but in very close proximity to the principal use. For example, a car park used only in relation to its principal use but separated from the principal use by a public road, may be considered ancillary to the principal use.

In some rare cases, a development unit might contain a composite use: two or more substantially different and unrelated 'bundles' of activities with no clear physical separation between them. Therefore, the cessation of one does not result in a material change of use. For example, land used for camping in summer and agriculture (grazing) in winter does not involve a material change of use when one seasonal activity gives way to the other (*Webber v Minister of Housing and Local Government (1968) UK*).

### **The start of a new use**

Having established there is a change to the primary use, there is a need to determine whether that change is of sufficient magnitude to be the start of a new use, or the change is merely a variation of the primary use.

There must be a significant (or material) change in the character of the use in respect of its potential impacts to be described as 'materially' different and consequently the start of a new use.

Establishing generic groupings of uses (e.g. light industry, offices) helps clarify that when the former and new uses are sufficiently similar, the change of use is not material. A change of occupier is not in itself material, unless this has led to the severing of the primary/ancillary relationship and hence the definition of the premises for the use. For example:

- If a clothes shop becomes a gift shop, a change of occupier has occurred rather than a change of use, because the broad character of the use as a shop has not changed.
- However, the change from a shop to a fast food outlet could be viewed differently on the basis that the character in terms of hours of operation, omission of smells etc. are significantly different.
- 

### **The Scope of the existing use rights**

The scope of the use rights depends on the source of those rights. The Bill protects existing lawful uses from further regulation by the planning scheme and their scope will be a matter of establishing historical fact in the context of the legislation and any planning schemes in effect at the time.

If there is an existing lawful use established historically without a permit, the use rights can include a range of uses sufficiently similar in character to the existing use that they would not involve a material change of the existing use (see for example *Westminster City Council v British Waterways Board* (1985) UK).

A development permit usually limits the scope of an existing approved use through the imposition of reasonable and relevant conditions or the general terms of the permit. If a development permit approves a broader range of uses than exists on the premises, a material change to the use might be within the scope of the existing permit. If so, further analysis is unnecessary as the change, material or not, is lawful. On the other hand, if the change to the use is outside the limits set by the permit, there is a need to decide whether any change to the use approved by the permit is a material change of use, or only requires a change to the condition(s) of the permit.

In summary, the key tests for determining the start of a new use of premises are:

- Does the change materially affect the use of premises, or does it only comprise some other form of development, such as building work or operational work?
- What is/are the existing/former primary use/s of the premises?
- What is the extent of any ancillary uses?
- What are the 'premises' in relation to the primary and ancillary uses?
- Is there a change in the primary use of the land or only one or more of the ancillary uses?
- Has any ancillary relationship been severed because the former ancillary use is no longer subordinate to the primary use, functionally related to the primary use, or part of separate premises from the primary use?

- If there a change to the primary use, is the change in character and its potential impacts significant enough to be described as the start of a new use?
- Does the new use fall within the scope of existing use rights, including the scope of any development permit?

### **Abandonment**

The second aspect of a material change of use is the re-establishment of a use that has been abandoned. The Bill does not define the meaning of 'abandoned' so it is again necessary to apply some key principles, using past judicial authority as a guide.

To pass the legal test of being 'abandoned', a use must have ceased, not merely interrupted or suspended. That is, it must have been abandoned 'finally and unconditionally' (See for example *Shannahan Crash Repairs Pty Ltd v Port Adelaide CC* (1978) 20 SASR 491 at 511, 41 LGRA 50 at 69.)

Whether a use is abandoned is a matter of fact. This means examining the circumstances, such as:

- the nature of the use and the normal pattern of use;
- the history of the use and activities on the site; and
- the intention of the owner and/or occupier.

The key test as to whether an existing use has been abandoned is whether 'a reasonable person' might conclude from the above facts that the previous use has been abandoned. (See for example *Ratcliffe v Sec of State for the Environment*, 1975, UK 235 EG 901)

A use 'need not be continuous in the sense of there being daily activity in all aspects of the use' (See for example *Ipswich CC v Vaughan* (1986) 61 LGRA 34 at 36). While all uses are intermittent in the limited sense that activities cease overnight or at weekends, there are uses that are intermittent for regular and substantial periods (for example land used for grazing in winter and camping during the summer season, or a market held on a weekly or monthly basis).

A use may be suspended rather than abandoned. Suspension implies a clear intent by the owner and/or occupier. For example, extractive industries or mines are sometimes suspended because of unfavourable market conditions. In such cases, periods of inactivity might be the normal pattern of the use and there is no intention for the use to cease permanently (i.e. be abandoned).

'If the sole use to which land is put is suspended and thereafter resumed without there having been any intervening different user, prima facie the resumption does not constitute development', (See for example *Hartley v Min of Housing and Local Gov* [1969] 2 QB46). but "there may be cases in which the period of suspension is so long that the original use can properly be described as having been abandoned." (See for example *Hughes v. Secretary of State for the Environment, Transport and the Regions* (2000) UK).

Although an important consideration, the intention of the owner or occupier is not decisive or sufficient in itself to establish continuance of a use (see for example *Earle Cameron Constructions Pty Ltd v Parramatta CC*, (1981) 46 LGRA 130 at 137).

Nevertheless, in the interests of natural justice, the intentions of the landowner/occupier should be given considerable weight, particularly where the other facts and considerations are inconclusive.

The intention to continue an existing use must be based on evidence, and must be distinguished from a mere hope that such use rights will survive the cessation of the existing use. Consequently,

some positive evidence of intention is likely to be necessary, particularly where activity associated with the use has been suspended or discontinued for periods regarded as unusual for the use concerned.

So allowing premises to fall into disrepair can provide strong substantiation for the abandonment of a use (See for example *Kogarah MC v Johnstone* (1979) 41 LGRA 366 at 373) even if this contradicts a stated intention to continue a use.

For example, a dwelling unoccupied and allowed to fall into advanced disrepair over more than two decades was decisive in determining the residential use had been abandoned, despite the owner's intention that the use should not cease. A 'reasonable person' would conclude the use had been abandoned. (See for example *Hughes v. Secretary of State for the Environment, Transport and the Regions* (2000) UK)

In summary, the key tests for determining abandonment of the use of premises are:

- What is the ordinary character of the use? In particular is the use ordinarily intermittent?
- If not, would a reasonable person conclude the use has been abandoned and not suspended under the circumstances such as:
  - o the length of time since the use ceased;
  - o whether the premises have been used for any other purpose since the use ceased;
  - o the owner or occupier's intentions; and
  - o the physical condition of the premises and their potential to accommodate resumption of the use

### **Material change in intensity or scale**

A material change of use may occur where the existing use is 'intensified', even though the same general use description may be applied to it. However, mere intensification of use doesn't necessarily constitute a '....material increase in the intensity of the use of the premises'.

The definition refers to a material change in both intensity and scale of a use. However considered in the context of a use, as opposed a building or other structure in which the use is carried out, there is in fact little or no difference between these terms.

For example:

- An extension of an existing factory building on premises is a change in the scale of the building. The use of the expanded building may however continue at its current level. If subsequently the use expands from the old floorspace into the new, this will result in additional impacts such as traffic, light, noise etc. These impacts could be described as an increase in either the intensity of the use or the scale of the use – again this is unrelated to the scale of the building or structure in which the use is carried out.
- A use of land for tallow storage had intensified but was found not to be a material change of use. (See for example *Elfamber Pty Ltd. v Council of the City of Townsville* (1998) QLD).

As for abandonment, it is important to consider the ordinary or 'intrinsic' character of the use in order to establish material intensification. For example:

- A school establishing in a developing residential area may experience a gradual increase in the number of students in its first years of operation, until a plateau is reached when the

- neighbourhood is fully populated. This would not constitute a material intensification having regard to the nature of the use;
- Schools also experience fluctuating school rolls, so the addition of demountable classrooms needs to be distinguished from an intended permanent increase in overall pupil intake and therefore school size. A school may have operated in the past with a particular number of students, suffered a fall in numbers, and then increased to the original student intake again.
  - On the other hand, a school that previously catered only for boys or girls, or only for particular grades, may double its size, and hence the intensity of its use, by becoming co-educational or adding more grades. This is likely to constitute a material intensification.
  - An industry may suddenly increase its output its production shifts to fulfil a particularly large order. If the increase in production is not permanent, and the level of production returns to more 'normal' conditions, this is unlikely to constitute a material intensification having regard to the nature of the use.
  - Over time, a house might accommodate families of varying sizes, and a shop might attract varying numbers of customers, but such changes are intrinsic to those uses.
  - A forestry use involves periods of activity interspersed with long periods of waiting for the tree crop to mature. The onset of harvesting is not a material intensification of the use, unless it can be demonstrated that the quantity of trees taken is significantly greater than past practice or what was originally planned.
  - An arterial road will have experienced increased traffic flows over many years, but such growth is an intrinsic part of the highway use. Therefore, highway improvements designed merely to improve safety or traffic conditions for the 'intrinsic' road capacity (perhaps signified by its classification in the road hierarchy) would not be intensification of the use. However, a deliberate planned increase in capacity over and above that intrinsic growth sufficient for a significant change in role and character of the road is likely to be a material intensification.

For distinguishing between intensification and the start of a new use:

- The start of a new use entails a significant change in the character of the use as well as its impacts; and
- Intensification describes a situation where the increase in the impacts of a use is significant but the character of the use has not fundamentally changed.

A helpful principle for distinguishing between the two is that intensification involves situations where no convenient or distinctive description can distinguish the 'before and after' status of the use. For example:

- The use of a private dwelling house as a hostel is an intensification of a residential use, but as the two uses can be easily distinguished and described, there is no need to consider the issue of intensification. Rather, there has been a change of use from private residence to hostel.
- On the other hand, the use of land as a caravan site remains a caravan site whether the site accommodates 10 or 100 caravans. However, a material change of use occurs where the change in intensity entails a material change in the impacts of the use.

The principles regarding intensification of a principal use equally apply to ancillary uses. However, an ancillary use that intensifies to the point where it ceases to be subordinate to the primary use would constitute the start of a new use. This is necessarily a matter of judgement.

The point at which intensification becomes 'material' inevitably involves some judgements based on the facts and circumstances of the particular case. Those judgements should be based on 'thresholds' derived from increases in impacts such as traffic generation, noise, hours of operation, light and emissions.

If a 'reasonable and relevant' condition on a development permit limits the maximum level of the use, any subsequent intensification requires approval for either:

- a change of condition where the intensification is not 'material' (i.e. a change application); or
- a development approval for a material change of use where the intensification is 'material' and assessable.

In contrast, an 'open' development permit with no condition limiting the level of the use allows all subsequent changes in the intensity of that use. However a development permit without such a condition might not be 'open' if the development applied for is specific about the level of activity (e.g. floorspace).

In summary, the key tests for determining a material increase in the intensity or scale of the use of premises are:

- Does the new activity affect the use of the premises, or does it only comprise other development such as building work?
- What is the existing or former primary use of the premises?
- What is the extent of any lawful ancillary use?
- Is the intensification a change to the primary use of premises or only to one or more ancillary uses?
- If an ancillary use is intensifying, has the ancillary relationship been severed because the ancillary use is no longer subordinate to the principal use?
- Is any intensification a significant increase in activity over and above the intrinsic character of the use?
- Is any intensification increasing the impacts of the use in a way that is significant enough to be considered 'material'?
- Does any material intensification fall within the scope of any existing use rights, including restrictions under any development permit?
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### **Minister**

Minister for chapter 3, part 7 includes the Minister responsible for administering the State Development Act.

### **Ministerial direction**

Ministerial direction refers to a direction given by the Minister which states the Minister's reasons for the direction and the State interest for which the direction is given.

**Minister’s rules and guidelines**

Minister’s rules and guidelines refers to the instrument that the Minister must make that contains guidelines setting out the matters that the chief executive must consider when preparing a notice about making or amending planning schemes; and rules setting out the process for making amendments, of a type stated in the rules, to planning schemes; and making or amending planning scheme policies and temporary local planning instruments.

**negotiated decision notice**

Negotiated decision notice refers to a notice that the assessment manager agrees with the change representations made by the applicant; the notice stating the nature of the changes agreed to, in addition to the information required in a decision notice generally.

**non-rural purposes**

Non-rural purposes refer to purposes that are not rural or rural residential purposes.

**non-port local government area**

This definition has been included in connection with simplifying the definition of tidal area.

Local governments may, under sections 16(11) and 43(7), include arrangements in local planning instruments for, and assess and decide development applications in, tidal areas adjacent to their local government areas, even though they do not normally have jurisdiction in these areas.

However local governments are not intended to have jurisdiction for assessing and deciding development applications in tidal areas adjacent to any strategic port land in their local government areas.

Consequently for identifying the tidal areas within which local governments may exercise jurisdiction over tidal works, it is necessary to exclude any strategic port land within a local government area.

The definition of non-port local government area achieves this by referring to a local government’s area, other than any strategic port land in the local government’s area.

**non-trunk infrastructure**

Non-trunk infrastructure refers to development infrastructure that is not trunk infrastructure.

**notice**

Notice means a written notice for the purposes of the Bill.

### **old Act**

Old Act refers to the repealed Sustainable Planning Act 2009.

### **operational work**

The definition of 'operational work' is different to that under the repealed Act. However the intended meaning and scope of the term is unchanged.

Both the repealed Act and the Bill include a 'core' meaning for operational work, being '...work, other than building work or plumbing and drainage work, in, on, over or under premises that materially affects premises or the use of premises.'

The term was originally included in the repealed Integrated Planning Act 1997 as a basis for integrating within the integrated development assessment system under that Act the broadest possible range of work.

As that Act was subsequently amended to integrate development approvals previously given under other legislation, the definition was progressively expanded to reference the particular works being integrated. However these specific references, while clarifying the application of the definition to those works, simply served to duplicate part of the core meaning described above and were not intended to expand upon it.

Consequently, as the core meaning already encompasses a very broad range of works, the references to specific works have now been removed, as they served merely to repeat the intent of the core meaning.

The word 'materially' may either mean 'significant or substantial', or relate instead to the physical substance of a thing. Unlike the definition of 'material change of use', its use in the definition of operational work is intended to draw upon the latter meaning – that is, any work that has a physical manifestation on premises, no matter how insignificant; for example, excavating, filling, clearing, trimming or otherwise managing vegetation, landscaping, drainage work, placing an advertising device (if the work is not building work), and damming, diverting or extracting water.

Development under the Bill 'defaults' to accepted development, and is only assessable or prohibited if so categorised under a categorising instrument. Consequently the definition of development, including that of operational work, intentionally encompasses a very broad range of activities, because the mere inclusion of an activity in the definition of development does not of itself regulate the development, but merely brings it within the potential scope of regulation under an integrated system, so that if there is ultimately a need to regulate the development, it may be regulated without creating additional regulatory systems.

Consistent with this approach to integrated development assessment, an intentionally broad meaning for the definition of operational work is to be preferred.

### **original assessment manager**

Original assessment manager for a development application that is called in refers to the entity that, before the call in, was the assessment manager for the application.

**owner**

Owner of premises refers to the person who is entitled to receive rent for the premises or who would be entitled to receive rent for the premises if the premises were let to a tenant at a rent.

**P&E Court**

This is an abbreviation of the Planning and Environment Court.

**P&E Court Act**

This is an abbreviation of the Planning and Development (Planning Court) Bill 2015.

**participating local government**

Participating local government refers to definition of participating local government in the South-East Queensland Water (Distribution and Retail Restructuring) Act 2009.

**party**

Party, for a Planning and Environment Court proceeding or development tribunal proceeding, or proposed proceeding refers to the applicant or appellant; and/or the respondent; and/or any co-respondent; and/or if the Minister is represented—the Minister.

**payer**

Payer for a levied charge or for a payment refers to any person who pays all or part of the charge or payment.

**payment**

Payment includes a contribution by way of a payment for the purposes of the Bill.

**perform**

Perform a function includes exercise a power for the purposes of the Bill.

**person**

Person includes a body of persons, whether incorporated or unincorporated for the purposes of the Bill.

**PIA**

PIA is an abbreviation of priority infrastructure area.

**plan of subdivision**

Plan of subdivision refers to a plan for reconfiguring a lot that must be approved by a local government before the plan is registered or otherwise recorded in accordance with the Act under which it is approved.

A plan of subdivision does not include a plan for reconfiguring a lot that relates to the acquisition of land or land held by the State under the Acquisition of Land Act or acquisition land for a water infrastructure facility. A plan of subdivision does not include a plan for reconfiguring a lot that consists of strategic port land.

**planning**

Planning refers to the system established in the bill for land use planning including the preparation and making of State and local planning instruments expressing integrated policies about planning matters.

**planning change**

Planning change for premises refers to the amendment, replacement or repeal of a local planning instrument, other than a TLPI, affecting the premises that create a superseded planning scheme in relation to the premises.

**planning instrument change**

Planning instrument change refers to either the commencement of a planning instrument or the amendment of a planning instrument; or the start of the application of an existing planning instrument to premises.

**planning scheme**

Planning scheme refers to a local planning instruments made by local governments expressing integrated State, regional and local planning and development assessment policies for the planning scheme area.

**Plumbing and Drainage Act**

Plumbing and Drainage Act is an abbreviation for the Plumbing and Drainage Act 2002.

**plumbing work**

Plumbing work refers to the definition of plumbing work in the Plumbing and Drainage Act 2002.

**prescribed**

Prescribed refers to prescribed by regulation under the Bill.

**prescribed tidal work**

prescribed tidal work refers to tidal work of a kind prescribed by regulation that a local government may provide for under the planning scheme.

**principal submitter**

Principal submitter for a properly made submission on a planning instrument or development application refers to the person that made the submission. Otherwise, if the submission is made by more than one person, the principal submitter is the person either identified as the principal submitter or the first name on the submission.

**priority infrastructure area**

Priority infrastructure area refers to an area identified by a local government under its planning scheme serviced, or intended to be serviced, with development infrastructure networks. A priority infrastructure area is a part of the local government area used, or approved for use, for non-rural purposes and that will accommodate at least 10 (but no more than 15) years of growth for non-rural purposes.

**private certifier**

Private certifier refers to a building certifier who is licenced under the Building Act 1975.

**properly made**

Properly made, for a development application, refers to a development application that is made in the approved form to the assessment manager and accompanied by any documents required by the form, any required fee and evidence of the consent of the owner where required.

If under the Environmental Protection Act, a development application is taken to be an application for an environmental authority, the development application must also comply with the requirements of that Act as if; a reference to the application were a reference to a development application, and a reference to the applicant were a reference to an applicant for a development application to be a properly made development application.

**properly made**

Properly made for a submission, refers to a submission about a planning instrument or development application that is made to the appropriate person and received within the required period for making the submission. A properly made submission must contain details of the submitter or submitters, is signed and states its grounds and the facts and circumstances relied on to support the grounds.

**provision**

Provision of a development approval, refers to all words or other matters forming, or forming part of, the approval.

**public notice**

Public notice refers to a notice that is published and about either a State or local planning instrument.

**public sector entity**

Public sector entity refers to a department or part of a department; a distributor-retailer (other than in Chapter 4); and also an agency, authority, commission, committee, corporation, instrumentality, office, or other entity, established under an Act for a public or State purpose.

**Queensland heritage place**

Queensland heritage place refers to the definition of Queensland heritage place in the Queensland Heritage Act 1992.

**rates**

Rates refer to the meaning of rates within, for Brisbane, the City of Brisbane Act; or otherwise the Local Government Act.

**reasonably believes**

Reasonably believes refers to believing on grounds that are reasonable in all the circumstances.

**reconfiguring a lot**

Reconfiguring a lot is a type of development under the Bill that involves the subdivision, amalgamation or rearrangement of a lot or lots. Reconfiguring also involves dividing land into parts by agreement, and creating an easement giving access to a lot from a constructed road.

**referral agency (advice only)**

Referral agency (advice only) refers to a referral agency that is limited by a regulation to give advice only but may tell the assessment manager to treat the agency's response as a properly made submission.

**referee**

Referee refers to a person the Minister has appointed by gazette to be a referee, or the Chief executive has appointed by notice to be a referee, on a development tribunal.

**region**

Region refers to the local government areas, or parts of local government areas, prescribed as a region; and Queensland waters next to the local government areas or parts.

**regional planning committee**

Regional planning committee, for a region, refers to a committee established by the Minister for a region to provide advice to the Minister when developing and implementing a regional plan.

**registered professional engineer**

Registered professional engineer refers to a registered professional engineer under the Professional Engineers Act 2002; or a person registered as a professional engineer under an Act of another State.

**registrar**

Registrar refers to the person appointed by the Chief Executive as a registrar to help tribunals perform their functions.

**registrar of titles**

Registrar of titles refers to the registrar of titles under the Land Title Act 1994; or another person who is responsible for keeping, under another Act, a register of interests in land.

**representation**

Representation refers to written representation for the purposes of the Bill.

**required contents**

Required contents refer to the content for local planning instruments that may be prescribed in a Regulation. While the State is providing more flexibility for local governments in drafting local planning instruments under the Bill than allowable under the repealed Act, this provision continues the ability for the State to require consistency across local planning instruments where required.

**required fee**

Required fee is the fee fixed by a local government resolution or prescribed by the Regulation for an application made under the development assessment system. A fee may also be a fee negotiated between the person charging and the person paying the fee. The person charging the fee may decide to waive all or some of the required fee.

**responding entity**

Responding entity, for a change application refers to an entity that gave a pre-request response notice or response about the application.

**road**

Road refers to the Transport Infrastructure Act 1994, schedule 6, definition of road, paragraphs (c) and (d) for the definition of road.

**SEQ Water Act**

This is an abbreviation for the South-East Queensland Water (Distribution and Retail Restructuring) Act 2009.

**sole-occupancy unit**

Sole-occupancy unit for a class 2 building refers to a room or other part of the building used as a dwelling by a person to the exclusion of any other person.

**standard conditions**

Standard conditions refers to the conditions taken to be imposed on a deemed approval if the assessment manager does not give an assessment notice in relation to the approval.

**State-controlled road**

State-controlled road refers to the Transport Infrastructure Act 1994, schedule 6 for the definition of State controlled road.

### **State Development Act**

This is an abbreviation for the State Development and Public Works Organisation Act 1971.

### **State infrastructure**

State infrastructure refers to infrastructure provided by a state infrastructure provider, for which a distributor-retailer cannot impose a condition on the supplier, and a supplier can impose conditions about maintaining the safety and efficiency of its operation.

### **State infrastructure provider**

State infrastructure provider refers to either the chief executive; or a public sector entity, other than a local government, that provides State infrastructure or administers a regional plan for a designated region.

### **State interest**

This definition defines 'State interest' as an interest that the Minister considers:

- affects an economic or environmental interest of the State or a part of the State; or
- affects the interest of ensuring this Act's purpose is achieved in the way mentioned in section 3(2).

Referring to the Act's purpose at section 3(2), clarifies that the system for land use planning and development assessment operating and being able to operate in an efficient, effective, transparent, integrated and accountable manner is a state interest.

### **State-owned or State-controlled transport infrastructure**

State-owned or State-controlled transport infrastructure refers to transport infrastructure under the Transport Infrastructure Act that the State owns or controls.

### **storey**

Storey, refers to the Building Code, part A1.1 for the definition of storey.

### **strategic port land**

Strategic port land refers to the Transport Infrastructure Act 1994 for the definition of strategic port land.

**submission**

Submission refers to a submission in writing.

**submitter**

Submitter for a development application refers to a person who makes a properly made submission about the application. Submitter for a particular submission refers to the person who made the submission.

**supporting information**

Supporting information for a form refers to the information or documents required under the form to be included in, attached to, or given with the form.

**tidal area**

Tidal area, for a non-port local government area or strategic port land refers to the extent of land under tidal water that comes under the jurisdiction of a non-port local government or a port authority for the purposes of assessing tidal works.

The definition of tidal area in the Bill has been considerably simplified compared to the definition in the repealed Act, but is intended to have the same meaning.

The definition in the repealed Act effectively included separate definitions of tidal area for both strategic port land, and local government areas excluding any strategic port land. By including a definition of non-port local government area in the Bill, it has been possible to condense the definition of tidal area to apply to both of the above situations.

Also, the definition in the repealed Act specifically distinguished between situations in which a local government area or strategic port land abutted one side, or both sides of a tidal river or estuarine delta. The definition in the Bill does not make this distinction but has the same effect, because if a local government area or strategic port land encompasses both sides of a tidal river, estuarine delta or canal, the definition is constructed so that the relevant tidal areas “meet in the middle” and so encompass the whole of the delta, river or canal.

Finally a reference to “canal” has been included to address a shortcoming in the previous definition, and allow local governments to exercise jurisdiction over particular tidal works in canals.

**tidal works**

Tidal works refers to the definition of tidal works in the Coastal Protection and Management Act 1995.

**TLPI**

TLPI is an abbreviation of a temporary local planning instrument.

### **Transport Infrastructure Act**

This is an abbreviation for the Transport Infrastructure Act 1994.

### **Tribunal proceedings**

Tribunal proceedings refer to proceedings in a tribunal to hear an appeal or an application for a declaration about a matter of development assessment.

### **trunk infrastructure**

Trunk infrastructure for a local government refers to development infrastructure identified in an LGIP as trunk infrastructure; or development infrastructure that as a result of a conversion application becomes trunk infrastructure; or development infrastructure required to be provided under a condition necessary to service the premises the subject of a development application that has not been identified in the LGIP.

And also until 1 July 2016, trunk infrastructure may also be identified by resolution

### **use**

In common with the repealed Act, the definition of 'use' is an inclusive definition intended primarily to take its ordinary meaning in relation to premises.

However the reference in the definition to any uses 'incidental to and necessarily associated with the use of the premises' under the repealed Act has been replaced in the Bill with a reference to "any ancillary use of the premises".

'Ancillary use' is a widely applied concept in other jurisdictions, in relation to which there is considerable judicial authority. It was also a term used extensively under Queensland planning instruments before the Integrated Planning Act 1997 applied the current definition universally.

The definition under the repealed Act required a subordinate use to also be 'necessarily' associated with the principal use of the premises. This resulted in a very 'high bar' for subordinate uses, inconsistent with the approach in other jurisdictions. For example:

- A small farm stall selling only produce from the farm and clearly subordinate to the principal agricultural use is unlikely to be "necessarily associated with" (i.e. essential to the operation of) the principal agricultural use, so would require separate regulation.
- A domestic tennis court intended only for the use of the occupants of the dwelling may nevertheless not be able to be considered as part of the principal residential use as it is not "necessary" for the principal use.

The substitution of the term 'ancillary' is intended to provide more flexibility in relation to subordinate uses, consistent with widely applied and well accepted principles about their limitations. These limitations reflect an overall intent to allow for such flexibility while preserving

the reasonably anticipated amenity of places, and the capacity of regulators to protect amenity through the regulation of material changes of use.

To be an ancillary use to the principal use of premises, a use should have all of the following characteristics:

- The use is subordinate to the principal use. This does not mean that the ancillary use must necessarily be small in relation to principal use, however the relative scale of the two uses is often a useful indicator;
- The principal and subordinate use are located on the same premises, and are not separated from each other by other uses of other premises, other than in the case of separation by, for example, a road or a physical feature such as a stream;
- There is a functional relationship between the subordinate and principal use, and not with a use of any other premises. For example if a florist shop in a hospital sells flowers only to hospital visitors and patients, it is likely to be an ancillary use. However if the shop sells flowers to the general public in addition to hospital visitors and patients, then it is not an ancillary use.

It is not particularly relevant that an ancillary use is similar or quite distinct from a principal use. For example an administrative office providing accounting and payroll services within a department store is of an administrative character, while the principal use is of a retail commercial character.

Also, the planning merits, or a desire on the part of an entity to regulate the use is not determinative of whether the use is ancillary or not. Whether or not a use is ancillary are a matter of fact and degree in the circumstances, and not a matter of opinion.

A helpful approach to dealing with ancillary uses is to consider them as if they were the principal use. For example, a domestic swimming pool or garage can be treated as if it were a 'dwelling house'.

Consequently, just because a use is ancillary does not mean it is immune from regulation. Instead it is regulated in the same way as the principal use. For example, a farm stall in the example above would be subject to the same restrictions as the principal agricultural use about proximity to, or access from a State controlled road. For further discussion about the relationship between ancillary uses and material changes of use, see the notes about the definition of material change of use.

### **variation approval**

Variation approval refers to the part of a decision notice in response to a variation request that varies the effect of a local planning instrument.

### **variation request**

Variation request refers to the part of a development application seeking to vary the effect of a local planning instrument.