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Planning and Development

Koalas:
The Current State of Play

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Koalas: The Current State of Play

On 26 February 2010, the State Government made the South East Queensland Koala State Planning Regulatory Provisions ("Provisions"). These replaced the draft South East Queensland Koala State Planning Regulatory Provisions ("Draft Provisions"), which had taken effect on 2 November 2009 and expired on 28 February 2010.

The Provisions, and the Draft Provisions, form part of the State Government's response to the rapid decline in koala numbers in South East Queensland. The Provisions are a "moratorium" measure, intended to protect koala habitat in the interim until the State Government finalises its overall response, including final, more comprehensive State Planning Koala Conservation Regulatory Provisions ("Conservation Provisions"). The Provisions extend the "state of play" brought about by the Draft Provisions in November 2009, and for the time being, the Provisions effectively prohibit the development of land mapped as Protected Koala Bushland Habitat area.

This article focuses on the changes to the "exemption" provisions from the November 2009 Draft Provisions to the current Provisions. These are of particular importance to developers and landowners who had existing applications and approvals in place before 2 November 2009, because the effect of the Provisions in some circumstances is to effectively sterilise land without compensation being provided.

Background

Draft South East Queensland Koala State Planning Regulatory Provisions (November 2009)

Taking effect on 2 November 2009, the Draft Provisions replaced previous South East Queensland Koala State Planning Regulatory Provisions[1] and operated as a moratorium on the clearing of mature koala habitat trees and other native vegetation on affected sites in South East Queensland. The Draft Provisions ensured that the proposed South East Queensland Koala Conservation State Planning Regulatory Provisions were not undermined by the pre-emptive clearing of mature koala habitat trees. The Draft Provisions achieved the Queensland Government's stated objective - ensuring that its ultimate koala protection measures were not circumvented by developers and landowners making development applications in anticipation of the final measures - by making virtually all development in Protected Koala Bushland Habitat areas "development that may not occur".[2]

Section 1.4 of the Draft Provisions specified a number of "exemptions", or circumstances, in which the Draft Provisions did not apply. By way of example, section 1.4(b) provided:

"These draft State Planning Regulatory Provisions do not apply to –

...

(b) development carried out under a development approval which has not lapsed for a development application -

(i) that was properly made before these state planning regulatory provisions commenced; or

(ii) to which Division 3 of these state planning regulatory provisions applied..."

One major concern about the exemptions in the Draft Provisions was whether, in circumstances where there existed a development approval given for a development application properly made before the Draft Provisions commenced, the State Government intended that further applications for approvals needed to facilitate the approved project be captured by the requirements of the Draft Provisions.

The exemptions in the Draft Provisions were arguably drafted narrowly, and did not cover subsequent applications that might be required for work associated with the "exempt" development approval, such as operational work associated

[1] These provisions commenced on 1 July 2009 and were due to expire on 28 February 2010
[2] Section 2.1 and Table 1 of the Draft Provisions

with an approval for reconfiguring a lot. This possibility arose because of the definition of "development", "development approval" and "development application" under the *Integrated Planning Act 1997* (Qld).[3]

"Development approval" is defined in Schedule 10 of the Integrated Planning Act as follows:

> *"Development approval means a decision notice or negotiated decision notice that –*
>
> *(a) approves, wholly or partially, development applied for in a development application (whether or not the approval has conditions attached to it); and*
>
> *(b) is in the form of a preliminary approval, a development permit or an approval combining both a preliminary approval and a development permit in the one approval."*

"Development application" means an application for a development approval, and "development" is defined in section 1.3.2 of the Integrated Planning Act to mean any of the following:

> *"(a) carrying out building work;*
>
> *(b) carrying out plumbing or drainage work;*
>
> *(c) carrying out operational work;*
>
> *(d) reconfiguring a lot; and*
>
> *(e) making a material change of use of premises."*

The effect of a narrow interpretation of the exemption would be that developers with land in Protected Koala Bushland Habitat area subject to an approval (either given, or for which the application was made, before 2 November 2009) would be unable to apply for, or carry out, associated works required to facilitate the exempt approval. If construed in this way, a developer's underlying approval might be protected, but it would not be possible to obtain other necessary related approvals for other "development" (for example, operational works).

Anecdotal reports suggest a degree of confusion about the intended protection afforded to existing applications and approvals. We have heard of instances where local governments have been concerned that they are unable to accept development applications for operational works for land in the Protected Koala Bushland Habitat area, despite the existence of an underlying approval for reconfiguring a lot or for material change of use contemplating those works. In these cases, the exemption afforded by section 1.4(b)(ii) (and the other subparagraphs) of the Draft Provisions would be rendered illusory, because any development in accordance with the exempt approvals could not be undertaken, even though they predated the Draft Provisions.

Arguably, the protection of rights under existing development approvals was not achieved by the exemptions contained in section 1.4 of the Draft Provisions.

This situation was obviously of significant concern to developers and landowners, in circumstances where the operation of the Draft Provisions effectively sterilises land without compensation being provided.

Draft South East Queensland Koala Conservation State Planning Regulatory Provisions (December 2009)

The State Government also released an "exposure draft" of the Conservation Provisions on 2 November 2009. That document was of no force or effect and was superseded in December 2009, when a further draft of the "ultimate" Conservation Provisions was released for public consultation. This draft did not take force or effect on release, and formal consultation closed on 28 February 2010. Submissions are currently being considered before a final version is

[3] Which was in force at the time

released and takes effect. The Conservation Provisions contain "exemptions" in substantially the same terms as in the Draft Provisions.

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South East Queensland Koala State Planning Regulatory Provisions (February 2010)

We believe that the Draft Provisions were, respectfully, deficient in providing clear exemptions to adequately protect rights accrued before their commencement. The exemptions were arguably not framed with sufficient breadth to facilitate development under a protected existing development approval, in circumstances where subsequent development permits were required to enable the project to be carried out.

The Queensland Government made the Provisions on 26 February 2010, replacing the Draft Provisions. Section 1.3 of the Provisions contains blanket exemptions where the Provisions do not apply:

> ***1.3 When these state planning regulatory provisions do not apply***
>
> *(1) Subject to subsection (3), these state planning regulatory provisions do not apply to the following—*
>
> ***(a) a development application that was properly made before the day these state planning regulatory provisions commenced;***
> ***(b) development carried out under a development approval that has not lapsed for a development application that was properly made before the day these state planning regulatory provisions commenced;***
> *(c) development mentioned in the Sustainable Planning Regulation 2009, schedule 4;*
> *(d) development that is generally in accordance with a rezoning approval given under the repealed Local Government (Planning and Environment) Act 1990, section 4.5(6), 4.8(6), 4.10(6) or 8.10(9A) or the Integrated Planning Act 1997, section 6.1.26;*
> *(e) development that is generally in accordance with a rezoning approval given under the repealed Local Government Act 1936, section 33(5)(K), to which section 33(5)(M) also applied;*
> *(f) development that is—*
> *(i) declared to be a significant project under the State Development and Public Works Organisation Act 1971, section 26(1)(a); or*
> *(ii) in a state development area under the State Development and Public Works Organisation Act 1971.*
>
> ***(2) These state planning regulatory provisions also do not apply to a development application made for development that is consistent with development mentioned in subsections (1)(b) to (f).***
>
> *(3) Subsection (1)(d) and (e) apply only if—*
> *(a) the development rights conferred by the resulting zone have been preserved under a planning scheme; or*
> *(b) a development permit is given in respect of the land for a development application (superseded planning scheme) where the superseded planning scheme preserved the development rights conferred by the resulting zone;*
> *(c) an acknowledgement notice is given in respect of the land under section 3.2.5(1)(a) of the Integrated Planning Act 1997, where the superseded planning scheme preserved the development rights conferred by the resulting zone;*
> *(d) the local government agrees to a request under section 95(1)(a) of the Sustainable Planning Act 2009, where the superseded planning scheme to which the request relates preserved the development rights conferred by the resulting zone.* [Our emphasis]

The Provisions continue to prohibit development in the Protected Koala Bushland Habitat area, so do the exemptions now provide more specific protection for existing rights? In this regard, the *Sustainable Planning Act 2009* (Qld) has

commenced, but notably the definitions for "development approval", "development application" and "development" in the Integrated Planning Act remain unchanged.[4]

The Provisions do not go so far as to specifically state that the exemption is available where further development permits are needed to facilitate development under an existing approval that predates the Provisions. However, it seems that section 1.3(2) intends to extend the exemption previously provided by the Draft Provisions.

Section 1.3(2) may serve to extend the exemption to further applications for development approvals for aspects of development, such as operational work, required to facilitate the project for which an "exempt" approval exists.

If, for example, "reconfiguring a lot" is substituted for the word "development" (ie one of the "aspects" of the definition of development), it can arguably be read widely enough to extend the protection afforded by the exemption to an application for "carrying out operational work" related to the underlying approval for "reconfiguring a lot". For example:

> *(1) Subject to subsection (3), these state planning regulatory provisions do not apply to the following—*
>
> *...*
>
> *(b) reconfiguring a lot carried out under a development approval* ***[for reconfiguring a lot]*** *that has not lapsed for a development application* ***[for reconfiguring a lot]*** *that was properly made before the day these state planning regulatory provisions commenced;*
>
> *...*
>
> *(2) These state planning regulatory provisions also do not apply to a development application made for* ***carrying out operational work*** *that is consistent with* ***the reconfiguring a lot*** *mentioned in subsections (1)(b) to (f).*

Conclusion

In our opinion, the Provisions attempt to rectify the deficiencies identified in the exemptions in the Draft Provisions, to more extensively protect the rights accrued before the Draft Provisions. Having said that, section 1.3(2) in its current form could be improved by, for example, providing an example of its application. The following could be included below section 1.3(2):

> "For example - the Provisions do not apply for an application for operational work that is consistent with reconfiguring alot for which an approval mentioned in subsection (1)(b) exists."

When the ultimate Conservation Provisions are finalised, it is critical that they also appropriately protect existing and accrued rights.

For more information on the South East Queensland State Planning Provisions, please click here.

[4] Schedule 3 and section 7 of the *Sustainable Planning Act 2009* (Qld)