How to deal with difficult referrals under the Sustainable Planning Act 2009

With a focus on water and transport referrals

Leanne Bowie

Planning Institute of Australia seminar ('How to' series) – 5 March 2013
Brisbane

Contact details and author's background:
Leanne Bowie is the Principal of Leanne Bowie Lawyers, a boutique firm specialising in planning, environment and resumption law. Before establishing this firm in August 2010, Leanne was head of the Brisbane Environment & Project Approvals practice at Minter Ellison Lawyers for the previous decade and she primarily acted for State Government during that period. Leanne is currently Chair of the Planning and Environment Committee of the Queensland Law Society, which has been advocating for a more simple and legible information and referrals system for many years.
She also has a particular interest in resources industries and infrastructure and has been actively involved in the Queensland Resources Council's Environment Committee for well over a decade.

Leanne Bowie Lawyers ABN 93 373 393 260
Level 8, Anglo American Metallurgical Coal Building, 201 Charlotte Street, Brisbane
Direct telephone: 07 3232 0932
Fax: 07 3232 0900 leanne.bowie@bowielaw.com.au

1. Introduction

The most difficult aspect of the Queensland referrals system at the moment is the pace of change. For water and transport jurisdictions, a major recent planning reform has been the removal of State resource evidence provisions, but consequential changes to that reform have yet to catch up. Simplification of transport referrals is anticipated this month. Meanwhile, there is a water legislation review underway. In mid-2013, the whole system of referrals is proposed to be changed with a 'single State referral agency'. The intent of all these planning reforms is to try to simplify the system for the long term, but the short term feels like 'shifting sands' for anyone trying to lodge a development application in the meantime.

The second most difficult aspect of the referrals system at the moment is that the regulatory framework is still a maze, with numerous built-in traps and pitfalls. Transport has often been cited as the most complex set of referral triggers, but if so, water would be a close runner-up.

This paper examines some consequences for the information and referral system of the omission of State resource requirements, picks out a few examples of the complexities of the current maze of water referral triggers and jurisdictions (without attempting to address all of these complexities, which would require a book) and outlines some tips to deal with the traps of the information and referral process generally.

2. Consequences of the omission of State resource requirements

Two years ago, I presented a paper for the Planning Institute of Australia in which I criticised the complexity of State resource requirements and suggested that it would be an improvement if the system reverted to 'owner's consent' for Crown land.[1] Often, when applicants have criticised the referral system in Queensland in the past, on closer questioning, the most difficult part of the process was actually the State resource process, rather than information and referral. Water and transport were two of the jurisdictions in which there tended to be a great deal of duplication (or at least overlap) between the matters considered at the State resource stage and the matters that were again required to be considered upon referral.

On 22 November 2012, the provision that used to require State resource evidence (Section 264) was omitted from the *Sustainable Planning Act 2009* (Qld) (**SPA**) under the *Sustainable Planning and Other Legislation Amendment Act (No. 2)* 2012. If a development relies on a State resource, it is still obviously necessary to obtain a licence or some other type of allocation for that State resource under separate legislation, but the omission of Section 264 means that this process can now be undertaken concurrently or subsequently to seeking the development approval, at the risk and discretion of the applicant.

The relevant legal principle that was in existence before State resource requirements came into being and which now snaps back into place is known as the 'Walker v Noosa principle' after the leading case, *Walker v Noosa Shire Council*.[2] The Council had refused an application for permission

[1] *How to make a properly made development application under the Sustainable Planning Act 2009* - Owners' consents and State resource evidence, Planning Institute of Australia seminar – 8 February 2011 (Updated for North Queensland region seminar, 18 March 2011), p4.

[2] [1983] 2 Qd R 86, 90 (Full Court of the Supreme Court of Queensland – Campbell, McPherson and Thomas JJ).

under by-law relating to sand dune problem areas, and as a ground for refusal raised that a separate permission had not been obtained to erect motor access ramps on the road reserve. The Supreme Court held, relevantly:

> "*With increasing government controls it is commonplace for an applicant to require multiple consents from different authorities or from the same authority in different capacities. With the exceptions I have already mentioned (illegality or obvious futility) it may be said that in general it is desirable that such applications be considered on their merits one at a time and without undue speculation on the fate of other necessary applications".*

This case was followed in relation to water licensing by Her Honour Judge Kingham in *Ebborn v Esk Shire Council & Ors.*[3]

There are a few traps to try to avoid with the 'multiple approvals' approach:

- There has always been a proviso in the Walker v Noosa principle about exceptions for 'illegality or obvious futility';
- Front-loading the State resource request at the beginning of the development application used to mean that most questions were addressed before the information and referral stage of the application. Deferring the State resource issue until after the development approval will still create duplication of information requirements but just in a different order, which is sometimes a less logical order. Avoiding duplication only works if both applications are before the State agency at approximately the same time.
- Also, if the State resource issue is deferred until after development approval (instead of being processed simultaneously), the applicant risks having wasted its own costs and various government agencies' time if the State resource licence or allocation is ultimately either refused or approved on conditions that are not feasible for the development.

Note that, at the date of this paper, the *Sustainable Planning Regulation 2009* (Qld) (**SP Regulation**) Schedule 14, the IDAS forms and checklists have not yet been updated to reflect that Section 264 has been omitted from SPA, creating another series of pitfalls.[4]

3. Referral triggers introduction

3.1 Transport

Although this paper has particular reference to both transport and water referrals, the timing of the seminar happens to have coincided with major reforms to the transport triggers, which are expected to occur during March 2013, so it would be pointless to examine the current transport referral triggers at this moment. Suffice to say that they have always been very complex and that simplification of these triggers has been long overdue. The detail remains to be seen.

---

[3] [2008] QPELR 24.

[4] Advice on how to deal with this transitional problem is available on the Queensland Law Society homepage at http://www.qls.com.au/About_QLS/News_media/News/Headlines/Update_on_transitional_issue_in_lodging_development_applications

3.2 Water

Leaving aside building work referrals and quarrying, the four main water referral triggers under the current system are:

- **Taking or interfering with water** under the *Water Act 2000*;
- Declared operations involving interfering with overland flow water in a **drainage and embankment area**;
- **Referable dams**; and
- Taking or interfering with water relating to the *Wild Rivers Act 2005* (Qld).

The issues for each one of these triggers are so complex that this paper just selects one of those triggers and discusses some aspects of that trigger, by way of illustration of the point that the water referral triggers are seriously in need of clarification and simplification.

4. Exploring the maze – taking or interfering with water

There is quite a maze of subordinate legislation relating to this referral trigger, beginning with Schedule 7 of the SP Regulation, which lists 'Operational work for taking or interfering with water under the *Water Act 2000*'[5], made assessable under schedule 3, with a couple of exceptions that are addressed separately.[6] Turning back to Schedule 3, in summary this covers the following types of water:

(i) Water from a watercourse, lake or spring, or from a dam constructed on a watercourse or lake;
(ii) Artesian water;
(iii) Subartesian water;
(iv) Overland flow.[7]

However, for each of these types of water, it is then necessary to continue through the maze to check for exceptions and declarations in some other statute or statutory instrument.

4.1 What is a 'watercourse'?

For example, to find the scope of the term 'watercourse', it is necessary to turn to the *Water Act 2000 (Qld)*.[8]

Following a series of cases that discussed what constitutes a 'watercourse' for the purposes of State resource evidence and referrals,[9] there were major amendments to the definition of a 'watercourse'

[5] Schedule 7 Table 2 item 9 *Sustainable Planning Regulation 2009* (Qld) (SP Regulation)
[6] The exceptions are (d) which is the drainage and embankment areas item, covered separately in Sch 7 item 10; and (e) which is the wild river floodplain item, also covered separately in in Sch 7 item 10.
[7] Schedule 3 Table 4 item 3.

[8] There is a special extra definition of 'watercourse' in Schedule 26 of the *Sustainable Planning Regulation 2009,* but only in relation to Schedule 24, which is about clearing of native vegetation that is not assessable.

[9] *Vidler v Fraser Coast Regional Council [2011] QPELR 457* (Robin QC DCJ); *Karreman Quarries Pty Ltd v Chief Executive Under the Water Act* [2008] QPELR 338 (Dodds DCJ) and *Cornerstone Properties Ltd v Caloundra City Council & Anor* [2005] QPELR 96 (Rackemann DCJ)

and its various constituent parts in 2010 and 2012, with the consequences that the old cases on this term now need to be treated with caution and the historic mapping of watercourses on various State government maps is no longer necessarily determinative of whether or not there is a 'watercourse' in the mapped location. (This is particularly confusing when referring to Queensland Herbarium maps for remnant vegetation and regrowth vegetation which rely on the historic mapping of watercourses.)

> **'Meaning of *watercourse***
> (1) A ***watercourse*** is a river, creek or other stream, including a stream in the form of an anabranch or a tributary, in which water flows permanently or intermittently, regardless of the frequency of flow events—
> (a) in a natural channel, whether artificially modified or not; or
> (b) in an artificial channel that has changed the course of the stream.
> (2) A ***watercourse*** includes any of the following located in it—
> (a) in-stream islands;
> (b) benches;
> (c) bars.
> (3) However, a ***watercourse*** does not include a drainage feature.
> (4) Further—
> (a) unless there is a contrary intention, a reference to a watercourse in this Act, other than in this part or in the definitions in schedule 4 to the extent they support the operation of this part, is a reference to anywhere that is—
> (i) upstream of the downstream limit of the watercourse; and
> (ii) if there is an upstream limit of the watercourse—downstream of the upstream limit; and
> (iii) between the outer bank on one side of the watercourse and the outer bank on the other side of the watercourse; and
> (b) a reference in this Act to, or to a circumstance that involves, land adjoining a watercourse, is a reference to, or to a circumstance that involves, land effectively adjoining a watercourse.
> *Note for paragraph (b)*— Generally, the non-tidal boundary (watercourse) of land bounded by a watercourse, as provided for under the *Survey and Mapping Infrastructure Act 2003*, would not correspond precisely with the line of the outer bank of a watercourse under this Act.
> (5) In subsection (4)(b)— ***adjoining*** includes being bounded by, being adjacent to, or abutting.'

(a) Bed and banks

Cases that previously discussed the limits of the bed and banks of a watercourse were *Karreman Quarries Pty Ltd v Chief Executive Under the Water Act* [2008] QPELR 338 (Dodds DCJ) and *Cornerstone Properties Ltd v Caloundra City Council & Anor* [2005] QPELR 96 (Rackemann DCJ). one of the legislative amendments to the Water Act on 26 March 2010 was to clarify the lateral extents of a watercourse, not termed 'outerbanks'.

A helpful diagram was included in the Explanatory Notes for the March 2010 amendments which explained these limits.

Section 5A of the Act now defines 'outer bank' as follows:

> *'(1) The outer bank, at any location on one side of a watercourse, is—*
> *(a) if there is a floodplain on that side of the watercourse—the edge of the floodplain that is on the same side of the floodplain as the watercourse; or*
> *(b) if there is not a floodplain on that side of the watercourse—the place on the bank of the watercourse marked by—*
> *(i) a scour mark;*

(ii) or a depositional feature; or

(iii) if there are 2 or more scour marks, 2 or more depositional features or 1 or more scour marks and 1 or more depositional features—whichever scour mark or depositional feature is highest.

(2) However, subsection (3) applies if, at a particular location in the watercourse—

(a) there is a floodplain on one side of the watercourse; and

(b) the other side of the watercourse is confined by a valley margin.

Examples of valley margin— hill, cliff, terrace.

(3) Despite subsection (1)(b), the outer bank on the valley margin side of the watercourse is the line on the valley margin that is at the same level as the outer bank on the other side of the watercourse.

(4) Despite subsections (1) to (3), if under this part the chief executive has declared an outer bank on a side of a watercourse for any length of the watercourse, the outer bank on that side of the watercourse for that length is the outer bank as declared by the chief executive.'

'Floodplain' is then defined in Schedule 4 of the Act to mean:

'an area of reasonably flat land adjacent to a watercourse that—

(a) is covered from time to time by floodwater overflowing from the watercourse; and

(b) does not, other than in an upper valley reach, confine floodwater to generally follow the path of the watercourse; and

(c) has finer sediment deposits than the sediment deposits of any bench, bar or in- stream island in the watercourse.

(b) Upstream Limits and the exemption for drainage features

The new definition of 'watercourse' relevantly:

- Only relates to '*anywhere that is…upstream of the downstream limit of the watercourse'*.[10]
- Specifically excludes '*a drainage feature'*.[11]

For some watercourses, their upstream limits are defined by the *Water Regulation 2002 (Qld)*[12], but this has not been done for most watercourses. In the absence of a regulatory definition for a particular watercourse, the Act is vague about upstream limits. However, there is a guideline: *Declared areas and watercourse limits*,[13] that defines the upstream limit (in the absence of regulation) as '*the point where the stream becomes so small that it does not have sustained base flows after rainfall events – usually evident by the lack of riverine vegetation species or aquatic-dependant habitat such as pools and riffles'*.

The point where a stream becomes this small can be a matter of widely differing professional opinions.

Sometimes, if it is difficult to determine upstream limits of a watercourse, it is useful to be able to refer to the exemption for a 'drainage feature'. The term 'drainage feature' is not based on mapping, but rather, this is a new definition in the *Water Act* that relies on an assessment of the factual situation on the ground, as follows:

---

[10] Section 5(4).
[11] Section 5(3).
[12] Schedule 8.
[13] Available at http://www.derm.qld.gov.au/water/declaredareas/index.html

> ***'drainage feature** means a natural landscape feature, including a gully, drain, drainage depression or other erosion feature that—*
> *(a) is formed by the concentration of, or operates to confine or concentrate, overland flow water during and immediately after rainfall events; and*
> *(b) flows for only a short duration after a rainfall event, regardless of the frequency of flow events; and*
> *(c) commonly, does not have enough continuing flow to create a riverine environment.*
> *Example for paragraph (c)—*
> *There is commonly an absence of water favouring riparian vegetation.'*

Only 'natural' drainage features are entitled to the exemption, which seems counter-intuitive. In many cases, the only way to check the 'natural' original condition of gullies would be through a review of historical aerial photographs and even then it is not always straightforward to work out what is natural and what is artificial on a brownfields site.

There are also exemptions from the referral requirement for taking or interfering with water in a watercourse, lake or spring, and again it is necessary to turn to the *Water Act 2000* to find these exemptions, which are in Section 20:

> *'(2) A person may take water in an emergency situation, for—*
> *(a) a public purpose; or*
> *(b) fighting a fire destroying, or threatening to destroy, a dwelling house.*
> *(3) An owner of land adjoining a watercourse, lake or spring may take water from the watercourse, lake or spring—*
> *(a) for stock purposes; or*
> *(b) for domestic purposes.*[14]
> *(5) A person may take water from a watercourse, lake or spring—*
> *(a) for camping purposes; or*
> *(b) for watering travelling stock.'*

4.2 What is 'taking or interfering' in the context of water?

Again, the terms 'taking or interfering' are not defined in the SP Regulation. In the *Water Act 2000,* the Dictionary Schedule provides that '***taking***, for water, includes diverting water,' but otherwise the terms 'taking' or 'interfering' are undefined in that Act.

[14] This item (taking or interfering with water for stock or domestic purposes) is self-assessable (not completely exempt) under Sch 3 Part 2 item 1 *Sustainable Planning Regulation 2009*.

(a) Trivial or minor taking or interfering

The exemptions in Section 20 of the *Water Act 2000* include examples of the types of water use which most people would regard as trivial, such as water for camping and for watering travelling stock. There is a legal principle expressed in Latin as *de minimis non curat lex* ("The law does not concern itself with trifles"), normally abbreviated to '*de minimis*'.[15]

The difficulty with water referrals exemptions is that, when a statute has specifically singled out a few examples of trivial matters for exemptions and has said nothing about other obvious everyday examples of trivial matters, this begs the question whether the statutory list of exemptions is exclusive. This is because of another maxim used in statutory interpretation, '*Expressio unius est exclusion alterius*', ie, an express reference to one matter indicates that other matters are excluded. All of the exemptions in Section 20 of the *Water Act 2000* that are referenced in the *Sustainable Planning Regulation 2009* Sch 3 are also only examples of trivial taking of water, not interference with water. Normally, interferences are even more trivial than taking.

The '*expressio unius'* maxim is sometimes applied more stringently than at other times, depending on context. In particular, when the statute that contains the confusing words has been drafted for a different purpose than another statute that has adopted the section references or terminology from the first statute, the courts tend to be more flexible in coming to the view that the maxim was not intended to apply. [16] However, it is a pity that the poor drafting of the referral provisions puts this question into doubt, when all that would have been necessary to avoid the situation would have been to include a general exemption for trivial taking or interferences followed by a few examples.

In practical terms, the approach I normally recommend for a truly trivial situation is a simple exchange of correspondence with the concurrence agency, confirming that both parties have taken the view that the matter was too trivial to trigger the referral, with reasons and attach it to the application.

The situation can be more difficult where the type of interference is not clearly trivial but the concurrence agency takes the view that the matter is so minor that it does not want to be bothered with the referral. Sometimes, concurrence agency officers, trying to be helpful, have expressed the view that if there is no 'taking', but only an 'interference', then it must be automatically trivial, but that is not what the Regulation actually says (except in relation to overland flow under a water resource plan item (f)). Unfortunately, the '*de minimis'* maxim only applies to truly trivial matters, not just any reasonably minor matter.

The leading case on the question of what constitutes 'interfering' in the context of a water referral is *Cornerstone Properties Ltd v Caloundra City Council & Anor.*[17] These were proceedings for declaratory relief relating to works for a supermarket. Part of the proposed development intruded into a watercourse. The relevant issue was whether the application involved work that allowed taking, or interfering with, water under s 206 of the *Water Act 2000* and consequently needed to be referred to the then Department of Natural Resources.

---

[15] This maxim most often arises in criminal cases, but also applies to the interpretation of statutes generally, eg: Farnell Electronic Components Pty Ltd v Collector of Customs (1996) 142 ALR 322.

[16] For example: Salemi v Minister for Immigration and Ethnic Affairs (No 2) (1977) 14 ALR 1.

[17] [2005] QPELR 96 (Rackemann DCJ).

His Honour Judge Rackemann held, relevantly, in relation to what constitutes an 'interference':

> *I accept that something might affect without interfering. It seems to me however that, in context, the concept of "interfering" should not be limited to a circumstance where an obstruction or hindrance is demonstrated to have a significant overall adverse impact. Whether any interference results in an impact which is significantly adverse is obviously something which would, examined in determining whether or not written consent would be granted or formulating the referral response as the case may be.* [18]

His Honour continued: '*Further, while I appreciate that the degree of interference in this case is minor, I was not directed to any provision which relieves against the requirements of the provisions in the case of "minor interferences.'*[19]

There was a similar decision in a subsequent case that related to a question of interference with a road (in the context of State resource consent): *Barro Group Pty Ltd Redland Shire Council & Ors.*[20] Although this paper is not intended to examine either the history of the former State resource consent provisions or road triggers generally, interestingly the argument about the road interference in the *Barro* case was primarily based on an analogy with the *Water Act 2000*. A quarry development application involved a proposal to place plant and equipment on a road that bisected the quarry land, as well as construction of an access road crossing the bisecting road. Barro tried to argue that State resource consent for interference with the road was not required, suggesting that the reference to interference with a road had its origins in the *Water Act* 2000, and that the concept of "interfering with water" connoted a physical impedance of flow of water for the purpose of ultimately taking it. Barro submitted that a substantial degree of interference is required. Barro further argued that "interfering" in this context should be construed as connoting some physical dealing with the goods, something in the nature of the movement of the goods or an alteration of their character.[21] His Honour Judge Seales dismissed the appeal and held (relevantly):

> *If the meanings contended for were intended, the legislature could have made that clear with little difficulty.*
> *To determine whether there is interference will necessarily involve different considerations in each case depending on the wording of the legislation under consideration, the subject matter of the alleged interference and the facts alleged as constituting the interference. Interfering with physical objects such as customs goods, or motor vehicles or other tangible items may be easier to identify than in other cases*.
> In relation to the road reserve at [17] "*we are dealing with a bundle of rights attaching to a Road reserve which rights are available for exploitation by the beneficiary of the reserve to achieve the purpose for which the land was reserved…**It seems to me that any activity which would, in any way, limit or encroach upon the right to the full exploitation of the beneficiary of the Road would constitute an interference.** The infringement of the rights attaching to the Road by any interference is not postponed to the point when the rights are sought to be exploited by the construction of a road*.

[18] at paragraph [112].
[19] at paragraph [113].
[20] [2009] QPELR 564 (Searles DCJ).
[21] referring to *Wilson v Chambers & Co Pty Ltd*[1925] 38 CLR 131 at 137, *Collidge v Russo* [1984] WAR 1 at p. 2.

There has also been a series of other cases about 'interfering' in the context of State resource consents for roads and footpaths.[22]

Returning to the topic of minor interferences with water, what the State Government should do is to specify in the Regulation the threshold point for taking and interference which is so minor that the referrals are only clogging up overflowing in-trays in government offices. A guideline cannot override the words of the Regulation, so this needs to be a regulatory amendment. In the meantime, for applicants in doubt about the cut-off between minor and trivial 'taking or interference', the only safe option is to refer it (and probably receive a response that the concurrence agency has no requirements).

4.3 Overland flow

Overland flow water is defined in the Dictionary in Schedule 4 of the *Water Act 2000*:

> *1 Overland flow water means water, including floodwater, that is urban stormwater or is other water flowing over land, otherwise than in a watercourse or lake—*
> *(a) after having fallen as rain or in any other way; or*
> *(b) after rising to the surface naturally from underground.*
> *2 Overland flow water does not include—*
> *(a) water that has naturally infiltrated the soil in normal farming operations, including infiltration that has occurred in farming activity such as clearing, replanting and broadacre ploughing; or*
> *(b) tailwater from irrigation if the tailwater recycling meets best practice requirements; or*
> *(c) water collected from roofs for rainwater tanks.*

A case that sets the context for discussing overland flow is *Daley v Redland Shire Council & Anor*.[23] This was an objector appeal and the objectors contended that the proposed development ought to be refused or modified because it would lead to their deprivation of overland flows of water which replenished their dams. His Honour Judge Robin QC held:

> *"There is no watercourse or anything similar here. It does not matter which side is right about where water has come from and gone in the past. The common law is clear. Subject to the special situation of established watercourses, and the like, a landowner is free to impound and use or dispose of as he or she sees fit water that falls or flows on to land. An adjacent owner of lower land can have no expectation of receiving such water … The common law has not been changed in any relevant way by the Water Act 2000…"*[24]

Following on from this case, the *Water Amendment and Other Legislation Amendment Act 2005* deleted the words 'interfering with' in relation to overland flow in Section 20 of the *Water Act 2000*, with the consequence that interfering with overland flow did not require an allocation, but taking of overland flow still did require an allocation,[25] which is reflected in the SP Regulation Schedule 3 Table 4 item 3(f), which only refers to 'taking overland flow' (not interfering) if this is specified either in a water resource plan for the area or in a regulation. In other words, taking overland flow is not necessarily assessable or subject to referral, but only if you take another step through the maze to

---

[22] *Stockland Property Management Pty Ltd v Cairns City Council & Ors* [2009] QCA 311 (McMurdo P, Keane JA and Wilson J); *WAW Developments Pty Ltd v Brisbane City Council & Ors* [2011] QPELR 17 (Everson DCJ); *Mahaside Pty Ltd v Sunshine Coast Regional Council* [2011] QPELR 23 (Robertson DCJ).

[23] [2005] QPELR 727 (Robin QC DCJ)

[24] At paragraph [18].

[25] There is a discussion of these changes in the Vidler case (supra).

check whether or not it is specified in a water resource plan or regulation. This is now a little more complicated, because 'interfering with' overland flow does become assessable development, also subject to referral under Schedule 7, if declared under the Water Act for a drainage and embankment area or if they are subject to wild rivers provisions, which means checking wild rivers declarations.

It is difficult to imagine how the regulation of overland flow could be made any more complicated.

5. Referral agencies

One of the topics on the PIA list to be addressed by this paper was to talk about the referral agencies, which is probably because the list was drawn up before the new 'single State referral agency' provisions had been introduced to Parliament last year in the *Sustainable Planning and Other Legislation Amendment Act (No.2) 2012*.[26] Most of the relevant changes to implement this policy are not in the legislation, but rather they are proposed to be by way of subordinate legislation and 'cultural change', which are proposed to occur in mid-2013. Consequently, at the time of this paper, it would be premature to discuss implementation of that major change, but also the old system is so close to being transformed that it seems rather pointless to discuss that in much detail either.

However, it is probably worth mentioning transitional risks for applications that are being lodged right now.

Schedule 7 of the SP Regulation tabulates Referral agencies and their jurisdictions. For the referral trigger relating to 'taking or interfering with water', the referral agency is currently listed is 'The chief executive administering the Water Act 2000 – as a concurrence agency'. In fact, under the current *Administrative Arrangements Order (No. 4) 2012*, as amended, some parts of the Water Act 2000 are currently administered by the chief executive for the Department of Energy and Water Supply and some parts are administered by the Department of Natural Resources and Mines and some parts are administered jointly. The SP Regulation was not amended at the same time to select one or the other of these as the concurrence agency, so currently both are concurrence agencies.

The same difficulty applies to numerous other concurrence agency references in the SP Regulation, such as strategic cropping land.

In my experience, acknowledgement notices do not always pick up on the fact that the administration of various legislation is currently shared by multiple State agencies. Checklists are also outdated. It is important to rely on the current *Administrative Arrangements Order* and the words of the SP Regulation, rather than relying on checklists or acknowledgement notices, so as to avoid missed referrals.

Note that, if the referral trigger is a dam rather than taking or interference with water, this triggers concurrence by the chief executive administering the Water Supply Act, which is solely the Department of Energy and Water Supply, so at lease that one is clear.

[26] Insertion of new Ch 6, pt 1, div 4, sdiv 2A Chief executive assessing particular applications as assessment manager or referral agency.

6. Information requests – tips and traps

Tips and traps for dealing with information requests are much the same for information requests from either the assessment manager or a referral agency, but there is one special trap now in relation to transport and water referrals because of the fact that there is no longer a requirement for State resource consent prior to lodging the development application. There are many information issues that used to be resolved upfront about these issues and in some cases already addressed contractually. To avoid bogging down the information and referral process of a development application with questions that more correctly relate to working through a licence, permit or agreement about the resource, or worse, to avoid a situation where the State agency cannot even ask the questions on the development application because of a concern that they would not be valid questions, in turn creating a concern about how to process the development application, a prudent applicant would be processing both steps concurrently, rather than completely deferring the negotiations about the resource allocation until later.

Other than that, issues that tend to be the same for all types of information requests include:

(a) Pre-lodgement meeting

At the risk of boring this audience with something that everyone already knows very well, a pre-lodgement meeting often goes a long way towards flushing out any questions or concerns of the agency that have not yet been fully addressed in a draft development application, with the consequence that those issues can then be covered upfront and minimise the information request process later. Conversely, sometimes the applicant may have been unnecessarily concerned about an issue on which the government agency can assist with further background information.

(b) Refusing to respond or responding in part

Applicants are entitled to refuse to respond to an information request or elect to respond in part only. From the applicant's perspective, this has always been a great strength of Queensland's IDAS system, particularly when dealing with information requests that have been based on simply misreading the development application, or which are mistaken about the law, outside the agency's jurisdiction or simply over-the-top in terms of the cost of the information compared with its trivial value in assessing the application.

However, applicants should be cautious in exercising this right. If an information request is refused or answered in part only, the applicant should state this clearly (so that the application can progress to the next stage of IDAS)[27] and explain the reasons properly so that, if there was a mistake in the request, the agency understands what the mistake was and does not use this as a reason to refuse or veto the application or impose conditions that derived from the original information request.

The leading case on this issue was *Monier PGH Holdings Limited v Pine Rivers Shire Council* [2002] QPELR 515 (Wilson SC DCJ). This was a development application for the reconfiguration of two allotments in order to separate a parcel of land, which had been mined under the *Mineral Resources Act* 1989, into a separate allotment so that it could be rehabilitated. The Council issued an information request in relation to rehabilitation and amenity issues. In response, the Appellant stated that the issues were not related to the reconfiguration application and refused to respond.

[27] Section 293 SPA.

The application was subsequently refused on the basis that the Council did not know enough about the future use of the site to permit approval or frame condition which might attach to an approval.

His Honour Judge Wilson SC held, in dismissing the appeal:

> *"… I do not think it can be said the Council can begin to contemplate, or formulate appropriate conditions to attach to a development approval unless and until it has more information about the manner in which landfill and rehabilitation will be undertake, so its decision to refuse the application, rather than approve it and make an under-informed attempt to formulate conditions, was the correct one."* [p.522]

Note: Section 319 of the *Mineral Resources Act 1989* was subsequently amended so as to expand the exemption of the mining industry from IPA. However, this does not alter the principle relating to information requests.

A similar case was *Keristar Pty Ltd v Maroochy Shire Council* [2004] QPELR 349 (Dodds DCJ). This was an appeal against the deemed refusal of an application for reconfiguration for residential development. The Council had requested further information, including a detailed report about slope stability and land slip zones, remediation measures, construction limitations and ongoing maintenance issues. Keristar refused to provide the Council with the requested information. His Honour Judge Dodds held, dismissing the appeal:

> *"In the case of land where there are a number of indications of land slip risk and resulting potential damage to person or property, I do not consider it unreasonable for a local authority to require, prior to issue of the development permit for reconfiguration for urban development, investigations sufficient to satisfy it to a reasonable level of satisfaction that a reconfiguration generally in accordance with the plan accompanying the application will result in developed lots without risk or damage to person or property from land slip. I do not regard it as a generally desirable approach to use a development permit for a plan of reconfiguration of land for urban development if it is not possible to achieve a reasonable level of satisfaction that the proposed reconfiguration will be capable of achieving fruition largely according to what is proposed."* [28]

(c) Multiple information requests

Unless an application has been changed, triggering the re-commencement of IDAS, normally there is only supposed to be one formal information request document per agency for an application, so understandably, applicants are often frustrated to find that they informally receive multiple information requests, including multiple requests for amendments to the project.

In the real world, complex projects do tend to involve an informal iterative process. This was a point made by His Honour Judge Searles in *Meiklejohn v Sunshine Coast Regional Council*.[29] His Honour held:

> *It is important to place the extensive negotiations between the parties in context. IPA s 3.5.7(4) reflects the reality that the end of the information stage of the IDAS process does not herald the end of contact between an applicant and the Council and the provision of further information. The Appellant accepted that. The commercial reality is that very few, if any, development applications are approved without an information request and subsequent*

[28] *Paragraph [54].*

[29] [2010] QPELR 558.

discussions between the applicant and the Council designed to narrow issues of disagreement.[30]

(d) Changes in response to information requests

An assessment manager or concurrence agency can include in an information request advice to the applicant about how the applicant may change the application.[31] This provision was not in the original corresponding provisions of the superseded *Integrated Planning Act 1997* (Qld). Note that this should be expressed as 'advice'.

Changes to a development application in response to this advice in an information request have important benefits in terms of avoiding re-starting IDAS, but often the difficulty is with working out whether particular changes to a development application were actually in response to the advice in the information request itself, or completely unrelated changes that the applicant just decided to throw in. Often, what seems like a small requested change can lead to numerous indirect consequences for other elements of a layout, so it can be difficult to work out where to draw the line. An example was *Coolong Pty Ltd v Gold Coast City Council [2006] QPELR 690* (Robin QC DCJ).

An obvious tip is that it is likely to save unnecessary time and costs for both the agency requesting the change and the applicant if they have a meeting before the information request is issued, so as to discuss both the requested change and its indirect consequences and then the agency is in a better position to express the wording of its request so as to cover all the changes to the plans.

7. Jurisdiction and assessment

In general, the Planning and Environment Court has tended to interpret the jurisdiction of concurrence agencies broadly. Examples include: *Wall, Director-General of the Environmental Protection Agency v Douglas Shire Council*[32]and *Reef Cove Resort Pty Ltd v Cairns City Council*[33].

For each of the water triggers outlined above, the referral agency has concurrence powers,[34] so is entitled to veto the application, veto part of the application, require the approval to be preliminary only, impose conditions or elect not to impose any requirements. [35]

Each of the powers of a concurrence agency is restricted to what is 'within the limits of the concurrence agency's jurisdiction'. Theoretically, the limits of each agency's jurisdiction should be set out in Column 3 for each trigger in Schedule 7 of the SP Regulation, but the descriptions of the agencies' jurisdictions in Schedule 7 are very brief and often confusing, which has sometimes led to overlap of jurisdictions and inconsistent requirements in the past.

For taking or interfering with water, the jurisdiction is: '*The purposes of the Water Act 2000, to the extent the purposes relate to taking, or interfering with, water under that Act*'.

Turning to the Water Act, Section 966 says that if the chief executive for the Water Act is the assessment manager or a referral agency for a development application for this (or other) triggers,

---

[30] Paragraph [26].

[31] Section 276(6) SPA.

[32] [2007] QPELR 517 (Robin QC DCJ).

[33] [2008] QPELR 77 (Dodds DCJ)

[34] Sch 7 SP Regulation.

[35] Section 287 SPA.

'the chief executive must assess the development application against the purposes of this Act to the extent the purposes relate to' the particular referral or assessment trigger. However, then if you turn back to the beginning of the Act, you find that there are in fact no 'purposes of this Act'. There is one purpose set out in Chapter 2, but it is expressed to be 'The purpose of this chapter', not the purpose of the Act. Chapter 2 does not actually deal with assessment of development applications in any way, but with water rights and licences and water resource plans.

Assuming that the purpose of Chapter 2 is meant to be interpreted as the 'purposes of the Act' referenced in both Section 966 and the SP Regulation, this is what it says:

> '*The purpose of this chapter is to advance sustainable management and efficient use of water and other resources by establishing a system for the planning, allocation and use of water.*'

Note that this purpose is about planning, allocation and use of water, as opposed to assessing development applications that involve taking or interfering with water; in particular, nothing in the stated purpose relates to interfering with water, as opposed to taking or using it.

No doubt, everyone simply assumes that the missing words are implied in the section,[36] but this is the kind of loose drafting which makes it so difficult to pin down what the limits of each agency's referral jurisdiction is supposed to be.

8. Conditions

Most of the requirements for a concurrence agency in assessing conditions are just the same as for an assessment manager and there have been many papers and articles on what those issues are.

However, a specific question that is sometimes raised about concurrence agency conditions is about resolving inconsistencies between the conditions of different agencies. In my experience, it is actually quite rare to come across a direct inconsistency between conditions and more often the situation is that one agency (say, the Council) has imposed a condition that is more stringent on the same topic as a condition imposed by a another agency and in most cases, the simple answer is that both conditions can be fulfilled by complying with the more stringent condition. In that situation, the conditions are not actually inconsistent, although the applicant often thinks they are. Consequently, there have been numerous cases alleging inconsistent conditions and the Court then reads the conditions and finds that there is no inconsistency. An example was *Bixtell Pty Ltd v Redland Shire Council* [2004] QPELR 27 (Quirk DCJ).

[36] The courts are generally reluctant to imply words that are not there into legislation, but will do so if there is a 'clear necessity', eg: *Thompson v Goold & Co [1910] AC 409 at 420*.