HopgoodGanim
LAWYERS

Planning and Development

Conserving South East Queensland's Koalas

MARCH 2009

David Nicholls
d.nicholls@hopgoodganim.com.au

Robyn Lamb
r.lamb@hopgoodganim.com.au

INGRAINED INTELLIGENCE

HopgoodGanim LAWYERS

Conserving South East Queensland's Koalas: The Impact of the New Regulatory Provisions on Development

On 5 August 2008, the State government noted new research showing that the population of koalas in the wild was directly linked to the animals' movement in urban areas, and announced its intention to form a taskforce to recommend action[1]. The outcome of the taskforce is the mapping of interim koala habitat protection areas and the related draft South East Queensland Koala State Planning Regulatory Provisions (DRPs), which came into effect on 12 December 2008[2] and will expire on 1 July 2009[3]. The website of the Department of Infrastructure and Planning (DIP) indicates it intends to release a new Koala State Planning Policy in 2009, presumably prior to the expiration of the DRPs[4].

State planning regulatory provisions

The Minister's power to make State Planning Regulatory Provisions is derived from the *Integrated Planning Act 1997* (IPA), which allows the Minister to make a State planning regulatory provision only if the Minister is satisfied it is necessary to, amongst other things, implement a regional plan[5]. It is a principle of the South East Queensland Regional Plan (SEQRP) to assist the survival of koalas in south east Queensland by protecting identified koala habitat areas and adopting conservation measures to reduce conflict between urban development and koalas[6].

Importantly, the IPA provides for State Planning Regulatory Provisions to be taken as a ' state interest' for the purposes of the IPA, which means the Minister's powers under Chapter 3 Part 6 of the IPA may be exercised in respect of a development application (e.g. call-in powers) where the DRPs apply.

Development in interim koala habitat protection areas

The *Integrated Planning Regulation 1999* (IP Regulation) was amended on 12 December 2008[7] to give concurrence jurisdiction to the DIP for:

"Development, in an interim koala habitat protection area, to which the SEQ koala State planning regulatory provisions apply"[8].

An interim koala habitat protection area means an area shown on the maps included in the DRPs[9]. The maps only concern land located in south-east Queensland within the urban footprint under the regional plan.

The IP Regulations make the chief executive administering the IPA a concurrence agency for any such development application, and specify the DIP's referral jurisdiction as the DRPs[10].

The DRPs and existing koala protection measures

The IP Regulations previously made the Environmental Protection Agency (EPA) a referral agency for particular material change of use (MCU), reconfiguration of a lot (ROL) and operational work in a koala conservation area or koala

[1] http://www.cabinet.qld.gov.au/MMS/Statement/DisplaySingle.aspx?id=59570
[2] The DRPs do not appear to operate retrospectively, that is, the provisions appear to operate from the date they commenced on 12 December 2008
[3] Section 1.3 of the DRPs
[4] http://www.dip.qld.gov.au/regional-planning/seq-koala-state-planning-regulatory-provisions.html
[5] Section 2.5C.2 of the IPA
[6] Section 2.2 of South East Queensland Regional Plan 2005-2026 and draft South East Queensland Regional Plan 2009-2031
[7] *Integrated Planning Amendment Regulation (No. 8) 2008*
[8] Item 34A of Table 2, Item 19A of Table 3
[9] Schedule 14 of the IP Regulation
[10] Section 3.1.8 of IPA; Item 34A of the Table 2 of Schedule 2 of IP Regulation

sustainability area[11]. Where land is outside the south east Queensland urban footprint area, the EPA's referral jurisdiction is unchanged[12].

The DIP's website notes the DRPs replace current koala protection measures under the Nature Conservation (Koala) Conservation Plan 2006 and Management Program 2006 – 2016 (NCCP & MP) for development within the south-east Queensland urban footprint, and provide specific additional protective mechanisms for habitat areas already identified within the urban footprint[13].

To avoid duplication and overlap of referral agencies, the IP Regulation has been amended so that the DRPs now apply to land within the south east Queensland urban footprint[14]. Accordingly, the relevant referral agency for development on land in an interim koala habitat protection area within the south east Queensland urban footprint will be the DIP, not the EPA, and the DIP's referral jurisdiction will be the DRPs rather than the NCCP & MP. The DIP's website acknowledges the DIP has a concurrence agency role under the IPA to implement the DRPs, but notes the EPA will have a ' key role' in considering development applications against the DRPs[15].

MCU and ROL to which the DRPs *do not* apply

Division 2 applies to development applications for MCU and ROL in an interim koala habitat protection area. Development identified in Column 1 of Table 1 does *not* require referral assessment by the DIP[16].

Domestic activity

Item 1 of Column 1 provides that development for a ' domestic activity' , that is, the construction or use of a single residence on a lot and any reasonably associated building or structure[17], does not require referral to the DIP.

Table 1 purportedly applies to 'development' which is a MCU and ROL. However, to read ' development' in this context as including ROL for a domestic activity is difficult as ROL involves subdivision of land, not work ' for' the construction or use of a single residence on a lot. Furthermore, to read ' development' as including ROL suggests that a development application for ROL to create, by way of example, 250 lots for single residences would not be referred to the DIP, but a development application for a MCU other than a single residence on a lot (e.g. for two residences) must be referred to the DIP. Reading 'development' as including ROL would seem to defeat the intent of the DRPs. Therefore, the definition of 'domestic activity' indicates that 'development' in this context is confined to a MCU.

Building or structure of less than 500m² gross floor area

Item 2 of Column 1 of the DRPs does not require referral of a development application to the DIP where development is for a building or structure of less than 500m² gross floor area.

Again, it is difficult to read 'development' as including ROL, as ROL does not involve development 'for' a building or structure. This suggests that 'development' should be read as only a reference to MCU.

---

[11] Items 33 and 34 of Table 2 and Items 18 and 19 of Table 3 of Schedule 2 of the IP Regulation

[12] IP Regulation; SEQ urban footprint area means an area shown as urban footprint on maps mentioned in schedule 1 of the State Planning Regulatory Provisions included in the Draft South East Queensland Regional Plan 2009–2031: Schedule 14 of IP Regulation

[13] http://www.dip.qld.gov.au/regional-planning/seq-koala-state-planning-regulatory-provisions.html

[14] *Integrated Planning Amendment Regulation (No. 8) 2008*

[15] http://www.dip.qld.gov.au/regional-planning/seq-koala-state-planning-regulatory-provisions.html

[16] It seems that development may fall within any type of development identified in Column 1, and it is not necessary for development to satisfy all the requirements of Column 1

[17] Examples of a building or structure that could be reasonably associated with a single residence include a caretakers residence, a granny flat, a building or structure used for a home business: Schedule 2 of DRPs

Limited clearing

A development application does not require referral to the DIP under Item 3 of Column 1 where development will result in clearing less than 2,500m² of native vegetation and no loss of mature koala habitat trees[18].

Therefore, development which results in clearing more than 2,500m² but no loss of mature koala habitat trees must be referred to the DIP, even though no mature koala habitat trees would be cleared and the Department of Natural Resources and Water may not be a referral agency for the development application under the *Vegetation Management Act 1999*.

'Development' in this context seems capable of being read as either a MCU or ROL. If Items 1 and 2 only apply to MCU, Item 3 is the only provision which appears to regulate ROL. On this basis, referral to the DIP would not be required where ROL does not result in clearing more than 2,500m² of native vegetation nor loss of mature koala habitat trees.

MCU and ROL to which the DRPs *do* apply

The DRPs apply to development which is not identified in Column 1 of Table 1. Column 2 of Table 1 requires that development must be consistent with the planning intent of the planning instruments for the premises and must comply with Schedule 3 of the DRPs.

The DRPs do not provide any guidance in respect of interpreting the phrase 'consistent with'. Would a number of minor deviations mean that development would not be 'consistent with' the planning intent in the planning instruments? Or would a single significant deviation be sufficient to fail the 'consistent with' requirement? As development *must* be 'consistent with' the planning intent of the planning instruments, it seems the DIP may adopt a strict reading of the phrase.

The IPA's definition of 'planning instrument' does not include a preliminary approval[19]. Therefore, a development application for a development permit required by a preliminary approval overriding the planning scheme under Section 3.1.6 of the IPA would be ' consistent with' with the preliminary approval, but not necessarily ' consistent with' the planning instrument which is overridden by the preliminary approval. The DRPs do not provide for the situation where a preliminary approval has been granted in respect of an interim koala habitat protection area, but development applications for development permits for MCU or ROL required by the preliminary approval have not yet been made.

Furthermore, development must also comply with Schedule 3 of the DRPs, which is further discussed below.

Operational work under the DRPs

Operational work for clearing native vegetation in an interim koala habitat protection area (Operational Work) may only be carried out where it is identified in Column 1 of Table 2 of Division 3[20].

Operational Work would not require referral to the DIP where it is for a domestic activity, for a building or structure of less than 500m² gross floor areas, or will result in clearing of less than 2,500m² of native vegetation and no loss of mature koala habitat trees[21].

Nor will a development application for Operational Work require referral to the DIP where it is 'consistent with' a development approval[22] which has not lapsed and the development application for the development approval was made before the DRPs came into force. A development approval includes both development permits and preliminary approvals[23]. Therefore, technically it would not be necessary to refer to the DIP a development application for

[18] Schedule 2 of the DRPs define these terms
[19] A planning instrument means a State planning policy, a designated region's regional plan, a State planning regulatory provision, a planning scheme, a temporary local planning instrument or a planning scheme policy: Schedule 10 of the IPA
[20] Column 2 of Table 2 of Division 3
[21] Items 1, 2 and 3 of Column 1 of Table 2 of Division 3
[22] For MCU, ROL or operational work
[23] Schedule 10 of IPA

Operational Work where it is consistent with an existing development permit or preliminary approval which was applied for before 12 December 2008. However, in practice local governments will usually not give operational work approvals in advance of development permits for MCU or ROL, and an operational work application may be deemed to include an application for a development permit for MCU[24].

A development application for Operational Work will also not require referral to the DIP where it is consistent with a development approval[25] which has not lapsed and the development approval was given under Division 2 of the DRPs.

Complying with Schedule 3

Schedule 3 of the DRPs provides a framework and direction for the use of offsets to provide net benefit for koala conservation in the interim koala habitat protection area. It provides a formula for calculating residual habitat impact and the value of proposed offset packages; and guidance in respect of providing offsets.

The applicant will be responsible for proposing and securing approved offsets. All offset packages must include a component of ' high quality habitat measures' , which are measures in or adjoining the interim koala habitat protection area, or a contiguous cluster as the development impact, and involving either protecting habitat that can be cleared under an existing development approval or improving habitat values through rehabilitation of cleared areas. The balance of measures may be provided elsewhere in the south east Queensland region in some circumstances, but this ' discretion' will not be available where evidence indicates that the resultant impact of the development will be critical to the long term survival of koalas in the interim koala habitat protection area or the contiguous cluster.

Development will not comply with Schedule 3 until delivery of the offset package has been secured through an offset agreement with the State government, which must be in place before the DIP's determination of a development application. Therefore, the DIP's approval of development will be contingent on the applicant entering an offsets agreement with the State. Additionally, this appears to make decisions of the DIP as a concurrence agency impossible to effectively appeal as the Court does not have the power to make the State enter into such an agreement, regardless of the merits of the conservation measures proposed.

Comments on the DRPs

State involvement in development applications

Where the DRPs apply to a development application for MCU or ROL, it will be necessary to enter an offset agreement with the State government before the DIP determines the development application. Therefore, in addition to the State's powers under Chapter 3 Part 6 of the IPA (e.g. the Minister may call-in a development application), the State has the power to refuse a development application where an 'agreement' cannot be reached. The parties to any such ' agreement' would be unlikely to have equal bargaining power and such a requirement seems to be an interference with private landowners' rights and usurps the role of local governments and the Court. Furthermore, it is likely that reaching agreement with the State would require lengthy negotiations which further protract the IDAS timeframes and delay the development approval process.

In addition, before the DRPs came into effect, existing koala protection measures administered by the EPA and Councils were in place. Why has the State considered koala protection in south east Queensland to be a matter within the jurisdiction of the DIP, rather than the EPA which seems to be the most appropriate body to administer koala protection? If existing koala protection measures were considered inadequate, why weren't the existing measures simply improved and strengthened?

Application of the DRPs

The IPA provides that a concurrence agency or advice agency for a development application means an entity prescribed under a regulation.

[24] Section 3.2.2 of IPA
[25] For MCU, ROL or operational work

In this case, the IP Regulations make the DIP a referral agency for development in an interim koala habitat protection area to which the DRPs apply. It is therefore the DRPs, not the IP Regulations, which determine whether the DIP has referral jurisdiction as a referral agency for a development application. The DRPs in effect purport to amend the IP Regulation. It is unclear whether this is legally permissible.

Schedule 3

The formula for calculating residual habitat impact and the value of proposed offset packages appears to be complex and difficult to precisely calculate. Most developers of land in an interim koala habitat protection area will need to engage experts to calculate residual habitat impact and offsets, and to assist in preparing development applications.

All development applications must include a component of ' high quality habitat measures' , which seems to overestimate the availability of appropriate land in south east Queensland for offsets, and the willingness of people to permit their land to be used for offsets and to, subsequently, subject their land to a covenant or declaration, or gift to the State or local government.

Preliminary approvals under Section 3.1.6 of the IPA

The DRPs do not provide for circumstances where a preliminary approval under Section 3.1.6 of the IPA has been granted before the DRPs came into effect, but development permits for MCU and/or ROL required by the preliminary approval have not yet been granted[26].

Therefore, future development applications for development permits for MCU and/or ROL subject to the DRPs will require referral to the DIP as a concurrence agency. Further complications will arise in the DIP's assessment of any such development applications, as development must be 'consistent with' the planning intent in the planning instruments for the premises and must comply with Schedule 3 of the DRPs. In many cases it will be difficult to show that a development application for a development permit required by a preliminary approval overriding the planning scheme will be ' consistent with' the planning intent of the planning instruments as the very nature of a preliminary approval is to override the planning instruments. The DIP may refuse the application solely on the basis it is not 'consistent with' the planning intent of the planning instruments and, as a concurrence agency, direct the assessment manager to refuse the development application[27]. However, each development application will obviously turn on its own facts.

A development permit for only one component of development

Division 2 of the DRPs does not provide for circumstances where a development permit has been granted for one component of development (e.g. MCU), but a development permit has not yet been granted in respect of other types of development (e.g. ROL). The DIP would be in a position to direct the assessment manager to refuse the subsequent development application.

Development applications made after 12 December 2008 - properly made applications

Sections 3.2.1(7)(f) and 3.2.1(10)(b) of the IPA provide that an application is not properly made if the development would be contrary to a state planning regulatory provision, and that such non-compliance can not be waived by an assessment manager. The High Court of Australia has confirmed that a non-compliant application can not legally commence its journey through the IDAS process[28].

It seems likely that the DRPs will generate litigation about whether an affected application made after 12 December 2008 is, or was, 'properly made'. The DRPs deal with matters of substance. The 'consistency test' if applied at this point would involve a planning assessment by the assessment manager coupled with a duty to refuse to accept the application if the test is failed. This would be of significance for applications which are in conflict with the Planning Scheme but rely

[26] Obviously, where a preliminary approval makes future development exempt or self assessable, it would not be necessary to obtain a development permit and, therefore, there would be no development application to refer to the DIP
[27] Section 3.5.12 of IPA
[28] *Chang v Laidley Shire Council* [2007] HCA 37

upon sufficient grounds, which is likely to be the case in respect of applications for preliminary approval under section 3.1.6 of the IPA.

However, we think the DRPs are drafted in a way which suggests that they apply to assessment of applications rather than, in effect, imposing a prohibition on the making of the application. In this regard they are different from the regulatory provisions under the SEQ Regional Plan. Division 2, section 2.1 of the DRPs states that an affected application 'is to be assessed against the identified criteria' and when assessed must satisfy the nominated criteria with respect to consistency with the content of the planning instruments and for compliance with schedule 3.

It would, in our view, be an absurd outcome if an application could not be properly made without the existence of an offset agreement between the applicant and the state. That does not seem to us to be what was intended by the DRPs.

There is much to commend the commonsense approach of Mackenzie J to difficulties of this nature:

> *"Where the boarder line lies can not be definitely stated. But unless it can be definitely stated in the individual case then under consideration that the outcome will be contrary to the regulatory provisions, then the application should prima facie be treated as a properly made application"*[29].

As Professor Fogg points out deferral of the contrariety test to later stages of IDAS can be productive of delay and expense[30]. Arguments at the appeal stage about whether applications are properly made are undesirable. They certainly test the nerves of applicants. It seems this is an unfortunate side effect of the intended prohibitory approach of the SEQ Regulatory provisions with respect to certain development outside the urban footprint. The legislative provisions which give effect to that prohibitory intent were probably only intended to operate in respect of state planning regulatory provisions which clearly intend to preclude particular developments in particular circumstances, such as is the case with aspects of development within the Regional Landscape and Rural Production designation under the SEQ Regional Plan. Arguably this is not the case where the provisions are intended to guide assessment and to allow development to happen provided certain outcomes are achieved, as is the case under the DRPs

Development applications made after 12 December 2008 - assessment considerations

The DRPs significantly alter the balanced way in which the decision rules applicable to development applications currently operate. There are specific rules which guide decision making for both code and impact assessable development applications[31]. These rules allow development to be approved in appropriate circumstances where the development conflicts with a code or a planning scheme. In the former case approval may be granted where the purpose of the Code is achieved. In the latter case 'sufficient grounds' may allow approval despite the conflict with the scheme. However Section 3.5.11(4A) of the IPA precludes approval that would be contrary to State Planning Regulatory Provisions. The DRPs introduce an independent consistency test. Development 'must' be consistent with the intent of the 'planning instruments'. If it isn't consistent with the intent of planning instruments it will be contrary to the DRPs and therefore must be refused by the assessment manager.

One can readily understand measures being introduced which are designed to conserve or replace essential koala habitat because they are directly related to the conservation of koalas. Conversely, why was an independent consistency test, which cuts across the established decision rules, thought to be necessary? It effectively operates as a prohibition on the bringing forward of greenfield land in the urban footprint for urban development where local governments have not yet moved forward with scheme amendments to facilitate urban expansion. Importantly this embargo will operate even where it is possible for development to satisfy the off-sets policy in Schedule 3 to the DRPs.

An example of the absurdity which is capable of emerging as a result of the DRPs consistency test is where the overall development footprint and proposed offsets (compliant with Schedule 3) are the same for both residential and commercial development. The land is zoned residential. The development includes a commercial component and mixed uses in addition to standard residential. The development is not consistent with the intent of the planning instruments,

[29] Tolocorp Pty Ltd v Noosa Shire Council [2007] QCA 33
[30] Planning & Development Queensland at [3055]
[31] Sections 3.5.13 and 3.5.14 of IPA

but is urban development which satisfies the koala conservation measures. However, as the DRPs currently operate in tandem with Section 3.5.11(4A) of the IPA, the application cannot be approved.

Development applications not yet in the decision stage by 12 December 2008

The DRPs do not appear to operate retrospectively, which means the DIP would not be a concurrence agency for a development application made before 12 December 2008[32]. However, complications may arise where such a development application is changed in accordance with Section 3.2.9 of the IPA.

Where a development application has been made before the DRPs came into effect but the Council's decision stage had not started, an assessment manager may give the weight it is satisfied is appropriate DRPs[33]. The weight to be given to the DRPs will depend on the particular facts of each application. Further, the Court in an appeal may give weight to laws which commenced after the application was made[34]. This weight would be influenced by the requirement in Section 3.5.11(4A) of the IPA that an assessment manager's decision must not be contrary to a State Planning Regulatory Provision. If the application is made after 12 December 2008 the Court's discretion to approve development is removed where the development would be contrary to the DRPs, that is, if *either* the consistency *or* the offsets requirement is not satisfied.

Development applications which do not require referral to the DIP

An assessment manager's decision must not be contrary to a State planning regulatory provision[35]. Therefore, the DRPs will apply to assessment of development applications even where the DIP is not a concurrence agency for the application.

Transitional arrangements

Insufficient consideration has been given to the effect of the DRPs on rights associated with existing development approvals. As mentioned above the transitional arrangements under the DRPs are unsatisfactory, particularly regarding applications made after 12 December 2008 for:

- Development permits subsequent to and in conformity with a preliminary approval;
- ROL subsequent to and in conformity with a development permit for MCU.

A literal reading of section 1.4.4 of the IPA suggests that the DRPs being a 'new planning instrument' would not operate so as to limit subsequent development that conforms to the preliminary approval. However the Planning & Environment Court's recent decision in *Stockland Developments Pty Ltd v Gold Coast City Council*[36] casts doubt upon such a broad assumption. The case concerned development conditions imposed on a development permit for ROL under a Planning Scheme policy which post–dated a preliminary approval. The central rationale for the Court's decision was that the only 'development' protected by section 1.4.4 was that which was the subject of the preliminary approval. His Honour Judge Robin Q.C. said:

> *"I agree with Council's submission that the preliminary approval being for an MCU 'for the entire site in accordance with a Plan of Development and Planning Code' relates to a different development from the ROL approval the subject of this appeal. The preliminary approval authorised an MCU, but not any ROL which, as the conditions made clear, would have to be assessed upon its own merits"*[37].

---

[32] Unless the DIP is a referral agency in any event for a development application made before the DRPs came into effect: Section 3.3.15 of IPA
[33] Or, if the decision stage is stopped, before the day the decision stage is restarted: Section 3.5.6 of the IPA
[34] *Coty (England) Pty Ltd v Sydney City Council* (1957) 2 LGERA 117
[35] Section 3.5.11 of IPA
[36] [2008] QPEC16
[37] [2008] QPEC16 at [15]

The point would be more sharply focused where the DRPs affect a subsequent application for a development permit for MCU which is clearly consistent with the conceptual change of use approved by a preliminary approval, more so where designated environmental corridors are not changed and conditions relating to further ecological assessment are fully complied with.

There can be no doubt that the DRPs 'regulate' in terms of section 1.4.4. The question is whether they ' further regulate' the approved MCU under the preliminary approval. Preliminary approvals do not authorise assessable development which arguably means that all subsequent applications, although assessed having regard to the preliminary approval (which may have altered assessment levels and applicable codes), must be assessed and decided on the basis of all relevant statutory criteria in force and applicable to the application including the DRPs. The question is not finally resolved. Professor Fogg says that the Stockland case *"clearly hampers a generous construction of the protections given by section 1.4.4 so far as a preliminary approval is concerned"*[38].

Given the uncertainty heaped upon existing preliminary approvals by the DRPs there is a case for the inclusion of clearly drafted transitional provisions in the DRPs and in the final State Planning Policy which will replace them, if the State Planning Policy is to be to similar effect as the DRPs.

Conclusion

The DRPs potentially affect development pursuant to a preliminary approval where development permits for further stages are needed, as well as applications for development made before 12 December 2008. Owners of land within the urban footprint, earmarked for development, which is now within the interim koala habitat protection area, will be significantly affected as the DRPs make development of the land subject to agreement with the State.

David Nicholls
d.nicholls@hopgoodganim.com.au

Robyn Lamb
r.lamb@hopgoodganim.com.au

[38] Planning & Development Queensland [1570]