The New EIS Provisions

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A new EIS process has been included in Part 7A of the *Integrated Planning and Other Legislation Amendment Act 2001* (IPOLAA). This paper first outlines the context before describing the new process itself and highlighting some anomalies.

1. Context

1.1 Existing environmental study processes under IPA

Queensland previously had an EIS process, which was required to take place before lodging a planning application, if the project was a "designated development" or was in a "prescribed area", under the repealed *Local Government (Planning and Environment) Act 1990.*[1]
This philosophy changed with the *Integrated Planning Act 1997.* Essentially, IPA replaced the traditional case-by-case EIS approach by providing opportunities for environmental studies and assessment, as a component of overall information requirements, at three points in the planning process:

- At the stage of preparing a planning scheme (on the basis that, once satisfied that all relevant environmental issues for a local area have been studied, assessed and addressed in the planning scheme, then any developments which fulfil these requirements may be categorised as self-assessable or code-assessable);
- In the supporting information for a development application; and
- In information requests from government agencies following lodgement of the application. (The system recognises that developments located in environmentally sensitive areas and also certain types of high-impact developments tend to involve more complex information requirements, and addresses this through a referral coordination process facilitated by the Department of Local Government and Planning.)

1.2 "Significant Projects"

The Queensland system also includes recognition of the special needs of the top-end of industrial and infrastructure projects, which are not usually capable of being planned for (or, in many cases, even contemplated) at the planning scheme stage. These projects are declared as "significant projects" and there is an EIS process led by the Coordinator-General under the *State Development and Public Works Organisation Act 1971.*[2]

1.3 Compatibility Difficulties with the Commonwealth System

This system is not readily compatible with the less sophisticated, case-by-case traditional approach of the Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999.* The Commonwealth legislation essentially creates a list of "matters of national environmental significance" and projects can be determined to be "controlled actions" requiring a form of environmental assessment and approval if they would or are likely to have a "significant impact" on these matters. The Commonwealth legislation does not contemplate a system in which planning schemes, codes or State Planning Policies (and the studies carried out for the purposes of those planning documents) would address up-front the relevant issues for a sensitive area, but instead requires referral of each individual "controlled action" for separate assessment. The terminology and timing for the Commonwealth process also does not fit readily into the current Queensland IDAS approach, which takes a more holistic approach to "information" than merely focussing on

the environmental component of this information. Queensland's repealed *Local Government (Planning and Environment) Act 1990* would have been a better "fit".

This is why the Queensland Government understandably has perceived that it has little option but to create a special add-on to IDAS for those developers of "controlled actions" who may prefer not to engage in a separate environmental assessment process with the Commonwealth, to the extent permitted by the Commonwealth legislation.

1.4 Bilateral Agreement

The Commonwealth and the State of Queensland are currently negotiating a bilateral agreement which is proposed to adopt the EIS processes administered by three State agencies in Queensland:

- "Significant projects", led by the Coordinator-General (State Development) under the State Development and Public Works Organisation Act 1971;
- The EIS process for mining projects, administered by the EPA under the *Environmental Protection Act 1994*[3]; and
- The new Part 7A process in IPA.

The Agreement must state which type of Commonwealth process the State process corresponds to[4], and all three of the above processes are proposed to correspond to the EIS assessment process in the EPBC Act.

1.5 Anomalies in the Commonwealth System

Most of the practical difficulties with trying to retro-fit an EIS process to the IDAS system are ultimately attributable to anomalies in the EPBC Act itself, rather than to State legislation. It is beyond the scope of this paper to address all of those issues.
However, a typical example is the provision about notices in 130(1B). Essentially, although the Commonwealth Environment Minister can start his decision-making period as soon as he has received the relevant assessment report, this is varied when the relevant action is for a purpose of interstate or under an international agreement or for international trade or commerce (which is relevant to the vast majority of controlled actions which are triggered for their impacts on matters covered by international agreements). In those circumstances, the decision-making period cannot begin until the State has given a notice to the Commonwealth which says, in effect, that everything else other than the controlling provisions has been addressed "to the greatest extent practicable". These are some interesting issues to consider:

- How can the State give this notice for IPA assessments when it is normally local governments in Queensland which are the assessment managers?
- What does "the greatest extent practicable" mean? After an approval? After an appeal? What about declaration proceedings? If different aspects of a project require different approvals, and the proponent has only applied for some of those approvals so far, how does the State know what all the matters are?
- And why should it be any of the Commonwealth's business whether or not impacts on matters other than those protected by controlling provisions have been assessed, anyway (for example, economic impacts)? (Note that s48A which relates to bilateral agreements suggests that the notice relates to 'environmental impacts', but this is not specified in section 130(1B)).
- If a proponent relies on an incorrect notice having been given to the Commonwealth, and an invalid approval subsequently obtained, what might be the implications for professional negligence?

Nothing in Queensland legislation can overcome such intractable problems with the Commonwealth legislation itself.

2. When new EIS process applies

There are two situations in which the new EIS process under IPA will apply:

- under a regulation; or
- if the development constitutes a controlled action under the EPBC Act and also DLGP has agreed in writing with the applicant to apply the process.[5]

As the relevant proposed regulations are not yet publicly available, it would be impractical to comment on the first of these situations. This appears to be a provision which is merely intended to keep the Government's options open for the future expansion of the process. It is to be hoped that the situations in which the EIS process are applied would not be incrementally expanded by regulation, without prior consultation with all stakeholders.

The second situation for applying the EIS process is the one which is actually relevant for a bilateral agreement under the EPBC Act. Most stakeholders involved in the IPA Operational Review forum process supported the concept of making it optional for a developer to refer a proposal to the Commonwealth Government directly for separate assessment under the EPBC Act, or to use the EIS process under IPA. This objective is almost achieved by IPOLAA, but not quite. Instead of leaving it solely to the applicant to make an election which process to use, IPOLAA requires that both the applicant and DLGP agree to use the process. It is not apparent why DLGP should be given the discretion to refuse to apply the process under its own legislation to a controlled action.

Possible reasons may be to allow the State flexibility to refuse to apply an EIS process for developments which may not warrant the full details of an EIS process, for example, where it may be more cost effective for the Commonwealth to use its 'preliminary documentation' process and for the State then to follow a normal IDAS process, or where the State would prefer, for whatever reason, not to conduct the assessment on behalf of the Commonwealth. In any of those circumstances, it is suggested that the State would still be able to advise a proponent not to elect to use the State process, in an informal way, without the need to enter a written agreement as a prerequisite.

Note that the proposed development must already have been determined by the Commonwealth Government to constitute a "controlled action" under the EPBC Act, before the applicant and DLGP can validly agree to apply the EIS process under IPA. The new Part (correctly) does not avoid the referral step. (In practice, applicants wishing to minimise their process risks often provide substantial supporting information to the Commonwealth at the referral stage, so as to demonstrate the lack of impact by their projects on matters of national environmental significance. The supporting information for a referral can be as much as would be required on a full EIS.)

3. Outline of Process

Essentially, the process is as follows:

- The proponent applies for terms of reference;
- Terms of reference are issued, and in some cases, this may be by a process of first publishing draft terms of reference, considering comments on them and then issuing the final terms of reference;
- The proponent submits a draft EIS and once DLGP is satisfied that the draft EIS addresses the terms of reference in accordance with the guidelines, the chief executive issues a notice to that effect;
- The draft EIS is publicly advertised and any person may make a submission;
- The draft EIS is then either accepted as the final EIS, or the chief executive may request changes first;
- The chief executive must then prepare an EIS assessment report within 30 business days (ie, within about 6 weeks) of issuing the notice accepting the EIS and this report may recommend conditions of development;
- To the extent that the development is the subject of the EIS, both the EIS and the EIS assessment report are taken to be part of the supporting information, and the information and notification stages do not apply to the development applications (although the referral

part of the information and referral stage still applies), a properly made submission about the EIS is taken to be a properly made submission on any impact assessable development application (meaning that the submitter has appeal rights).

It is important to be aware that this is not the whole of the process, which will continue to be "topped and tailed" by steps at the Commonwealth level. The referral to the Commonwealth to determine whether a project constitutes a "controlled action" must still be the first step. The Commonwealth's environmental approval process (including the ability to request further information) must remain the final step under the EPBC Act.

4. Some anomalies

There are some anomalies in the new EIS process:

(a) Timing of EIS

In the section on applying for terms of reference, there is a mandatory requirement that, if an applicant proposes to make 1 or more applications for preliminary approval for the development, the EIS must be prepared for the first of the applications,[6] unless the chief executive requires the EIS to be prepared for a later stage.

The apparent intention of this provision is laudable, that is, to trigger the EIS at an early stage, rather than having to retro-design a project late in the approvals process because of a delayed EIS. However, in the absence of qualifying provisions such as those set out in Section 5.7A.14(3) for other purposes, the drafting may have some unintended consequences, for example:

- Many applications for preliminary approval are vague, and essentially in the nature of "ambit claims". At this point, it may be difficult for some developers to identify with sufficient clarity what the proposal is about, for the Commonwealth to be capable of making a determination whether or not it constitutes a "controlled action". This may only become apparent at later stages. The opportunity to use the process would then have been lost.
- In some cases, it may be that only part of an overall development could constitute a "controlled action". For example, a mixed use development may be proposed for a large area of land, the size of a suburb or town. As it expands, it may encroach upon an area of national environmental significance, and only the relevant development permits for that limited area might trigger "controlled actions". Does this mean that the preliminary approval for the whole development should have gone through an EIS process? What would constitute "the development" in this context?

(b) EIS assessment report

When the chief executive of DLGP prepares an EIS assessment report, this may recommend conditions not only for development approvals under IPA, but for "any approval required for the development"[7]. This would appear to be beyond the scope of DLGP's functions.[8] It is understandable that the report should be able to recommend conditions for a Commonwealth environmental approval, in addition to IPA approvals, given that the Commonwealth would have had an opportunity to participate in the EIS process. However, there are also still various State approval processes which have not yet been "rolled in" to IDAS, and it is difficult to see why the power should extend this far.

A project which requires a report recommending conditions for other types of approvals would probably be more conveniently undertaken by the Coordinator-General upon a declared "significant project".

The report may also address other matters prescribed by regulation. The details of this regulation are not yet available. If the scope of the report is substantially extended by regulation, it is to be hoped that stakeholders will first be consulted about the regulation.

(c) Overriding part of Information and Referral Stage only

There is an awkward provision that the information stage of a subsequent development application does not apply, but that, if there is a referral agency, the referral agency's assessment period starts upon receiving the material from the chief executive.

Obviously, starting the referral agency's assessment period without the development applications having been lodged would leave the referral agencies in an absurd situation.

Apart from this, it is not clear why IPA needs to be inconsistent with the position under the *State Development and Public Works Organisation Act 1971*, that the whole Information and Referral Stage is overridden, given that referral agencies would have had opportunities for input throughout the EIS process.

(d) Decision Stage for Application May Start Before Application Lodged

Similarly, the decision stage for a development application starts upon receiving the chief executive's material on the EIS, without regard to whether the development applications have actually been lodged.[9] Most local governments would find this a little difficult.

5. Inconsistencies in the 3 State EIS Systems

There are numerous inconsistencies between the three State EIS systems (for significant projects, mining and IDAS). Most of these inconsistencies would not appear to bear any relationship to the different nature of the projects, but are merely matters of drafting practice, minor process differences, the extent to which it was considered necessary to duplicate Commonwealth requirements rather than simply adopting them by reference, and terminology. The effect is likely to be confusing to the layperson, and to government officers at each of the levels of government.

One inconsistency of particular interest is that an EIS assessment report under IPA can only make recommendations about conditions of development[10], whereas the Coordinator-General's report for a "significant project" may state the conditions which must attach to a development approval.[11] In my experience, this would be likely to be a factor continuing to make the "significant projects" process more attractive to developers, as it would tend to focus the minds of all government agencies at the earlier stage of the EIS rather than waiting until the development applications are lodged, and would also be likely to facilitate a "whole of government" approach to conditions.

6. Development Applications Accidentally Lodged

From experience with the "significant projects" system, an issue that occasionally arises is that developers mistakenly lodge development applications before completing the EIS process, which means that the applications start progressing through the IDAS system, creating problems for referral agencies, when they ought to have waited until the end of the EIS process and then omitted the Information and Referral and Notification stages of IDAS. The simple commercial solution to this is that developers should withdraw applications mistakenly lodged and seek a refund of fees. However, those developers who are unsophisticated enough to have made the error in the first place, or who are poorly advised, may not do this. A suggested solution would be a deeming provision that the application is withdrawn or stayed until the EIS process has finished.

7. Timeliness

One of the available objectives for a bilateral agreement would be to ensure an efficient and timely process.[12] There are few timeframes for government actions in the IPA EIS process, and, in the absence of regulations or guidelines at this stage, there is a question how timeliness is proposed to be achieved. The EPBC Act, while it suggests timeframes for Government actions where the Commonwealth conducts the assessment, does not actually impose any penalties for breaches. There are also no requirements of bilateral agreements for timeframes on State Government actions. Timeframes only apply to minimum public comment periods.
The QELA submission on IPOLAA raised the question of timeframes.

However, there are also reasonable arguments available against over-rating the significance of this issue, and my understanding is that the omission was deliberate (consistently with the process for "significant projects").

For example, while there are statutory timeframes for the environmental approvals process under the EPBC Act itself, this has not prevented delays in the assessment of certain projects, essentially because of the ability to request further information at different stages of the assessment. In particular, the power to request further information at the end of the process, just before approval, could lead to lengthy delays for issues such as migratory birds, which potentially only visit a site once per year.

As another example of an exercise in futility in imposing statutory timeframes, the experience of lawyers practising regularly in the field of commercial due diligence is that the existence of statutory timeframes for matters such as planning and development certificates bears almost no relationship to the timeframes for local governments to provide full certificates, in practice.

For any development which is not entirely straightforward (and, indeed, any project requiring an EIS for a "controlled action" should fall into this category), the commercial reality is that timeframes for assessment of any significant environmental issues will tend to correlate to qualitative factors such as the political and economic significance of the project, the technical thoroughness of the documentation, the relative status and functions of the lead agency for the project, and the level and sensitivity of consultation undertaken. These timeframes are unlikely to have any relationship to arbitrary statutory timeframes.

Footnotes

1 Section 8.2 and Schedules 1 and 2 of the Local Government (Planning and Environment) Regulations 1991 (repealed).

2 It is recognised that this description bears little relationship to the list of criteria for considering whether to declare a significant project in Section 27. As a matter of experience, there is a "rule of thumb" that a project should be worth over $50 million, it would generally not be residential, and it is most likely to be an industrial or infrastructure project.

3 A process not discussed in this paper. Refer to the author's previous paper: *"Why the New Environmental Legislative Principles Don't Work for the Mining and Extractive Industries"* (QELA annual conference, May 2001, updated and reprinted in QEPR Vol 7 No 32 p99 and NELR 2001 Vol 4).

4 Section 3.02 EPBC Regulation.

5 Section 5.7A.1 IPA (not yet commenced).

6 Section 5.7A.3(3).

7 Section 5.7A.12.

8 This difficulty appears to have arisen from Sch1 Section 6.03(f) of the EPBC Regulation, which requires a statement of State or Territory approval requirements and conditions that apply, or are proposed to apply, to the action when the report is prepared...Perhaps this could still be addressed if the DLGP report lists likely necessary approvals (including under other legislation) together with relevant conditions for IPA approvals (but not for approvals beyond its jurisdiction), and still comply with Sch 1 Section 6.03(f). Perhaps proposed conditions for other approvals could also be included by way of advice or background information, without attempting to interfere with other agencies' future discretion.

9 Section 5.7A.14(2)(e).

10 Section 5.7A.12 (d)

11 *Section 39 State Development and Public Works Organisation Act 1971.*

12 Section 45(2)(a)(iii) EPBC Act. Bilaterals are intended to provide **for one or more** of the following... ensuring an efficient, timely and effective process..." It could be argued that merely by combining the two assessment processes into one is a major efficiency, timeliness (given the1301B provisions) and effectiveness gain in itself.