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ESD and its application by the Courts



LAWS5134 Environmental Law

LAWS7989 Ecologically Sustainable Development Law

Judge ME Rackemann

Sunday, 3rd March 2013

Environmental Law

- It's the Law

Judge ME Rackemann
Queensland Planning and Environment Court

Kirk v Industrial Relations Commission of NSW
(2010) 239 CLR 531

History teaches us to be suspicious of specialist courts and tribunals of all descriptions. They are usually established precisely because proceedings conducted in accordance with normal judicial standards of fairness are not producing the outcomes that the government wants. From the Court of Star Chamber to the multitude of military courts and revolutionary tribunals in our own century, this lesson has been repeated time and time again.

There is a related danger in that course in that the courts on which the jurisdiction has been conferred, while in some sense specialist, are not familiar with all the relevant rules... Another difficulty in setting up specialist courts is that they tend to become over-enthusiastic about vindicating the purposes for which they were set up... So too courts set up for the purpose of dealing with a particular mischief can tend to exalt that purpose above all other considerations, and pursue it in too absolute a way. They tend to feel that they are not fulfilling their duty unless all, or almost all, complaints that that mischief has arisen are accepted. Courts which are “preoccupied with special problems”, like tribunals or administrative bodies of that kind, are “likely to develop distorted positions”.

Ecological Sustainability

What does it mean?

What is 'Ecological Sustainability'?

- *Ecological sustainability* is that balance that integrates—
 - (a) Protection of ecological processes and natural systems at local, regional, state and wider levels; and
 - (b) Economic development; and
 - (c) Maintenance of the cultural, economic, physical and social wellbeing of people and communities.

SPA Section 8

- *Chesol Pty Ltd v Logan CC* [2007] QPELR 285 at [87]

The 'Precautionary Principle'

5. What advancing Act's purpose includes

(1) Advancing this Act's purpose includes—

(a) ensuring decision-making processes—

.....

(iii) apply the precautionary principle

...

(2) For subsection (1)(a)(iii), the precautionary principle is the principle that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment if there are threats of serious or irreversible environmental damage.

– *Histpark Pty Ltd v Maroochy SC* [2002] QPELR 134

When do you use ESD?

- (1) If, under this Act, a function or power is conferred on an entity, that entity must—
 - (a) unless paragraph (b) or (c) applies—perform the function or exercise the power in a way that advances this Act’s purpose; or
 - (b) if the entity is an assessment manager other than a local government—in assessing and deciding a matter under this Act, having regard to this Act’s purpose; or
 - (c) if the entity is a referral agency other than a local government (unless the local government is acting as a referral agency under devolved or delegated powers)—in assessing and deciding a matter under this Act, having regard to this Act’s purpose.
- (2) Subsection (1) does not apply to code assessment or compliance assessment under this Act.

SPA Section 3

– *Chesol Pty Ltd v Logan CC* [2007] QPELR 285 at [93]-[96]

Which development is “Sustainable”?

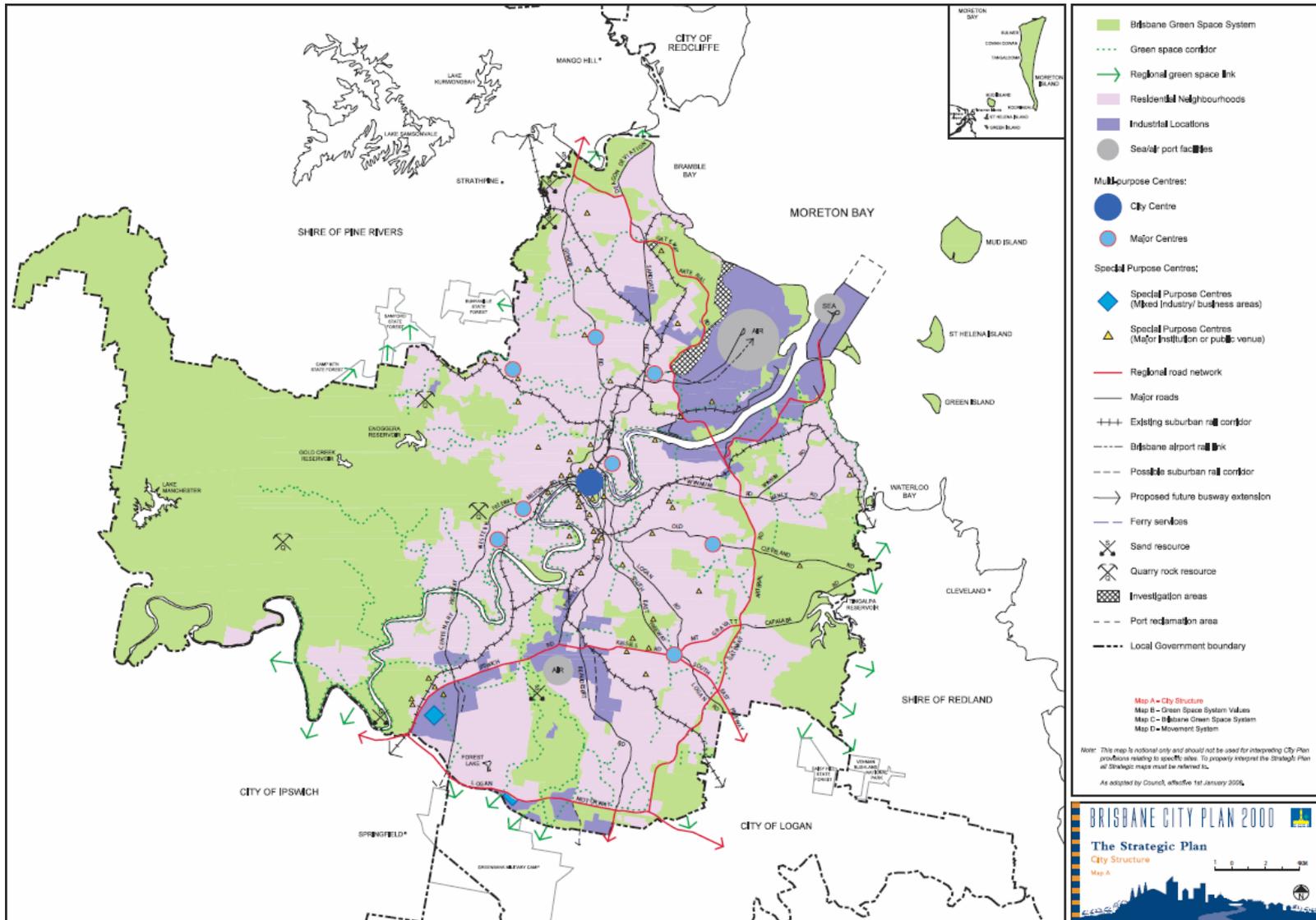


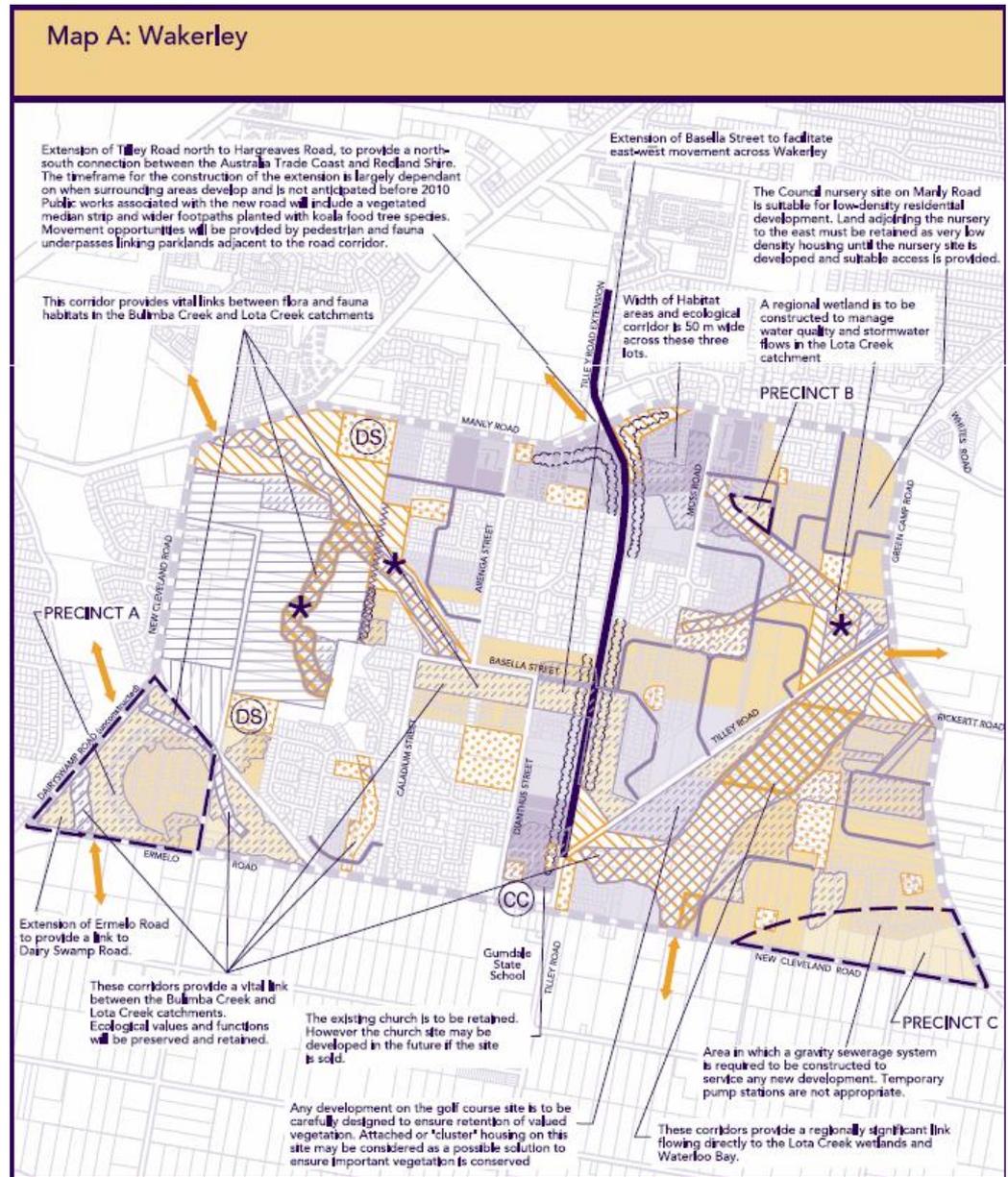
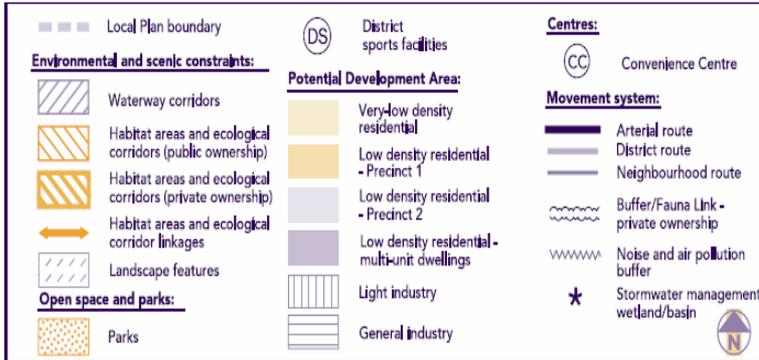
What is the Plane of Reference?

- National
 - State
 - Regional
 - Local
 - » Site



- *Metroplex Management Pty Ltd v Brisbane CC & ORS [2010]*
QPELR 270





The Evidence Base

- How to manage experts.
 - ME Rackemann, '[The Management of Experts](#)' (2012) 21 Journal of Judicial Administration 168

Environmental Law

Future directions in practice



Questions?