HopgoodGanim
LAWYERS

Planning and Development

Who says you can't go home? The *Queensland Reconstruction Authority Act 2011*

FEBRUARY 2011

David Nicholls, Partner
d.nicholls@hopgoodganim.com.au

Sarah Persijn, Senior Associate
s.persijn@hopgoodganim.com.au

Olivia Williamson, Solicitor
o.williamson@hopgoodganim.com.au

HopgoodGanim LAWYERS

Who says you can't go home? The *Queensland Reconstruction Authority Act 2011*

The floods over December and January, together with recent tropical cyclones including Cyclone Yasi, appear likely to impact on Queensland's planning system. To assist with the rebuilding and recovery of Queensland communities, the State Government has established the Queensland Reconstruction Authority (QRA), with powers to make development schemes, and to intervene in the development assessment system.

Key points

- The *Queensland Reconstruction Authority Act 2011* establishes the Queensland Reconstruction Authority, which will coordinate and manage the rebuilding and recovery of disaster-affected communities following the recent flooding and cyclones.
- The Queensland Reconstruction Authority has the ability to overrule council development decisions, to compulsorily acquire land, and be charged with considering whether or not existing damaged infrastructure ought to be repaired, replaced with like infrastructure, relocated, or re-established with natural disaster resilient infrastructure.
- Local governments retain primary responsibility for assessing and deciding development applications and requests. However, QRA development schemes will prevail over other planning instruments to the extent of any inconsistency.
- The significant powers granted to the QRA to prepare development schemes which are given status as the pre-eminent planning instrument for declared areas, coupled with an ability to amend existing development approvals, need to be exercised cautiously and equitably, particularly where the findings of the Holmes Commission of Inquiry are not yet known.

When was the Queensland Reconstruction Authority established?

On 19 January 2011, Queensland Premier Anna Bligh announced the creation of the Queensland Reconstruction Authority. It was with both gravity and urgency that the *Queensland Reconstruction Authority Bill 2011* was tabled on 15 February 2011, the first sitting day of the Queensland parliament for this year. The Bill was then passed by the House two days later, and received Royal Assent to become Act No 1 of 2011, the *Queensland Reconstruction Authority Act* (QRA Act), on 21 February 2011.

The QRA has been established in addition to the Holmes Commission of Inquiry, which was set up to forensically inquire into and report on the flood disaster. Amongst the Commission's terms of reference is an examination of "all aspects of land use planning through local and regional planning systems to minimise infrastructure and property impacts from floods".

The QRA Act has a two-year sunset period[1], recognising that the focus is to fast-track the rebuilding effort and get Queensland back into the sunshine as quickly as possible. The transitional provisions transfer relevant powers and responsibilities to the Coordinator-General following cessation of the authority's operations.[2] Faced with a mammoth task ahead, doubts abound as to whether the QRA Act and the Reconstruction Authority it creates will have completed its work within two years. There is also the prospect that the QRA may make significant planning decisions ahead of the findings of the Commissioner concerning land use planning.

[1] Section 139
[2] Section 131

What is the purpose of the Queensland Reconstruction Authority Act?

The main purpose of the QRA Act is to provide for appropriate measures to ensure Queensland and its communities effectively and efficiently recover from the impacts of disaster events.[3]

A 'disaster event' means either the floods caused by heavy rains in Queensland in December 2010 and January 2011; severe tropical cyclone Yasi; or another disaster, within the meaning of the *Disaster Management Act 2003*, and prescribed under a regulation.[4] The inclusion of a regulation-making power will allow flexibility in the Authority's jurisdiction in the event of any further disasters. This impacts the prospect of extensions of the QRA's current 2 year term, to become a standing authority which deals with all future natural disasters.

Section 3 of the QRA Act sets out how the main purpose of the Act is to be achieved, primarily through:

- establishing the Queensland Reconstruction Authority (QRA)[5] to coordinate and manage the rebuilding and recovery of disaster-affected communities, including the repair and rebuilding of community infrastructure and other property;
- establishing the Queensland Reconstruction Board[6] to oversee the operations of the QRA; and
- providing for the declaration of 'declared projects' and 'reconstruction areas', and for the making of development schemes for declared projects and reconstruction areas, to facilitate flood mitigation or the protection, rebuilding and recovery of affected communities.

Who is the Queensland Reconstruction Authority?

The QRA has been established to coordinate the State Government's program of construction, with functions[7] that include:

- deciding priorities for community infrastructure and community services needed for the protection, rebuilding and recovery of affected communities;
- working closely with disaster-affected communities to ensure each community's needs are recognised in the rebuilding and recovery of communities;
- collecting and collating information about community infrastructure;
- developing an arrangement for sharing data;
- coordinating and distributing financial assistances for affected communities;
- putting into effect the strategic priorities of the board;
- facilitating flood mitigation for affected communities and ensuring the protection, rebuilding and recovery of affected communities is effectively and efficiently carried out and appropriate, having regard to the nature of the disaster event; and

[3] Section 2
[4] Section 6
[5] Section 7
[6] Section 28
[7] Section 10

- if asked by the Minister, giving advice about putting into effect the recommendations of the Commission of Inquiry established to investigate the flooding events.

Having regard to the functions and powers of the QRA set out in the Act, the QRA is a powerful new authority. Of particular significance is its ability to overrule council development decisions, to compulsorily acquire land, and be charged with considering whether or not existing damaged infrastructure ought to be repaired, replaced with like infrastructure, relocated, or re-established with natural disaster resilient infrastructure.

The powers vested with the QRA, however, are somewhat familiar. They appear to be adopted from existing powers available under various acts, such as the *State Development and Public Works Organisation Act 1971*, the *Urban Land Development Authority Act 2007* and the *Sustainable Planning Act 2009*. Other authorities have similar powers, in particular the Urban Land Development Authority.

Premier Anna Bligh as the Minister for Reconstruction will oversee the QRA.

The membership of the QRA consists of the Chief Executive Officer and other staff.[8] Graeme Newton, previously the State's Coordinator-General, has been appointed as CEO.

The QRA then has a seven person Board of Management (the Queensland Reconstruction Board[9]) to provide strategic direction to, and oversight of, the Authority.[10]

The Board consists of:[11]

- the Chairman (Major General Mick Slater);
- two members nominated by the Commonwealth (Brad Orgill, previously head of the Building the Education Revolution Implementation Taskforce; and Glenys Beauchamp, the secretary of the Department of Regional Australia, Regional Development and Local Government);
- a person nominated by the Local Government Association (Brian Guthrie, former CEO of Townsville City Council); and
- three nominees with expertise and experience in engineering, finance, planning or another field the Minister considers appropriate (Kathy Hirschfield, Jim McKnoulty and Steve Golding).

The QRA will also set up a dedicated office in North Queensland, with Chief Superintendent Mike Keating, from the Queensland Police, looking after the reconstruction effort in North Queensland following Cyclone Yasi.

Where will the reconstruction areas be?

The statistics that came out following the peak impact of the December 2010 and 2011 flooding events and tropical cyclone Yasi were staggering. The scale of these disasters means that approximately 92 percent of Queensland has activated disaster areas.

At the time of writing, the Minister had not yet declared or recommended for declaration any 'reconstruction areas' or 'declared projects'. The process for making these declarations is discussed below.

[8] Section 13
[9] Section 28
[10] Section 29
[11] Section 30

Why was the Queensland Reconstruction Authority established?

The explanatory notes justify the decision to establish the QRA, a single entity responsible for managing the reconstruction, because of the magnitude of the damage caused by the recent disaster events and the number of people and communities affected.

There is no doubt that the magnitude of the QRA's task is great. The question is whether the required prioritisation and co-ordination of the necessary tasks justifies some of the powers included in the QRA Act. The explanatory notes state that the QRA Act enables the QRA to cut through red tape and any other barriers that would stand in the way of swift recovery and rebuilding. What constitutes 'red tape' and 'barriers' is not identified, and it is not clear why legislation of this nature is needed for this disaster when it has not been needed in the case of previous natural disasters. If the task at hand was limited to rebuilding public infrastructure, many of the powers given to the QRA would not be needed. However, it appears that the State Government's intent is to go further than just repairing and rebuilding to exercising specific planning powers in relation to affected areas and projects on both public and private land. These powers are extensive, and may be exercised in relation to private land without giving rise to compensation, unless the land is compulsorily acquired under the part 7, division 2 of the QRA Act.

How will the Queensland Reconstruction Authority work?

Application of the *Sustainable Planning Act 2009*

It is important to note that section 110 of the QRA Act specifically provides that the *Sustainable Planning Act 2009* (SPA) does not bind the QRA or its CEOin relation to their functions or powers under the QRA Act.

Declared projects and reconstruction areas

Before the QRA can exercise its powers under the QRA Act, the Minister must declare or recommend the declaration of 'declared projects' (declared by gazette notice) or 'reconstruction areas' (declared by regulation).[12] Before a reconstruction area or a declared project is declared, the QRA Act gives councils and communities a say on how the QRA would operate in their towns, recognising that for the most part local governments will retain primary responsibility for land use and granting development approvals in each area.

Once declared, the powers of the QRA are activated to expedite both State and local government regulatory decisions or approval processes by issuing certain notices - namely notices:

- to require a decision-maker to undertake a process (a 'progression notice')[13];
- to require a decision-maker to make a decision (a 'notice to decide')[14]; and
- advising that the QRA will assume responsibility for making a decision (a 'step-in' notice)[15].

These notices are based on powers which presently exist and are exercised by the Coordinator-General under the *State Development and Public Works Organisation Act 1971,* or by the Minister under the SPA. The latter is similar in its operation to a Ministerial 'call in' under the SPA.

The progression notice

The progression notice requires the decision-maker to undertake, within the period stated, administrative processes required to complete the process. The explanatory notes use the giving of an acknowledgement notice under the application stage of IDAS as an example.

[12] Sections 42 and 43
[13] Section 49
[14] Section 50
[15] Section 51

Notice to decide

A notice to decide requires the decision-maker to make the decision within the period stated in the notice. This period is at least 20 business days, or if the decision-maker would be required to make the decision within a period that is less than 20 business days, the lesser period. Importantly, if the prescribed decision relates to an application for a development approval under the SPA, the notice to decide may be given to the decision-maker only after the decision stage for the application starts.

Section 60 of the QRA Act clarifies that the QRA is not required to consult with anyone before giving either a progression notice or a notice to decide.

Step-in notice

A step-in notice advises a decision-maker and applicant that the QRA is to make an assessment and a decision about a prescribed decision or process. The QRA takes responsibility for making the decision in place of the decision-maker.[16]

The Minister may only approve the giving of a step-in notice if the Minister is satisfied that the giving of the notice is necessary to facilitate flood mitigation or the protection, rebuilding and recovery of an affected community. Further, the QRA may give a step-in notice for a prescribed decision or process only after a progression notice or a notice to decide has been given for the process or decision, and the time for compliance has passed, or if a decision-maker has complied, on request by the applicant given to the QRA within 10 business days after notification of decision.[17]

Section 53 provides that a decision-maker for the prescribed decision or process must give the QRA all reasonable assistance or materials it requires to act under a step-in notice. The explanatory notes confirm that this can include a local government giving the QRA a written recommendation to impose a condition for infrastructure to which chapter 8, part 1 of the SPA applies, if the local government could have otherwise imposed such a condition.

In the circumstances of a step-in by the QRA as decision-maker, if the prescribed decision or process relates to an application for a development approval under the SPA, then the assessment manager and each concurrence agency for the application is, under the SPA, taken to be an advice agency for the application until the QRA makes a decision about the prescribed decision or process.[18]

Once a step-in notice has been given, any appeal or review which was started in relation to the decision or process under the relevant law is of no further effect.[19]

In making a decision about a prescribed decision or process, the QRA may impose conditions it considers necessary or desirable, having regard to the nature of the declared project or development in the reconstruction area, any criteria for the prescribed decision, and the main purposes of the QRA Act.[20] As already mentioned, if the QRA receives a recommendation from local government to impose a condition about infrastructure, the QRA must impose the condition unless the Minister directs otherwise. The QRA's decision to impose such a condition is taken to be a decision for the purposes of section 633(2)(b) of the SPA (infrastructure charges notices).[21]

The effect of the QRA's decision under a step-in notice (including a decision to impose a condition) is that it[22]:

- is taken to be a decision of the original decision-maker under the relevant law for the prescribed decision or process, but a person may not appeal against the QRA's decision under this Act or the relevant law; and

[16] Section 54(a)
[17] Section 52
[18] Section 54(d)
[19] Section 54(e)
[20] Section 55
[21] Section 55(4)
[22] Section 56

- takes effect when the applicant for the prescribed decision or process and the original decision-maker are given notice of the QRA's decision.

The removal of appeal rights for conditions about infrastructure contributions is questionable, because the conditions are imposed at the request of the local government, and do not affect the QRA's ability to undertake reconstruction. This change to the law leaves applicants without recourse for conditions that are unlawful.

If the original decision-maker makes another prescribed decision for the declared project or development in the reconstruction area to which a step-in notice already relates, the other prescribed decision must not be inconsistent with the QRA's decision.[23]

Development schemes

In addition to these notice-based powers, the QRA is also able to undertake planning functions by making a development scheme for a declared project or reconstruction area[24] which would displace the local government planning scheme to the extent of any inconsistency.[25] This seems based on the process for making development schemes for urban development areas under the *Urban Land Development Authority Act 2007.*

In making the development scheme, the QRA must consider, but is not bound by, a requirement under a planning instrument or plan, policy or code made under the SPA or another act relevant to the project or area.[26]

This clarifies the relationship with the SPA and contemplates that the QRA will negotiate a whole-of-government position on planning issues for a declared project or reconstruction area. Further, the QRA Act sets out that the effect of the finalised development scheme on other instruments is such that if there is a conflict, the development scheme prevails to the extent of any inconsistency. The development scheme becomes the pre-eminent instrument that prevails over a planning instrument and any plan, policy or code made under the SPA or another Act.[27] Such development schemes suspend and affect the operation of these planning instruments, but do not amend them.[28]

It is important to note that such a development scheme may provide that assessable development prescribed under the SPA is not assessable development for a declared project or reconstruction area.[29] The explanatory notes suggest this enables a development scheme to effectively 'turn off' assessment triggers under the SPA (schedule 3) where appropriate to facilitate reconstruction objectives.

Further, a development scheme may also provide that an entity that would ordinarily be a referral agency for a development application, under the SPA, is not a referral agency for a development application for a declared project or reconstruction area.[30] This enables a development scheme to effectively 'turn off' referral triggers under the SPA (schedule 7) where appropriate to facilitate reconstruction objectives.

Before preparing a proposed development scheme in a reconstruction area, the QRA must consult with the relevant local government and make reasonable endeavours to consult with a government entity, government-owned corporation or another person or entity likely to be affected by a development scheme.[31] A period of at least 30 business days will apply, during which time the QRA must publish its proposed development scheme on its website and by way of advertisement in local papers to invite public submissions.[32]

---

[23] Section 56(3)
[24] Section 62
[25] Section 78
[26] Section 63(4)
[27] Section 78(1)
[28] Section 78(2)
[29] Section 64(1) & (2)
[30] Section 64(3) & (4)
[31] Section 65
[32] Section 66-73

Interestingly, sections 71 and 72 include a process by which a submitter who is an 'affected owner'[33] may, within a prescribed period after receiving notice of a finalised development scheme, "ask the Minister to amend the submitted scheme to protect the owner's interests".

The development scheme takes effect once it is approved under a regulation.[34]

To summarise, development applications and requests for compliance assessment for declared projects and reconstruction areas continue to be assessed and decided using IDAS under the SPA.[35] Local governments retain primary responsibility for assessing and deciding such development applications and requests. The local planning schemes and other planning instruments already in place will remain in place, with the QRA's development scheme becoming relevant to assessing and deciding development applications and requests for declared projects and reconstruction areas. It will prevail over other planning instruments to the extent of any inconsistency.[36]

It is relevant to note that section 82 enables an assessment manager's decision to be inconsistent with a State planning regulatory provision under the SPA if the conflict is necessary to ensure that the decision complies with the development scheme. This section recognises that there may be situations where a development scheme is inconsistent with a local or State planning regulatory provision, and reiterates the intention that the QRA development scheme will be the pre-eminent planning instrument.

If an application is inconsistent with the land use plan for the development scheme, it must be refused.[37] However, there is one exception to this restriction - namely when a preliminary approval under the SPA is in force for the land, and the development would be consistent with the preliminary approval. In this circumstance, an approval could be given even though it would be inconsistent with the land use plan. The QRA Act, however, clarifies that an assessment manager is not necessarily required to give an approval in this situation.[38]

Development applications made before a development scheme takes effect continue to be assessed against the planning instruments, codes, laws and policies in effect when the application was properly made, but section 81 enables the development scheme to be given weight if it came into effect before the decision stage started or was re-started.

These plan making powers are similar to those given to the ULDA. The ULDA was set up to fast track residential development in response to Queensland's housing affordability crisis. In the disaster recovery context it appears to have been assumed that existing planning instruments are inappropriate to deal with re-construction in combination with future flood mitigation strategies. The QRA Act has no effect on land title, other than through the use of compulsory acquisition powers, and existing use rights are not affected. It appears likely then that the planning powers are more likely to be used to regulate development of greenfield sites in declared areas with a view to imposing different flood mitigation measures than those which presently existing under local and state planning instruments.

Existing uses

Existing lawful uses of premises, lawfully constructed buildings and existing development approvals and compliance permits cannot be affected by a new development scheme, or an amendment of the development scheme.[39]

However, the Minister can amend existing development approvals or compliance permits if the approval or permit relates to a reconstruction area for which a development scheme is now in effect, and the Minister is satisfied that the amendment is necessary to carry out the Authority's reconstruction function.[40] While the QRA Act places importance on

[33] 'Affected owner', for a declared project or a reconstruction area, means a person who owns land in, or that adjoins the area to which the declared project relates; or the reconstruction area.
[34] Sections 74 and 75
[35] Section 79
[36] Section 82
[37] Section 83
[38] Section 83(2)
[39] Sections 89-91
[40] Section 92

protecting existing rights, it recognises that there may be circumstances where a development approval or compliance permit is inconsistent with the Authority's reconstruction functions. In these circumstances, it may be appropriate for a change to be made to the approval or permit to ensure that, for example, communities are protected from the impacts of future flood events.

It is likely that exercising this power will generate significant debate, and possibly controversy, if the 'amendment' changes the ARI beyond Q100 to a much lower level of frequency reflecting the extreme nature of some of the rainfall events, without considering other relevant factors.

Many owners of flood affected properties have already completed or are undertaking repairs. This work will often be exempt development, being minor building work. Certainly no material change of use is involved. In the case of more extensive rebuilding there is unlikely to be any intensification of the use, and therefore no material change of use. In those circumstances, unless the relevant planning scheme makes the building work assessable development against the planning scheme, the only permit required would be one for building work. Many planning schemes recognise rebuilding after a damage event as exempt development. It is possible that a development scheme under the QRA Act could change these rules.

Planning and Environment Court

The QRA may bring a proceeding in the Planning and Environment Court for a declaration about a matter that is either done, to be done, or that should have been done for this Bill; the interpretation of the Act; or the lawfulness of land use or development for a declared project or reconstruction area. The Court may make a declaration about a matter mention in this section, or any others it considers appropriate.[41]

While these rights are limited to the QRA under this section, those affected by the proposed relief would be necessary parties to any such proceedings. Further, while appeal rights have been curtailed as mentioned earlier, and recourse to the Judicial Review Act has been limited, there has been no similar restriction on recourse to the Planning and Environment Court's powers to give declaratory relief.

Direction to take action in relation to local planning instruments

Part 8 of the QRA Act gives the Minister the power to direct a local government to take an action in relation to a local planning instrument (such as a planning scheme, planning scheme policy and temporary local planning instrument). An example of such action includes an amendment to a planning scheme. We note that this is consistent with similar powers given to the Planning Minister under chapter 3, part 6 of the SPA. It is intended that such power is exercised at the request of the local government to fast-track the reconstruction. Before giving such a direction, however, the Minister must give notice of the proposed direction to the council, and give them an opportunity to make submissions about the proposed direction. This tool will allow the authority to intervene in situations where more significant interventions, such as declaring a whole development scheme, may not be warranted.

Suspension of deemed approvals

The QRA Act also includes additional disaster-related amendments to the *Building Act 1975* to allow for the relaxation of statutory requirements relating to swimming pool fencing; to the *Land Valuation Act 2010* to allow a delay in the issuing of valuation notices; and to the *Disaster Management Act 2003* to allow the suspension of deemed approvals during disaster situations.

Section 149 inserts a new 20B into the *Disaster Management Act 2003,* to apply if there is a disaster situation. The proposed amendments allow, despite the SPA, the chairperson of the State Disaster Management Group to give a written notice to the relevant local government stating that chapter 6, part 5, division 3, subdivision 4 of the SPA (the 'deemed approval' provisions) do not apply to a development application (an 'affected' application) made to the local government but not decided before the day the local government receives the notice.

[41] Section 95

The effect of giving a notice under this section is that the deemed approval provisions do not apply to an affected provision from the day the local government receives the notice to the end of the stated day. This will adversely affect the right of individuals by precluding applicants from giving notice of a deemed approval if a council has not finalised assessment of an application due to a disaster situation. The applicant is prevented from giving a deemed approval notice under the SPA until after the stated day. Any deemed approval notice given is taken to be of no effect. The explanatory notes identify that the purpose of this section is to recognise that local government and other assessment managers may be required to divert resources from its planning functions during disaster situations, and for a period after the disaster situation.

Conclusion

The QRA Act signals to Queensland that the road to recovery is underway. Essentially, this Act gives the QRA the ability to make decisions that may not be made because another level of government or authority drags their feet. The work set down for the QRA cannot be underestimated, and it will have to make some tough calls, including whether some places should be rebuilt at all.

Importantly, the QRA will not be responsible for 'hindsight' issues. This will be a job for the Holmes Inquiry. However, the QRA can advise on possible implications of the Commission's recommendations including future flood mitigation, land use and regulation of planning.

It is important that changes to planning instruments and development approvals are considered carefully, and are based upon all available evidence. 'Knee-jerk' reactions to the disaster should be avoided. The massive economic value of existing development in terms of both State and private revenue should not be set aside on the basis of a single extreme event, especially where engineered mitigation measures could possibly eliminate or significantly reduce the probability of future similar events, or the extent of likely damage. The capacity for such engineered solutions (such as levee banks or new dams) has to be balanced against the economic and social effects of down zoning and compulsorily acquiring land that was affected by the recent floods. There will also be questions of fairness and equity if some affected land is dealt with in these ways, while other such land is left alone.

If the QRA exercises its powers to this effect before the Holmes Inquiry delivers its findings, and those findings have a bearing on the considerations that lead to these powers being exercised, then those decisions should be the subject of review and reconsideration.

For more information about the QRA Act and its impact on development in Queensland, please contact HopgoodGanim's Planning and Development team.