# Planning and Environment Court Bill 2015

# Explanatory Notes

## Short title

The short title of the Bill is the Planning and Environment Court Bill 2015.

## Policy objectives and the reasons for them

The *Sustainable Planning Act 2009* (SPA) which establishes Queensland's current planning and development assessment system has been under review over more than two years in response to broad ranging concerns and issues raised by stakeholders about the complexity, and the lack of outcomes and responsiveness of the system and the legislation.

The objective of planning reform is to deliver better planning for Queensland by:

- enabling better strategic planning and high quality development outcomes
- ensuring effective public participation and engagement in the planning framework
- creating an open, transparent and accountable planning system that delivers investment and community confidence
- creating legislation that has a practical structure and clearly expresses how land use planning and development assessment will be done in Queensland
- supporting local governments to adapt to and adopt the changes.

Analysis of SPA and stakeholder feedback indicated that fundamental elements of SPA remained sound:

- integrating State, regional and local policies in plan making;
- applying an integrated, structured development assessment system to produce well-balanced decisions; and
- ensuring there are appropriate dispute resolution opportunities including the efficient resolution of technical matters.

Significant consultation with stakeholders and analysis has culminated in a proposed new Act as the most efficient and constructive way of addressing the changes necessary to achieve

legislation with a better structure that solves problems, offers genuine community engagement and better planning and development outcomes.

The purpose of the Planning and Environment Court Bill 2015 (the Bill) is to provide a separate piece of legislation to govern the constitution, composition, jurisdiction and powers of the Planning and Environment Court, that has to date been embodied in SPA. The Bill provides the legislative foundation for new Court Rules and procedures to ensure the Court's efficient operation.

The Planning and Environment Court is presently established under provisions of the SPA (Chapter 7, part 1, division 1). These provisions are located in SPA primarily due to the historical establishment of the court in local government and planning legislation over time.

In more recent years, the Court's jurisdiction has expanded significantly, with it now having jurisdiction conferred on it by approximately 28 different acts in addition to SPA. They cover topics such as planning and development, environmental protection, coastal protection and management, heritage, fisheries, marine parks, transport infrastructure and vegetation management.

Given the wide jurisdiction of the Planning and Environment Court, it is considered appropriate for the provisions establishing the jurisdiction and powers of the court to be transferred out of the State's planning legislation, and into its own specialised, stand-alone Bill. Having a separate Bill for the Planning and Environment Court will enhance the role and visibility of the Court as a specialised court to hear planning and environment disputes.

There has been significant consultation with stakeholders about the need for reform and it has been evident that stakeholders generally consider the broader dispute resolution framework and mechanisms in Queensland, including the Planning and Environment Court, are working well.

However, it was noted that adjustments could be made to improve the overall system. For example, stakeholders continue to raise concerns about the time and cost associated with resolving disputes; and that the provisions of SPA are difficult to apply in court proceedings. The reforms under the Planning and Environment Court Bill 2015 and the Planning Bill 2015 (to the extent they relate to dispute resolution) have sought to address these concerns.

There has also been significant positive feedback on the previous improvements to the Alternative Dispute Resolution processes within the Planning and Environment Court, and the desirability of continued improvement to uphold the efficiency of the court, allow disputes to be resolved more quickly and affordably, and reduce judicial time spent in determining such matters.

The Planning and Environment Court Bill 2015 complements the Planning Bill 2015. Together, both Bills will govern the development assessment dispute resolution system in Queensland, which comprise of the following:

- the Planning and Environment Court, which hears various matters, including complex, high risk matters generally started by applicants and submitters.
- the ability to appoint a number of Alternative Dispute Resolution (ADR) Registrars who, as officers of the Planning and Environment Court, conduct mediations, without prejudice conferences, case manage conferences and have the power to hear and decide certain proceedings if directed by the court.
- the Development Tribunals (SPA's Building and Development Dispute Resolution Committees), which hear certain low risk, technical disputes generally started by applicants (established under the Planning Bill 2015).

# Achievement of policy objectives

The policy objectives of the Bill are achieved through the following key elements.

### Administration of the Planning and Environment Court

The Bill provides that the Chief Judge of the District Court has overall responsibility for the administration of the Planning and Environment Court.

### Remit to Development Tribunal

The Bill retains the existing ability for the Planning and Environment Court to remit a matter within the jurisdiction of the Development Tribunal.

It is possible for development applications and approvals to be comprised of different aspects of development (e.g. material change of use and building work) and for the applicant or appellant to be dissatisfied with different aspects of the decision. This remittal power allows a person to make a single appeal to the court covering all matters in dispute. However, the clause requires the court to remit to the Development Tribunal the matters the court is satisfied should be dealt with by a Development Tribunal.

### Philosophy of the Court - principles for exercising the Court's jurisdiction

The court's overriding philosophy is currently found in the Planning and Environment Court Rules and not the principal legislation. It is considered that the philosophy and principles for exercising the Court's jurisdiction is better embedded in the legislation.

The philosophy provides that in conducting a Planning and Environment Court proceeding and applying the rules, the Planning and Environment Court must facilitate the just and expeditious resolution of the issues and avoid undue delay, expense and technicality.

## Declaratory jurisdiction

The Bill continues the ability for any person to start a Planning and Environment Court proceeding seeking a declaration on a matter done, to be done or that should have been done for this Bill or the Planning Bill 2015; or the interpretation of this Bill or the Planning Bill 2015*;* or the lawfulness of land use or development under the Planning Bill 2015 or the construction of a land use plan under the *Airport Assets (Restructuring and Disposal) Act 2008* and the interpretation of chapter 3, part 1 of that Act; or the construction of the Brisbane port Land Use Plan under the *Transport Infrastructure Act 1994*.

## Orders and Directions Powers

The Bill contemplates that the Planning and Environment Court, in its day-to-day work, may make an order or direction about the conduct of a proceeding it considers appropriate, even though such an order or direction may be inconsistent with a provision of the Court Rules. This inbuilt flexibility enables the court to respond to each case on its merits and confirms that the interests of justice are paramount.

## Alternative Dispute Resolution and the powers of an Alternative Dispute Resolution (ADR) Registrar

The Bill continues the opportunity for parties to a proceeding before the Planning and Environment Court to participate in an alternative dispute resolution (ADR) process. ADR processes provide alternative, efficient and lower cost options for resolving disputes to the benefit of the parties to the proceeding.

The Bill also continues to provide for the Chief Judge of the District Court to issue directions, and for a Planning and Environment Court to make a direction, about proceedings in which an ADR registrar may exercise the Planning and Environment Court's powers and hear and decide a particular proceeding. This is in recognition that there are some development matters which are relatively simple, straight forward disputes which could be resolved quickly, cheaply and effectively without the burden of an expensive trial. Also, there are routine procedural matters which may not always require judicial determination.

## Discretion to deal with non-compliance

The Bill continues a provision to deal with non-compliance where the Planning and Environment Court finds there has been noncompliance with a provision of this Act or an enabling Act. In these instances, it is intended that the Planning and Environment Court may deal with the matter in the way it considers appropriate. In addition, recent case law has identified issues with the current equivalent provision in SPA, which have also been rectified by this Bill.

The inbuilt flexibility of this clause continues to enable the parties to achieve a range of outcomes, premised on the position that legal technicality should not defeat appropriate development, unless in the court's discretion there are reasons to do so.

## Each party must bear the party's own costs, except in limited circumstances

The Bill changes the costs rules for the Planning and Environment Court so that the general position is that each party pays its own costs for proceedings, except in specific circumstances. Circumstances where the court will have discretion to make an order for costs include where the court considers a party has brought a frivolous or vexatious proceeding, or where the court considers a party started or conducted a proceeding for an improper purpose. Other exceptions deal with specific situations, such as proceedings for enforcement orders.

## Retention of hearing anew ("de novo") appeals

Under the Bill appeals heard by the Planning and Environment Court started under the Planning Bill 2015, or any other enabling Act (unless that Act provides otherwise) are to be heard anew ('de novo'), meaning that the court 'stands in the shoes' of the initial decision-maker and re-decides the development application, having reviewed the merits of the application on the evidence before the Planning and Environment Court and not being limited to the material that was before the initial decision maker. This is a feature of the existing system under SPA, and is a fundamental feature of the Planning and Environment Court jurisdiction. Historically, this provision has ensured that any controversy or influence (political or other bias) placed on the development application is neutralised, by ensuring a jurisdiction of independent judges in a specialised court.

De novo appeals focus the appeal upon the true merits of the dispute, thereby removing unnecessary and distracting debates about the earlier decision-making process, politics or personality. They also enable parties to adduce fresh evidence to properly address issues.

## Uniformity of Relief

A number of reforms have been identified in relation to the Planning and Environment Court, including reforms to remedies and powers of the courts. The reforms provide for consistency in the relief available in both the Magistrates Court and the Planning and Environment Court (see the Planning Bill 2015) for enforcement orders. Uniformity has also been extended in criminalising contravention of court orders, such that the provisions in the Magistrates Court and the Planning and Environment Court are now the same in this regard (with the maximum penalty being 4500 units or 2 years imprisonment).

Another significant improvement is those changes made to better secure compliance with orders, whether made by the Magistrates Court (or the Planning and Environment Court (see the Planning Bill 2015). The amendments provide that, unless the Court orders otherwise, the defendant in criminal proceedings or the respondent in civil proceedings must give the

registrar of titles a notice in the approved form, asking the registrar to record the order on the appropriate register. The order attaches to the premises and binds the owner, the owner's successors in title and any occupier of the premises. At any time (presumably after complying with the order), the defendant or respondent (dependent on the court) can apply to the court for an order stating they have complied with the enforcement order. In such instances, the defendant or respondent can request that the registrar of titles remove the enforcement order for the premises in which the order relates.

The intent of such proposals is to provide a disincentive for noncompliance with orders by attaching temporal consequences to orders which will remain for as long as the order remains unperformed

## Registry and resources of the Court

The Planning and Environment Court will continue, as it currently does, to use the resources of the District Court throughout Queensland. This includes the registry staff and its facilities.

## Annual Report

The Bill includes a provision to require an annual report to be prepared for the Planning and Environment Court. The annual report will report on the operation and performance of the court on a yearly basis, including the number and types of proceedings lodged and the number and type of proceedings that benefit from alternative dispute resolution processes. This will ensure continued feedback between the judiciary and the executive, and will be publicly available to inform its users.

To remove any doubt, the annual report for the Planning and Environment Court and the annual report for the District Court may be the same report. This is consistent with current practice.

## Approval of forms

A clause has been included in the Bill to enable the Chief Judge and another Planning and Environment Court judge to approve forms under the Bill. This continues to provide flexibility for the Court to create and amend its administrative procedures in responding to urgent or emerging issues.

## Regulation-making power

A clause has been included to enable the Governor in Council to make regulations under the Bill. This provides flexibility to deal with matters that could be provided as part of a regulation as the need arises.

### Savings and Transitional provisions

The Bill contains several savings and transitional provisions. The Bill continues existing judgeships, existing proceedings and proceeding rights, appeals to the Court of Appeal, continuance of existing orders and directions, existing references to the court and existing rules that migrate under the Bill. The Bill also provides that two sections of the repealed SPA will continue in effect as if they formed part of the rules. This is largely due to these particular provisions being procedural, and therefore best placed outside the primary legislation.

### Other Legislation amendments

A range of other amendments have been made to improve the overall simplicity, operation and clarity of the framework, including improvements to the structure, functionality and usability of the Bill.

## Alternative ways of achieving policy objectives

The purpose of the Planning and Environment Court Bill 2015 is to establish the constitution, composition, jurisdiction and powers of the Planning and Environment Court.

The existing Planning and Environment Court (with associated ADR processes) and the Development Tribunals (SPA's Building and Development Dispute Resolution Committees) continue to be supported by stakeholders as the best development assessment dispute resolution system for the jurisdiction of Queensland. There are therefore no alternatives to continuing the establishment of the Planning and Environment Court in primary legislation, however, alternative legislative options were examined:

1. Retaining the establishment and jurisdiction of the Planning and Environment Court in the Planning Bill 2015.
2. Transitioning the establishment, powers and jurisdiction of the Planning and Environment Court into a chapter of the *District Court Act 1967.*
3. A separate, specialised Planning and Environment Court Act supported by attendant rules.

Option 1 would effectively maintain the status quo, establishing the powers and jurisdiction of the Planning and Environment Court within the Planning Bill 2015. This would be despite there being approximately 29 statutes conferring jurisdiction on the Planning and Environment Court, with the Planning Bill 2015 being only one of them. It would continue the historical establishment of the court within the local government and planning legislation. However, option 1 would not meet the overall planning reform objectives of simplifying and streamlining the system, increasing navigability or ease of use.

Option 2 was primarily based on the existing Planning and Environment Court and District Court administrative arrangements being shared, and that the Planning and Environment Court is constituted by District Court judges. However, it was quickly found that establishing the Planning and Environment Court as a chapter of the *District Court of Queensland Act 1967* would not be user-friendly, with users having to go to multiple places in the statutes to find relevant provisions. This option would also create unnecessary duplication not found in the existing arrangements.

Comment was sought from key legal stakeholders including the Queensland Law Society, Queensland Environmental Law Association and the Queensland Bar Association on the range of options available for reform. Consultation confirmed unanimous support for option 3, a separate Planning and Environment Court Bill, due to the limitations presented by options 1 and 2; including that both options would potentially lead to multiple incremental legislative amendments without comprehensive and cohesive reform benefits of streamlining the system and improving navigability or ease of use for users of the system.

This resulted in the preparation of a specialised and streamlined Planning and Environment Court Bill 2015 separate from the Planning Bill 2015.

## Estimated cost for government implementation

Although the Bill now provides for the establishment and jurisdiction of the Planning and Environment Court by a separate and specialised piece of legislation, any financial cost implications that may be incurred through the implementation of the Bill are considered negligible. This is because the framework for implementation is essentially the same as that provided under SPA, and as such will continue to be funded within current resources.

Whilst there are no precise costings of the objectives contained in the Bill, there are a number of potential savings for reasons including that:

- The Bill continues to provide for a streamlined system of court-supervised case management and a range of pre-hearing steps (including ADR processes). This will continue to encourage early resolution of appeals (currently 90-95% of appeals are resolved through ADR processes) and narrow the issues in dispute, which is likely to lessen the hearing time for those cases that do proceed to trial.
- The ADR Registrar function continues for the determining of certain matters that would otherwise be performed by Judges.
- Provisions in the Bill allow more than one ADR Registrar to be appointed, giving the Court the ability to send additional non-contentious matters to ADR processes and save valuable judge time.
- Projected savings, time and effort should continue not only for the Court, but also for the parties to those proceedings more generally by its improved processes.

Greater uptake of ADR processes and powers may mean that additional resources are required over time to manage demand. However, this is balanced against the broader cost savings to the government and the community to resolve disputes via ADR processes.

Where appropriate, the Development Tribunals, currently administered by the Queensland Government, will also retain concurrent jurisdiction with the Court for certain types of appeals. The Tribunals are typically a low cost forum, with appointed referees eligible for basic remuneration to cover the costs of the referee's time to prepare, hear and decide disputes that come before it. These costs are partially offset by the filing fees attributed to the proceeding, which may vary depending on the type and complexity of the issues in dispute.

The Planning and Environment Court will continue to utilise the District Court's judges, registry staff and other officers, as well as its facilities. The association of the Planning and Environment Court with the District Court also allows each to benefit from flexibility in matching judicial resources to its caseload. For example, if a matter is resolved in the Planning and Environment Court before it reaches trial, that judge may be reassigned to undertake work in the District Court or vice versa.

There will be initial costs to government in rolling out the new arrangements and training users of the improved planning system provided by the Planning Bill 2015, as well as those presented by this Bill, related to dispute resolution processes. However these costs are considered to be outweighed by the benefits and cost savings expected over the longer term. This will also likely include improved information about the options for dispute resolution and facilitate improved practices as well as communication tools such as fact sheets and better use of government websites to provide overall benefit to users of the system.

# Consistency with fundamental legislative principles

The Bill is consistent with fundamental legislative principles contained in section 4 of the *Legislative Standards Act 1992*, noting the following minor matters are addressed as follows:

### Preservation of confidentiality

During the course of matters before the ADR Registrar, the Register will acquire information pertaining to the parties. It is important to the parties in a proceeding that their rights and liberties are not infringed such that the information given and received during the course of an ADR process is maintained as confidential by the ADR registrar and is not expressed outside the process.

To ensure this fundamental legislative principle is not infringed, the Bill specifically provides under clause 21 that an ADR Registrar must not disclose to anyone information acquired during an ADR process, other than in compliance with the section. These circumstances are: with the agreement of the person to whom the information relates or someone else authorised by the person; or for the purposes of giving effect to this part of the Bill; or for statistical

purposes not likely to reveal the identity of a person to whom the information relates; or for an enquiry or proceeding about an offence happening during the ADR process; or for a proceeding founded on fraud alleged to be connected with, or to have happened during, the ADR process; or if the disclosure is authorised under an Act or another law.

This obligation on the ADR Registrar is further supported by the inclusion of a maximum penalty of 50 penalty units for breach of the provision.

### Privileges protection and immunity

It is a fundamental legislative principle that legislation does not confer immunity from proceeding or prosecution without adequate justification. The Bill provides that a Planning and Environment Court judge, party, lawyer or witness to a proceeding has the same privileges, protection and immunity as person would have if the proceeding were in the District Court. This is intended to simply carry forward current privileges, protections and immunities, matching the District Court arrangements.

### Regulation-making power

It is a fundamental legislative principle that a Bill must have sufficient regard to the institution of Parliament, by allowing the delegation of legislative power only in appropriate cases and to appropriate persons. While the Bill includes a regulation-making power to create offences and impose penalties, the clause includes an appropriate safeguard to the exercise of this power by limiting penalties to no more than 20 penalty units.

## Consultation

Improvements to the regulatory component of the planning framework have been a key component of planning reform, and legislative review has been underway over a number of years. In the course of review, there has been considerable engagement with stakeholders including local government, peak bodies, industry, professional and legal representatives, community and environmental groups and the public to identify key reforms around plan making, development assessment, dispute resolution and other areas of the planning system. This engagement has ranged from individual meetings, to formal consultation processes and whole sector summits.

Most recently, a Planning Summit was held on 28 July 2015, which brought together over 200 representatives from the planning community including local government elected members, planning practitioners, peak bodies, industry, development, community and environmental groups.

In May 2015, the Government released Better Planning For Queensland, its strategic course for the next steps in planning reform, with a particular focus on the legislative reform agenda. This directions paper was communicated through a contact database of over 700 people and

every local government in Queensland; a 'live streamed' event to engage as broad an audience as possible in the reform discussions; and though local government and industry workshops held in 11 locations across Queensland throughout June and July 2015. Over 1100 comments on key topics were captured through the workshops.

From feedback received at the local government and industry workshops and through public submissions, it was clear that stakeholders were broadly supportive of many of the key directions and of the continuation of the legislative reform agenda. However, there were some topics on which stakeholder responses were mixed and consensus could not be reached. This feedback informed the preparation of the consultation draft Planning Bill.

Public consultation on a consultation draft Planning Bill was open from 10 September to 23 October 2015. Some provisions in the Bill were highlighted to identify areas that the Government was seeking further input on.

The consultation program on the consultation draft Planning Bill extended to each region across the state. In local government and practitioner workshops, and development industry sessions, attendees were taken through the key elements and the highlighted areas of the Bill to encourage discussion and to answer any questions. These workshops and sessions were intended to assist attendees in preparing informed submissions on the Bill.

Meetings were hosted with community groups and 'meet the planner' sessions aimed at the broader community and which were advertised through newspapers and radios.

The Bill was available during the consultation period on the planning reform website, together with drafts of supporting instruments, explanatory videos and fact sheets.

As a result of public consultation, 322 submissions were received. Feedback was wide ranging and included general planning matters, comments on specific provisions and viewpoints supporting or objecting to elements of the Bill. A number of submissions focussed their comments on the highlighted topics in the Bill.

Each submission was analysed to identify key issues, and collate shared or alternate views on topics. This analysis was used to provide a more complete understanding of the impacts of planning reform on a range of stakeholders and to inform the Bill.

Overall, there has been broad support for the policy concepts of the Bill. It is clear that stakeholders are aware of the need to balance certainty with flexibility in the planning system. However, because of the diversity of stakeholders who use or contribute to the planning system, differing levels of support have been expressed on a range of matters, as expected. Many matters have been addressed and some compromise positions have been determined to resolve issues.

The Bill has been heavily informed and influenced by stakeholder views, particularly the feedback received about the highlighted areas in the Bill.

The development industry has generally indicated high levels of support for the reforms. Representative bodies and individuals have been involved in stakeholder forums and in the formal public consultation and have provided high levels of input. The planning community's representative body has indicated general support amongst its members for many of the reforms and the opportunities they present to the sector.

Variable views have been expressed by the local governments as anticipated. The high level of engagement with local government since the commencement of the reform program will continue to ensure transitional arrangements and key documents required under the Bill are trialled, adjusted and implemented.

The environmental and community interests sectors have raised a number of issues which have been managed through the Bill development process, including maintaining ecological sustainability; protection of the State's interests in heritage and coastal matters and providing for community engagement in, and accessibility to, planning processes.

## Consistency with legislation of other jurisdictions

The Bill is specific to the State of Queensland, and is not uniform with or complementary to legislation of the Commonwealth or another state. Its uniqueness when compared to other States and Territories is largely due to the planning and development assessment dispute resolution system in Queensland being governed by two separate bodies, being the Planning and Environment Court and the Development Tribunal. Other States and Territories rely on one or the other. The two bodies are further complemented by specific powers which may be provided to an ADR Registrar within the Planning and Environment Court.

The Planning and Environment Court in Queensland also maintains high international and national recognition, achieved particularly in relation to advancements about individual case management, alternative dispute resolution processes and its efficient management of expert evidence.

# Part 1 Preliminary

### Clause 1 Short title

*Clause 1* establishes that when enacted, the Bill will be cited as the *Planning and Environment Court Act 2015*.

### Clause 2 Commencement

*Clause 2* states that the Bill is intended to commence on a day to be fixed by proclamation.

### Clause 3 Dictionary

*Clause 3* provides that the dictionary in Schedule 1 defines particular words used in the Bill.

Where a word or term is only used in one section of the Bill, it is not defined in the dictionary, but rather in the relevant section of the Bill. Also, certain words or terms used in the Bill are defined in the *Acts Interpretation Act 1954* (Qld).

# Part 2 Establishment and jurisdiction

## Division 1 Establishment

### Clause 4 Continuation

*Clause 4* provides for the continuance of the existing Planning and Environment Court, presently established under provisions of the SPA (Chapter 7, part 1, division 1). These provisions are located in SPA primarily due to the historical establishment of the court in local government and planning legislation over time.

The Court was first established as the Local Government Court under the *City of Brisbane Town Planning Act 1964*, which was proclaimed into force on 21 December 1965. The Court's primary function, at the outset, was to hear appeals from those dissatisfied with local government decisions on applications for rezoning, land subdivision or land use. Before the Court was established, decisions were determined on appeal to the Minister for local government, or the delegate of the Minister.

Pursuant to the repealed *Local Government (Planning and Environment) Act 1990*, which commenced on 15 April 1991, the court was renamed the Planning and Environment Court. The court continued to exist under the *Integrated Planning Act 1997* and SPA.

Subclause (2) states the Planning and Environment Court is a court of record. Subclause (2) also provides the Planning and Environment Court has a seal that must be judicially noticed by all courts and persons acting judicially.

### Clause 5 Constituting the P&E Court

*Clause 5* describes the notification process and manner in which the Governor in Council appoints District Court judges as Planning and Environment Court judges (termed 'P&E Court judges' in the Bill) to constitute the Planning and Environment Court. In practice, the Chief Judge of the District Court is also appointed as a Planning and Environment Court judge.

Subclause (3) states that the appointment of a Planning and Environment Court judge may be for a specific period.

Subclause (4) states that a decision or order of a District Court judge purporting to constitute the Planning and Environment Court without being appointed, or a decision or order of a judge who's appointment as a Planning and Environment Court judge has ended, is not, and never has been, invalid merely because the decision or order was made.

Subclauses (5) and (6) provide that more than one Planning and Environment Court judge may constitute the Planning and Environment Court and sit at the same time, and in doing so, each court may exercise the jurisdiction and powers of the court.

### Clause 6 Chief Judge has overall responsibility for P&E Court

*Clause 6* provides that the Chief Judge of the District Court has responsibility for the administration of the Planning and Environment Court. SPA does not identify overall responsibility for the Planning and Environment Court.

The Chief Judge of the District Court already has responsibility for the administration of the Planning and Environment Court, so the intent of this clause is to confirm and clarify the powers of the Chief Judge in relation to the administration of the court.

## Division 2 General jurisdiction

### Clause 7 Jurisdiction

*Clause 7* establishes the jurisdiction of the Planning and Environment Court. It provides, consistent with section 49A of the *Acts Interpretation Act 1954*, that the Planning and Environment Court has the jurisdiction given to it under any Act (referred to as 'enabling Acts'). As well as this Bill, one of the key enabling Acts to confer jurisdiction on the Planning and Environment Court will be the Planning Bill 2015, which will repeal SPA.

The Planning and Environment Court currently has jurisdiction conferred on it by approximately 28 different Acts. They cover matters such as planning and development, environmental protection, coastal protection and management, heritage, fisheries, marine parks and transport infrastructure.

Subclause (2) states that a Planning and Environment Court decision is non-appealable other than under part 7 of the Bill (to the Court of Appeal), under a relevant enabling Act (if that Act permits) or to the Supreme Court on the ground of jurisdictional error. 'Non-appealable' means that the decision or order is final and conclusive and may not be challenged, appealed against, reviewed, quashed, set aside or called into question in any way.

Following the decision of the High Court in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1, it is considered necessary to include an express provision in the Bill confirming that a decision can be appealed to the Supreme Court on the ground of jurisdictional error. This provision is considered necessary given the broad privative clause ousting review under the *Judicial Review Act 1991*.

## Clause 8 District Court jurisdiction unimpaired

*Clause 8* provides that a judge serving on the Planning and Environment Court is not prevented from hearing or continuing to hear matters in the District Court.

## Clause 9 When P&E Court must remit to tribunal

*Clause 9* allows the Planning and Environment Court to remit a matter within the jurisdiction of the Development Tribunals, as established under the Planning Bill 2015, to a Development Tribunal. Subclause 2 provides that on making the order, the procedure for starting the proceeding in the Tribunal is taken to apply.

It is possible for development applications and approvals to comprise of different aspects of development (e.g. material change of use and building work) and for the applicant or appellant to be dissatisfied with different aspects of the decision. This clause allows a person to make a single appeal to the Planning and Environment Court covering all matters in dispute. However, the clause requires the Planning and Environment Court to remit to the Development Tribunal the matters the court is satisfied should be dealt with by a Tribunal.

The variety and degree of seriousness or importance of matters within the jurisdiction of the Planning and Environment Court makes it difficult to identify any particular category that will always be suitable for referral to the Tribunals. Practically, remittance may occur by the Planning and Environment Court in its discretion, generally on application to the Planning and Environment Court by the parties on a case-by-case basis.

### Clause 10 Principles for exercising jurisdiction

*Clause 10* provides that in conducting a Planning and Environment Court proceeding and applying the rules, the Planning and Environment Court must facilitate the just and expeditious resolution of the issues and avoid undue delay, expense and technicality. While the Planning and Environment Court currently undertakes an effective and efficient approach to conducting proceedings, the court's overriding philosophy is currently found in the court rules (rule 4 of the *Planning and Environment Court Rules 2010*) and not the principal legislation. It is considered that the philosophy and principles for exercising jurisdiction are better embedded in the Bill.

Subclause (2) states that the parties to a Planning and Environment Court proceeding impliedly undertake to the court and each other to proceed in an expeditious way.

## Division 3 Declaratory jurisdiction

### Clause 11 General declaratory jurisdiction

*Clause 11* describes the power of the Planning and Environment Court to hear and decide declaratory matters, and to make orders about a declaration made by the court. This clause allows for any person to initiate a proceeding for a declaration. It provides that the Planning and Environment Court has jurisdiction to hear and decide a proceeding about the following matters:

- a matter done, or to be done, or that should have been done under this Bill or the proposed Planning Act 2015;
- the interpretation of the Bill or the proposed Planning Act 2015;
- the lawfulness of land use or development under the proposed Planning Act 2015;
- the construction of a land use plan under the *Airport Assets and (Restructuring and Disposal) Act 2008*, and the interpretation of chapter 3, part 1 of that Act; and
- the construction of the Brisbane port LUP (land use plan) under the *Transport Infrastructure Act 1994*.

The intent of this clause, along with clause 12, is to retain the current declaratory jurisdiction of the Planning and Environment Court, as provided in current section 456 SPA. Pursuant to section 7 of the *Acts Interpretation Act 1954*, a reference to an Act in this clause includes a reference to the statutory instruments made under the Act. Section 7 of the *Statutory Instruments Act 1992* defines a statutory instrument to include a regulation, a rule, and a guideline of a public nature.

Therefore, the declaratory jurisdiction of the Planning and Environment Court extends to, for example, planning instruments, development assessment rules and guidelines made under the Planning Bill 2015.

However, a declaratory proceeding for a matter relating to a Minister's call in under the Planning Bill 2015 can only be started under clause 12. Declaratory proceedings cannot be started for a matter relating to the exercise of the Minister's powers to make a direction under the proposed Planning Act 2015.

Subclause (4) states that the Planning and Environment Court may also make an order about a declaration made by the court.

### Clause 12 Declaratory jurisdiction for Minister's call in of development application

*Clause 12* provides for an assessment manager, for a development application, to bring a proceeding for a declaration about a matter done, to be done, or that should have been done in relation to an application that has been called in by the planning Minister under the Planning Bill 2015. However, this clause only applies if, at the time the application was called in, the assessment manager had refused the application or not made a decision on the application.

## Part 3 Rules and orders or directions

### Clause 13 Rules

*Clause 13* provides that matters relating to court procedure will be set out in the Planning and Environment Court Rules. In Queensland, the UCPR applies to civil proceedings in the Supreme Court, District Court and Magistrates Court. The UCPR is designed to achieve a level of consistency across courts exercising civil jurisdiction. The UCPR is comprehensive, but complex and lengthy. Specific practices and procedures in relation to the Planning and Environment Court are currently governed by the *Planning and Environment Court Rules 2010*. The Planning and Environment Court rules aim to be comprehensive enough to be read as a 'stand alone' set of rules, but not so bulky as to be unwieldy or incomprehensible. Given the uniqueness and specialisation of the Planning and Environment Court, the need for recourse to the UCPR is generally limited.

The rules are subordinate legislation made by the Governor in Council under this Bill, and are made with the concurrence of the Chief Judge of the District Court and another Planning and Environment Court judge.

The clause provides that the Planning and Environment Court's procedures are governed by the rules, subject to the requirements of enabling Acts.

### Clause 14 Orders and directions

*Clause 14* sets out the court's broad power to make orders or directions about the conduct of Planning and Environment Court proceedings. In making orders or directions, the interests of justice are paramount. In the event that there is no provision, or an insufficient provision, governing a particular issue or matter in the rules of court, then the judge may make an order or direction.

The Chief Judge of the District Court may make directions of general application (practice directions) about the procedures of the Planning and Environment Court. Practically, directions may also be made to encourage the just and expeditious resolution of matters and avoid unreasonable expense and undue delay.

This may include continued encouragement of fit-for-purpose alternative dispute resolution practices, to ensure proceedings are commensurate to the scale and technicality of the issues in dispute.

The orders and directions of the Planning and Environment Court, and the directions of the Chief Judge made under this clause, may be inconsistent with a provision of the rules. In this instance, the order or direction of the Court or Chief Judge prevails to the extent of the inconsistency.

The Planning and Environment Court or Chief Judge may vary or revoke an order or direction made under this clause.

# Part 4 Powers and procedure (general)

## Division 1 Alternative dispute resolution

### Subdivision 1 ADR process

### Clause 15 Purpose of subdivision

*Clause 15* provides that the purpose of this subdivision is to provide an opportunity for parties to a Planning and Environment Court proceeding to participate in an alternative dispute resolution (ADR) process.

### Clause 16 ADR process

*Clause 16* states the ADR process is a process, without adjudication, under the rules in which an ADR registrar helps the parties to a dispute the subject of the proceeding to achieve an early, inexpensive settlement or resolution of the dispute.

The clause states that the ADR process includes all the steps in the process, including for example, an ADR conference or pre-ADR conference and post-ADR conference sessions. This clause provides flexibility in that another step, appropriate to a Planning and Environment Court proceeding, may be prescribed by the rules and therefore be adapted as new ADR processes continue to evolve.

The clause also provides that an ADR registrar may confer with the parties about the way to conduct the proceeding, for example by way of case management conference, as provided for under the rules.

### Clause 17 Referral to ADR process

*Clause 17* provides that, if a dispute is referred to an ADR process, then the proceeding is not stayed unless the Planning and Environment Court orders otherwise. However, the Planning and Environment Court cannot decide the proceeding until the ADR process has been finalised.

### Clause 18 Resolution agreement

*Clause 18* provides that if the parties agree on a resolution of their dispute or part of it as a result of an ADR process, the agreement must be written down and signed by or for each party and by the ADR registrar who conducted the ADR process. The clause provides that such an agreement has effect as a compromise.

### Clause 19 Documents to be filed

*Clause 19* provides that as soon as practicable after the end of an ADR process, the ADR registrar must file a certificate about the ADR process in the approved form.

The purpose of the certificate is for the ADR registrar to certify whether or not the parties attended the ADR process, and whether or not they resolved all or part of their dispute. However, the ADR registrar cannot include in the certificate any comment about the extent to which a party participated in, or refused to participate in, the ADR process.

### Clause 20 Orders giving effect to resolution agreement

*Clause 20* provides that a party may apply to the Planning and Environment Court for an order giving effect to an agreement reached as a result of an ADR process; however that party may apply for the order only after the ADR registrar's certificate is filed pursuant to clause 19.

When enforcing a resolution agreement, the Planning and Environment Court may make any order it considers appropriate in the circumstances.

### Clause 21 Preservation of confidentiality

*Clause 21* is an offence provision that requires an ADR registrar not to disclose information coming to the ADR registrar's knowledge during an ADR process other than in accordance with subclause 2. This includes a maximum penalty of 50 penalty units. Subclause 2 provides for a limited range of situations, where it is considered acceptable for an ADR Registrar to disclose the information, including for example, if the ADR Registrar has the agreement of the person to whom the information relates.

## Subdivision 2 P&E Court proceedings

### Clause 22 ADR registrar's powers on Chief Judge's direction

*Clause 22* provides a general power that the Chief Judge of the District Court may issue directions about the matters and types of proceedings in which the ADR registrar may exercise powers of the court. This is intended to allow the Chief Judge of the District Court to issue directions of a general nature (practice directions) for this clause.

### Clause 23 ADR registrar's powers to hear and decide

*Clause 23* provides that, if the Planning and Environment Court makes a direction that an ADR registrar is to hear and decide a particular Planning and Environment Court proceeding, the ADR registrar may hear and decide the proceeding and make a final judgment or order. The ADR registrar can also make interlocutory orders and procedural orders about the proceeding. The proceeding does not need to go back before a judge for final judgment or orders.

### Clause 24 Conduct of proceedings

*Clause 24* provides that an ADR registrar may decide how to conduct a proceeding before the ADR registrar, for example they may decide it is appropriate to conduct the proceeding on written submissions only. This clause is subject to clause 28, so in deciding how to conduct a proceeding, the ADR registrar must, for example, continue to ensure all parties are afforded natural justice.

If the ADR registrar decides a hearing is to be conducted for the proceeding, the ADR registrar must notify the parties of the time and place for the hearing. If the ADR registrar decides the proceeding can be decided on written submissions only, then the ADR registrar must notify the parties of the period within which written submissions must be given to the ADR registrar. This stated period for submissions must be reasonable, taking into account clause 28.

### Clause 25 Reference to P&E Court by ADR registrar

*Clause 25* provides that an ADR registrar may refer a proceeding to the Planning and Environment Court if it appears to the ADR registrar to be more appropriate for the court to decide the matter.

For example, the ADR registrar may consider that the matter is too complex, and best to be dealt with by judicial determination in the Planning and Environment Court.

In this event, the Planning and Environment Court may dispose of the matter or refer it back to the ADR registrar with any direction the court considers appropriate.

### Clause 26 Review by P&E Court

*Clause 26* provides that the Planning and Environment Court may review a decision, direction or act of an ADR registrar.

Subclause (2) provides that an application for the review must be made to the Planning and Environment Court within 15 business days after the decision, direction or act complained of is made or done or any longer period allowed by the Planning and Environment Court.

Subclause (3) provides that a court review is on the material that was before the ADR registrar and any additional material the court gives leave to consider. The court review is not a hearing anew.

## Subdivision 3 ADR registrar's powers

### Clause 27 ADR registrar's powers – general

*Clause 27* provides general orders and directions powers available to an ADR registrar in a Planning and Environment Court proceeding, whether during an ADR process or when hearing and deciding a proceeding.

This clause provides powers to an ADR registrar to make orders or give directions in a proceeding if the parties consent in writing, or about the conduct of an ADR process or at the end of an ADR process, to ensure the proceeding progresses expeditiously.

However, an ADR registrar may only make a final judgment or order under clause 23.

### Clause 28 Provision for exercise of ADR registrar's powers

*Clause 28* provides how an ADR registrar must exercise the ADR registrar's powers and inform himself or herself under this division. For example, an ADR registrar must act with as little formality as is consistent with a fair and appropriate consideration of the issues.

The clause also provides that an ADR registrar may, subject to ensuring all parties are afforded natural justice, prohibit or regulate questioning in a hearing before the ADR

registrar. For example, this may be to limit the duration of the hearing, limit the number of witnesses, or limit the time taken in cross-examination, to avoid unnecessary delay, expense and ensure the expeditious resolution of the issues.

## Division 2 Powers

### Clause 29 Where P&E Court may sit

*Clause 29* states that the Planning and Environment Court may convene at any place.

The Planning and Environment Court, using the infrastructure of the District Court of Queensland, achieves a regional presence across Queensland.

### Clause 30 Adjournments

*Clause 30* provides that the Planning and Environment Court may allow proceedings to be postponed, interrupted or continued at another time and place as appropriate to the circumstances.

### Clause 31 Subpoenas

*Clause 31* describes the manner in which the Planning and Environment Court can obtain evidence or produce documents in a person's possession or power. The Planning and Environment Court also has powers to punish for non-compliance with a summons. The powers of a Planning and Environment Court judge are the same as those of a District Court Judge for the purposes of this clause.

### Clause 32 P&E Court may extend period to take an action

*Clause 32* allows the Planning and Environment Court to grant extensions of time for actions otherwise required within a specified time, if the court is satisfied there are sufficient grounds for the extension.

In a practical sense, the Planning and Environment Court may consider whether the delay has been significant and whether extending the time would cause substantial injustice to another party.

### Clause 33 Taking and recording evidence

*Clause 33* establishes the ways in which the Planning and Environment Court must take evidence, including the taking of evidence on oath, affirmation, affidavit, declaration or in another way the court considers appropriate.

### Clause 34 Power to state case for Court of Appeal

*Clause 34* describes the manner in which a Planning and Environment Court judge may submit a question of law, which has arisen during a Planning and Environment Court proceeding, to the Court of Appeal.

If the Planning and Environment Court judge considers it desirable, it may state the question in the form of a case stated for the Court of Appeal's opinion. The UCPR establish the relevant procedures. The question may only be stated during a Planning and Environment Court proceeding, and the court must not make a decision about the matter while the question is pending, or proceed in a way, or make a decision inconsistent with, the Court of Appeal's decision on the question.

### Clause 35 Terms of orders etc.

*Clause 35* states that the Planning and Environment Court may make an order, give leave or do anything else it is authorised to do on terms it considers appropriate.

### Clause 36 Contempt

*Clause 36* states that a Planning and Environment Court judge has the same powers to punish for contempt as a District Court judge. The contempt powers in section 129 (Contempt) of the *District Court of Queensland Act 1967* apply in the Planning and Environment Court the same way they apply to the District Court.

This clause also establishes that a failure to comply with an order of the court is contempt of the court. This is intended to clarify that the court has the power to enforce its own orders.

### Clause 37 Discretion to deal with noncompliance

*Clause 37* provides the Planning and Environment Court with broad discretionary powers to relieve against any non-compliance, partial non-compliance or non-fulfilment of any provision of the Bill or an enabling Act. The intent of this clause is to ensure a person's rights to a hearing are not compromised on the basis of technicalities concerning processes.

Recent case law has identified issues with the current equivalent provision in SPA, section 440, and the transitional provision in section 820. It was held by the Planning and Environment Court that these provisions do not apply to matters of non-fulfilment, and it was unclear whether the term 'provision' also includes a definition. This clause aims to address these identified issues, to ensure the Planning and Environment Court has appropriate excusatory powers.

The term "provision" is intended to be interpreted broadly, includes a definition, and is not limited to circumstances where there is a positive obligation to take a particular action.

The clause clarifies that it applies to a development approval that has lapsed, or a development application that has lapsed or has not been properly made under the Planning Act. The intent is to include other matters that may not otherwise by valid, for example, timeframes that have not been complied with, fees that have not been paid, a change or mistake in relation to: ownership details; boundaries of land; an entity which should have issued a notice; provisions referred to in a development application or development approval under the Planning Bill 2015 or an approval or permit (howsoever called) granted under an enabling Act.

This clause enables the court to give relief in response to proceedings commenced for that purpose or in the context of other proceedings; and to give that relief notwithstanding any other provision of the Bill or an enabling Act, including provisions which would otherwise provide that an application had lapsed.

The court's power is not restricted to proceedings before it. This allows access to the Planning and Environment Court for declarations and orders about procedural disputes which do not form part of wider proceedings.

The intent of the clause is that the Planning and Environment Court may deal with the matter in the way it considers appropriate. The inbuilt flexibility of this clause enables the parties to achieve a range of outcomes, premised on the position that legal technicality should not defeat appropriate development, unless in the court's discretion there are reasons to do so.

### Clause 38 What happens if P&E Court judge or ADR registrar dies or is incapacitated

*Clause 38* describes what will occur if the presiding Planning and Environment Court judge or ADR registrar dies or cannot continue with a proceeding for any reason.

Subclause (2) applies if the presiding judge has started to hear a proceeding and is unable to continue with a proceeding for any reason, including illness or leave of absence. This provision is intentionally broad to cover a broad range of circumstances that may lead to a judge being unable to continue with a proceeding.

Subclause (2) provides that another Planning and Environment Court judge, after consulting with the parties, can postpone the proceeding until the first judge can continue, or order the matter to be reheard. This clause also allows another Planning and Environment Court judge, with the consent of the parties, to make an order about deciding the proceeding, or about completing the hearing of, and deciding, the proceeding.

Subclause (3) provides that, if an ADR registrar has started to perform functions for a Planning and Environment Court proceeding, but dies or cannot continue with the proceeding for any reason, then the court may deal with the proceeding in the way it considers appropriate.

# Division 3 Parties

### Clause 39 Planning Minister

*Clause 39* states the planning Minister is entitled to be represented in any declaratory proceeding or appeal under the Planning Act if the Minister is satisfied that the proceeding involves a matter of State interest.

The power under this clause provides a mechanism for the State to be provided reasonable opportunity to be heard.

The Minister may elect to be a party by filing a notice of election in the approved form in the court and can join at any time before it is decided.

### Clause 40 Appearance

*Clause 40* provides that a party to a Planning and Environment Court proceeding may appear personally before the court or be represented by a lawyer or agent.

### Clause 41 Representative proceedings in particular cases

*Clause 41* provides that a declaratory proceeding or a proceeding for an enforcement order under the Planning Act may be brought in a representative capacity with the consent of the person on whose behalf the proceeding is brought, if the represented is a person (i.e. an individual or corporation). If the represented is an unincorporated body, a representative may start the proceeding if its committee or other controlling body or governing body consents.

Subclause (3) provides that the represented person or unincorporated body, on whose behalf the proceeding is brought, may contribute to or pay the expenses, including legal costs, incurred by the representative bringing the proceeding.

This clause clarifies that the common law principles relating to maintenance (i.e. the support of litigation by a person with no personal interest in the proceeding) do not apply.

# Division 4 Miscellaneous

### Clause 42 P&E Court proceedings open to public

*Clause 42* requires that all matters be heard and decisions given in open court, unless the court has ordered the proceeding be decided on written submissions only, or if the rules of court provide otherwise.

### Clause 43 Nature of appeal in general

*Clause 43* establishes that, subject to any relevant enabling Act, an appeal is to be heard by the court by way of hearing anew ("de novo"), as if the court "stands in the shoes" of the original decision-maker. This clause is particularly relevant if an enabling Act is silent on the nature of appeals heard by the Planning and Environment Court under that Act.

Clause 46 provides for how this applies for appeals under the Planning Act.

### Clause 44 Privileges, protection and immunity

*Clause 44* provides that: the Planning and Environment Court judge presiding over a proceeding; a party to the proceeding; a lawyer or agent appearing in the proceeding; or a witness attending in the proceeding; have the same privileges, protection or immunity as they would have if the proceeding were in the District Court.

In performing the functions of an ADR registrar, including during the ADR process or when hearing and deciding a matter, the ADR registrar also has the same privileges, protection or immunity as a District Court judge performing a judicial function.

# Part 5 Planning Act proceedings

Part 5 notes that the Planning Act provides for matters about starting an appeal. This includes: how and when an appeal must be started; the parties to an appeal; how to give notice of the appeal; and how to elect to be a party to an appeal.

## Division 1 Planning Act appeals

### Clause 45 Who must prove case

*Clause 45* establishes who must prove the case in an appeal to the court started under the Planning Act. For most types of appeals (as set out in subclause (1)), the appellant has the responsibility for establishing that the appeal should be upheld. However, there are some exceptions in subclauses (2) to (4).

Subclause (2) provides that if the appeal is brought about a development application by a submitter or advice agency, it is for the applicant for the development application to establish that the appeal should be dismissed (i.e. the onus of proof remains with the applicant).

An advice agency is a referral agency whose functions are limited to the giving of advice to the assessment manager.

Subclause (3) provides that if the appeal is about the giving of an enforcement notice under the Planning Act, it is for the enforcement authority that gave the notice to establish that the

appeal should be dismissed (i.e. the enforcement authority must prove the case). As such appeals relate to the commission of an offence, it is appropriate that it is consistent with the onus of proof for offence proceedings.

Subclause (4) provides that in an appeal about a claim for compensation made under the Planning Act, it is for the local government responsible for deciding the claim for compensation to establish that the appeal should be dismissed.

In most planning appeals, there is no particular disadvantage to an applicant in bearing the onus of proof; and by allowing the applicant to state their case first, a context is established for the court's consideration of the matters in dispute, allowing quicker proceedings.

In each case under subclauses (2) to (4), the alteration of the onus of proof is considered to be consistent with fundamental legislative principles. These provisions ensure that persons affected by a decision are not further disadvantaged in an appeal.

### Clause 46 Nature of appeal

*Clause 46* establishes that an appeal is to be heard by the Planning and Environment Court by way of hearing anew ("de novo"), as if the court "stands in the shoes" of the original decision-maker.

Subclause (2) provides, however, that if the appellant was the applicant or a submitter for the development application the subject of the appeal, subsection (1) applies subject to subsections (3) to (6).

Subclause (3) states that a particular clause of the Planning Bill applies for the decision of the Planning and Environment Court on the appeal as if the court were the assessment manager for the development application and the reference in the Planning Bill clause to when the assessment manager decides the application were a reference to when the court makes the decision. This clause is not intended to prevent the court from applying the "Coty" principle (or non-derogation doctrine) whereby the court may also give weight to laws and policies not yet in effect when an appeal is heard.

Subclauses (4) and (5) state that the Planning and Environment Court cannot consider a change to the development application or a development approval unless the change is only a minor change under the Planning Bill 2015.

Subclause (6) states that the Planning and Environment Court is not prevented from considering and making a decision about a ground of appeal (based on a referral agency response under the Planning Bill 2015) merely because the Planning Act required the assessment manager to refuse the development application or approve it subject to conditions. This confirms that, while the court "stands in the shoes" of the assessment manager, the court is not bound to apply referral agency conditions or refuse an application on the basis of a referral agency's response.

Subclause (7) states that if the appeal is against a decision about a superseded scheme application under the Planning Act, the Planning and Environment Court must consider the aspect of the appeal relating to the assessment manager's consideration of the superseded scheme in question as if the application had been made under the superseded scheme; and in considering the aspect, disregard the planning scheme in force when the application was made.

### Clause 47 Appeal decision

*Clause 47* describes the ways in which the Planning and Environment Court must decide an appeal made under the Planning Act. The court must do one of the following: confirm the original decision; change the original decision; set aside the original decision and substitute it with a new decision; or set aside the original decision and return the matter to the entity that made the original decision appealed against with directions the court considers appropriate. For example, if the appeal was about the decision of a Development Tribunal the court may remit the matter to the committee with a direction to make its decision according to law.

Subclause 2 provides that an appeal decision may also include other orders, declarations or directions the P&E Court considers appropriate.

Subclause 3 provides that in the event that the Planning and Environment Court changes the original decision or makes a new decision to be substituted, then this new decision takes the place of the decision appealed against.

## Division 2 Evidence in P&E Court proceedings

### Clause 48 Application of division

*Clause 48* provides that this division applies to any Planning Act proceeding and any declaratory proceeding under this Bill.

This clause also provides a note that under the Planning Act, part 5, division 2 of this Bill applies to a proceeding relating to the Planning Act in a court other than the Planning and Environment Court or in a Development Tribunal, and to anyone else acting judicially in relation to a proceeding relating to the Planning Act.

### Clause 49 Appointments and authority

*Clause 49* provides that it is not necessary for an enforcement authority Chief Executive Officer to prove either their appointment to that office or the authority to do anything under the Planning Act. This goes further than usual evidentiary provisions related to enforcement authorities which typically require a conclusive evidence certificate to prove that a particular matter is a fact.

### Clause 50 Signatures

*Clause 50* provides that a signature purporting to be the signature of an enforcement authority Chief Executive Officer is evidence of the signature it purports to be.

### Clause 51 Instruments, equipment and installations

*Clause 51* provides that any instrument, equipment, or installation prescribed and used in accordance with a regulation is taken to be accurate and precise unless there is evidence to the contrary.

### Clause 52 Analyst's certificate or report

*Clause 52* provides that a certificate or report purporting to be signed by an appropriately qualified analyst is evidence of certain matters that it states, such as the analyst's qualifications and the results of the analysis.

### Clause 53 Evidence of planning instruments or designation

*Clause 53* provides that, in a proceeding, a certified copy of a planning instrument or a designation notice issued under the proposed Planning Act 2015 is evidence of the content of the instrument or notice, and requires all persons acting judicially to take judicial notice of such instruments or notices.

Subclause (3) provides that a copy of the gazette or newspaper containing a notice about the making of a planning instrument or designation is evidence of the matters stated in the notice.

### Clause 54 Planning instruments presumed to be within power

*Clause 54* provides that unless the issue is raised, the power of a Minister or local government under the proposed Planning Act 2015 to make planning instruments is to be presumed.

### Clause 55 Evidence of local planning instruments

*Clause 55* allows a local government's Chief Executive Officer to certify a document to be a true copy of all or part of a local planning instrument in force at a stated time. Such a certified document is admissible as if it were the original instrument.

### Clause 56 Effect of planning and development certificates

*Clause 56* states that in a proceeding, a planning and development certificate under the proposed Planning Act 2015 is evidence of the matters the certificate states.

### Clause 57 Evidentiary aids generally

*Clause 57* specifies that if a certificate purporting to be signed by an enforcement authority's Chief Executive Officer contains any of the matters specified in subclause (1), such as whether or not a development permit was in force on a stated day, or whether a stated amount is payable under the proposed Planning Act 2015 and has not been paid by a stated person, it is considered to be evidence of the matter.

## Part 6 Costs

### Clause 58 Definitions for part

*Clause 58* provides definitions used in this part.

### Clause 59 General costs provision

*Clause 59* establishes that each party to a proceeding in the Planning and Environment Court must bear the party's own costs for the proceeding unless particular circumstances apply. These particular circumstances are identified in clauses 60 and 61.

### Clause 60 Orders for costs

*Clause 60* establishes that, despite clause 59, the Planning and Environment Court may make an order for costs as it considers appropriate in specified circumstances.

Subclause (1)(a) provides the court with discretion to make an order for costs if it considers the proceeding was started, or conducted by party to the proceeding, primarily for an improper purpose.

The subclause identifies delaying and obstructing as an example of an improper purpose. It also identifies, as an example, a specific scenario where this may occur in relation to a proceeding instigated primarily to delay or obstruct a commercial competitor.

Subclause (1)(b) provides the court with discretion to make an order for costs if it considers the proceeding to have been frivolous or vexatious. An example in the subclause identifies that an award for costs under this ground may occur where the court considers a proceeding was started, or conducted by a party, without reasonable prospects of success.

Subclauses (1)(c) to (i) deal with further circumstances in which the court may award costs, including if:

- a party has not been given reasonable notice of intention to apply for an adjournment of a proceeding;

- a party is required to apply for an adjournment because of the conduct of another party;
- a party has introduced, or sought to introduce, new material;
- a party has defaulted in the court's procedural requirements;
- the court considers an applicant for a development application, or a change application that is not for a minor change, did not give all the information reasonably required to assess the development application or change application;
- the court considers an assessment manager, referral agency or local government, that is a party to a proceeding, should have taken an active part in a proceeding and did not do so;
- an applicant, submitter, assessment manager, referral agency or a local government, that is a party to a proceeding, does not properly discharge its responsibilities in the proceeding. For example, a party may take an active part in a proceeding, but present evidence that is poorly researched or not relevant to the issues in dispute.

### Clause 61 Orders for costs for particular proceedings

*Clause 61* provides for orders for costs in particular proceedings.

Subclause (1) applies, in addition to clause 60, for a proceeding for an enforcement order or an interim enforcement order under the proposed Planning Act 2015. This subclause allows the court to make a costs order against a person the subject of an enforcement order or interim enforcement order.

Subclause (2) provides that costs must be awarded against the owner if the court declares that an owner wrongly sought the cancellation of a development approval in contravention of the owner's consent requirement under the proposed Planning Act 2015.

Subclause (3) states that the Planning and Environment Court cannot award costs against an assessment manager if it allows an assessment manager to withdraw from an appeal.

### Clause 62 Procedures, scale and enforcement of orders for costs

*Clause 62* applies to an order for costs made under clause 60 or 61.

Subclause (2) provides that the amount of costs awarded may be decided under the procedure and scale of costs for District Court proceedings, which are provided under the *Uniform Civil Procedure Rules 1999*.

Subclause (3) provides that a costs order of the Planning and Environment Court may be enforced as if it were an order of the District Court.

# Part 7 Appeals to Court of Appeal

## Clause 63 Who may appeal

*Clause 63* provides that a party to a Planning and Environment Court proceeding may appeal a decision in the proceeding, but only on the ground of error or mistake in law or jurisdictional error (meaning that the court had no jurisdiction over the matter or appeal or alternatively that the court exceeded its jurisdiction in making its decision).

The party appealing the matter to the Court of Appeal must first seek leave from the Court of Appeal or a judge of appeal.

The Planning and Environment Court does not have jurisdiction to excuse non-compliance or extend timeframes in relation to proceedings purported to start in the Court of Appeal. Any such applications must be made to the Court of Appeal under the *Uniform Civil Procedure Rules 1999.*

## Clause 64 When leave to appeal must be sought and appeal made

*Clause 64* establishes timeframes for when leave of the Court of Appeal to appeal against a decision of the Planning and Environment Court must be sought and when the appeal must be made to the Court of Appeal.

Subclause (1) requires that a party intending to seek the Court of Appeal's leave against a Planning and Environment Court decision must initiate the application within 30 business days after receiving the decision.

Subclause (2) requires that following the grant of any leave a notice must be served and filed, unless the Court orders otherwise.

The relevant notices under this clause are made to the Court of Appeal under the *Uniform Civil Procedure Rules 1999*.

## Clause 65 Court of Appeal's powers

*Clause 65* specifies the powers by which the Court of Appeal can decide a matter. It may return the matter to the Planning and Environment Court to decide in accordance with the appeal decision; it may affirm, amend or revoke the decision appealed against and substitute another order or decision; and it has broad powers to make any orders it considers appropriate.

For example, under the Planning Bill 2015, the Court of Appeal has the power to allow development, or an aspect of development, to proceed before the appeal is decided if the Court of Appeal considers the outcome of the appeal would not be affected.

# Part 8 Registry and officers

### Clause 66 Registrars and other officers

*Clause 66* establishes that the principal registrar, registrars and other officers appointed for the District Court will be the principal registrar, registrars and other officers for the Planning and Environment Court. This clause reflects the flexible resourcing arrangements between the District Court and the Planning and Environment Court.

### Clause 67 ADR registrar

*Clause 67* provides that the Planning and Environment Court's principal registrar (also the District Court principal registrar) may, after consulting the Chief Judge, appoint a registrar or other officer of the Planning and Environment Court as an ADR registrar of the court.

The clause permits the principal registrar to appoint more than one ADR registrar.

### Clause 68 Registries

*Clause 68* states that each District Court registry is a registry of the Planning and Environment Court. This clause also allows for the establishment of a principal registry in Brisbane, which will be under the control of the principal registrar. It also allows the principal registrar to give directions to other registrars and officers of the Planning and Environment Court in relation to the court and its proceedings.

### Clause 69 P&E Court records

*Clause 69* requires the principal registrar to keep records of Planning and Environment Court decisions, which must be kept in the custody of the principal registrar. The clause also provides that the principal registrar must perform other functions the court directs.

# Part 9 Miscellaneous

### Clause 70 Annual Report

*Clause 70* states that, after the end of each financial year, the Chief Judge must prepare and give the Minister a written report about the operation of the Planning and Environment Court during the financial year.

Subclause (2) provides that the Minister must table a copy of the report in the Legislative Assembly within 14 sitting days after receiving the report.

Subclause (3) provides that the Chief Judge may combine the report with the District Court report for the same financial year. This is intended to avoid the need for a separate annual report for the Planning and Environment Court and is consistent with current practice.

### Clause 71 Judicial notice

*Clause 71* requires that judicial notice be taken of the appointments and signatures of the registrars and court officials holding office under the Bill.

### Clause 72 Approval of forms

*Clause 72* enables the Chief Judge of the District Court and another Planning and Environment Court judge to approve forms for use under this Bill. Should an approved form under this Bill be required to be combined with, or used together with an approved form under another Act, it is intended to rely on section 48A(3) of the *Acts Interpretation Act 1954* for this purpose.

### Clause 73 Regulation-making power

*Clause 73* enables the Governor in Council to make regulations under the Bill, which may include a maximum penalty for a contravention of a provision of a regulation of no more than 20 penalty units.

## Part 10 Savings and transitional provisions

### Clause 74 Definitions for part

*Clause 74* includes definitions used for this part.

### Clause 75 Continuance of existing judgeships

*Clause 75* provides that, on the commencement, a judge of the court becomes a Planning and Environment Court judge for the rest of the judge's unexpired term of office as a judge of the court.

### Clause 76 Proceedings

*Clause 76* provides for transitional arrangements for proceedings under the repealed SPA or an enabling Act.

The clause identifies transitional arrangements for circumstances where: a person had started proceedings under repealed SPA before the commencement but the proceedings had not ended; a person had a right to start proceedings under repealed SPA before the

commencement; and where a person has a right to start proceedings that arises after the commencement in relation to certain matters.

It also deals with proceedings for declarations under clauses 11 and 12 of the Bill.

Also, the clause provides for how the Planning and Environment Court is to deal with noncompliance under repealed SPA section 440. This is intended to ensure the Planning and Environment Court has as much flexibility as is necessary to adequately dispense with matters.

For matters relating to the repealed SPA, the Planning Bill 2015 also contains transitional provisions for proceedings.

### Clause 77 Continuance of existing orders and directions

*Clause 77* provides for the continuation of orders and directions in effect under the *Sustainable Planning Act 2009* before the commencement, as if they had been made or given under this Bill.

### Clause 78 Existing references to court

*Clause 78* provides that a reference in another Act or document to the court to be taken as a reference to the Planning and Environment Court.

### Clause 79 Existing rules migrate to this Act

*Clause 79* provides for the continuation of the *Planning and Environment Court Rules 2010* as if they had been made under this Bill. However, the operation of the rules will only continue for a period of 6 months after commencement, or until they are replaced by new rules under the Bill, whichever happens sooner.

### Clause 80 Migration of particular repealed SPA provisions about the P&E Court to the rules

*Clause 80* provides that existing sections 456(8) and 459 of SPA are to continue in effect, for any matter not provided for under the rules, as if they form part of the rules of court. Section 456(8) requires a person starting a proceeding for a declaration to give notice to the chief executive, and section 459 provides for the payment of witnesses. These existing provisions in SPA are procedural and best placed in the Planning and Environment Court Rules.

Subclause (4) provides that this clause expires 6 months after the commencement or earlier should the rules amend or repeal their effect.

# Schedule 1 Dictionary

This schedule defines particular words used in this Act. Many of the words and terms used in the Bill are defined in Schedule 2 of the Planning Bill.

### ADR conference

ADR conference means mediation or a chaired meeting of experts, a case management conference or without prejudice conference convened under the rules.

### ADR process

ADR process means an ADR Registrar led process which assists the parties to a dispute the subject of a Planning and Environment Court proceeding, to achieve an early, inexpensive settlement or resolution of the dispute.

### ADR registrar

ADR registrar means a person holding an appointment under the Bill as an ADR registrar of the Planning and Environment Court.

### appeal decision

Appeal decision means the decision the Planning and Environment Court has made in relation to a Planning Act appeal by allowing it, or changing it, or setting it aside, or including further orders or declarations.

### approved form

Approved form means a form approved by the Chief Judge and another Planning and Environment Court judge for use under this Bill.

### assessment manager

Assessment manager has the meaning under the Planning Bill 2015, and is the person responsible for either or both of the following - administering a properly made development application; and assessing and deciding part or all of a properly made development application. It includes a prescribed assessment manager and a chosen assessment manager.

### business day

Business day does not include a day between 26 December of a year and 1 January of the following year.

### Chief Judge

Chief Judge means the Chief Judge of the District Court.

### costs

For part 6 (Costs), costs for a Planning and Environment Court certain proceeding includes a party's costs to investigate, or gather evidence for, the proceeding that the Planning and Environment Court decides the party reasonably incurred. These proceedings are a declaratory proceeding about the lawfulness of land use or development under the Planning Act, including any order about the construction of a land use plan under the *Airport Assets (Restructuring and Disposal) Act 2008;* an appeal against the giving of an enforcement notice under the Planning Bill; and a proceedings for an enforcement order or interim enforcement order under the Planning Bill. For an appeal against the giving of an enforcement notice under the Planning Bill, this also includes costs relating to investigations or gathering of evidence for the giving of the relevant enforcement notice.

### declaratory proceeding

Declaratory proceeding means a proceeding in the Planning and Environment Court for a declaration about a matter done, to be done, or that should have been done under this Bill or the Planning Bill 2015; or the interpretation of this Bill or the Planning Bill 2015, or the lawfulness of land use or development under the Planning Bill 2015, or the construction of a land use plan under the *Airport Assets (Restructuring and Disposal) Act 2008* or the construction of the Brisbane port Land Use Plan under the *Transport Infrastructure Act 1994*.

### development application

Development application has the meaning under the Planning Bill 2015 and means an application for a development approval.

### development approval

Development approval is defined in the Planning Bill 2015 and means a preliminary approval; or a development permit; or a combination of a preliminary approval and development permit.

### enabling Act

Enabling Act means any act which gives jurisdiction to the Planning and Environment Court.

### enforcement authority

Enforcement authority refers to definition of enforcement authority under the Planning Bill 2015. Under the Planning Bill 2015, enforcement authority means, for assessable development that is the subject of a development approval: the assessment manager including a chosen assessment manager; or a referral agency for matters within the agency's functions for the development application; or if the chief executive is the assessment manager or a referral agency - a person that the chief executive nominates by written notice to the person; or if a private certifier (class A) performed private certifying functions for the development application under the Building Act – the certifier or the local government. For assessable development that is not the subject of a development approval, the enforcement authority is the person who would have been the enforcement authority as if it were assessable development and a development approval had been given. For building or plumbing work carried out by or for a public sector entity, the enforcement authority is the chief executive, however described, of the entity. For any other matter, the enforcement authority is the local government.

### enforcement authority CEO

Enforcement authority CEO means the chief executive or the chief executive officer, however called, of an enforcement authority.

### enforcement notice appeal

For the purposes of Part 6 (Costs). the enforcement notice appeal means an appeal against the giving of an enforcement notice under the Planning Bill 2015.

### enforcement proceeding

For the purposes of Part 6 (Costs). the enforcement proceeding is a proceeding for an enforcement order or interim enforcement order under the Planning Bill 2015.

### minor change

Minor change refers to the definition of minor change under the Planning Bill 2015, Schedule 2.

### P&E Court

P&E Court means the Planning and Environment Court.

### P&E Court judge

P&E Court judge means a District Court judge appointed under this Bill who constitutes the Planning and Environment Court.

### P&E Court proceeding

P&E Court proceeding means a proceeding before the Planning and Environment Court. For part 6 of this Bill, which relates to costs, it includes a part of a proceeding and an application in a proceeding before the Planning and Environment Court.

### P&E Court's principal registrar

P&E Court's principal registrar means the principal registrar appointed for the District Court.

### party

Party, for a provision about a Planning and Environment Court proceeding, means any or all of the following for the proceeding—

(a) the applicant or appellant;

(b) the respondent;

(c) any co-respondent, including co-respondent by election;

(d) if the Minister is represented, or elects to be a party—the Minister.

### Planning Act

Planning Act means the Planning Bill 2015 as enacted.

### Planning Act appeal

Planning Act appeal means an appeal to the Planning and Environment Court for which the Planning Bill 2015 as enacted is the enabling Act.

### Planning Act proceeding

Planning Act proceeding means a Planning and Environment Court proceeding for which the Planning Bill 2015 as enacted is the enabling Act; or a declaratory proceeding relating to the Planning Bill 2015 as enacted; or a proceeding for an enforcement order under the Planning Bill 2015 as enacted.

### planning instrument

Planning instrument means a State planning instrument or a local planning instrument under the Planning Bill 2015.

### relevant enabling Act

Relevant enabling Act, for a provision about a Planning and Environment Court proceeding, means the enabling Act that confers jurisdiction for the proceeding on the Planning and Environment Court.

### rules

Rules means the rules of the Planning and Environment Court made by the Governor in Council.

### submitter

Submitter means, for a development application or change application, a person who makes a properly made submission about an application. Submitter, for a particular submission, means the person who made the submission.

### tribunal

Tribunal means the Development Tribunal under the Planning Bill 2015.