PLANNING – A RISKY BUSINESS?

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Since the introduction of performance-based planning, Queensland's planning law framework has been repeatedly amended in response to complaints of complexity. This article traces Queensland's law reform journey and focuses on the issue of complexity in the context of planning schemes. The causes of complexity are diverse and to some extent remain unresolved. An issue that warrants more attention is the concept of "risk" in the context of planning (and particularly planning schemes). Risk-based approaches to regulation have been increasingly regarded as an effective way to manage risk and uncertainty. This article asks questions about risk concepts in planning and argues in favour of further research around a risk-based approach to planning scheme preparation.

I INTRODUCTION

In the 1990s, the Queensland Government asserted that the development assessment system was too complex and focused on simplifying the regulation of planning.[1] No government sets out to create a system that results in complexities. However, the impetus for planning reform in Queensland has repeatedly been to realise simplicity.[2] Although simplicity is not the sole virtue of good regulation, legal instruments ought to be proportionate to the issues they address and impose only the burdens needed to achieve their aims.[3]

A range of commentators have already written about the failings of the Integrated Planning Act 1997 (Qld) (the IPA) and the difficulties with Queensland's version of performance-based planning

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1 Department of Housing and Local Government (Qld) *Is it Too Complex? A Discussion Paper: Development Approvals Systems Review* (Queensland Government, Brisbane, 1990); and Integrated Planning Bill 1997 (explanatory note) at 2.

2 Steve Reynolds and Michael Anderson "We Are Not Alone – A Comparison of Planning Reform in Queensland with the United Kingdom and New South Wales" (paper presented to the Queensland Environmental Law Assocation Conference, Noosa, May 2013) at 25.

3 This is in line with the five principles for regulation set by the Better Regulation Task Force, cited in Deborah Peterson and Sally Fensling "Risk-Based Regulation: Good Practice and Lessons for the Victorian Context" (paper presented at the Victorian Competition and Efficiency Commission Regulatory Conference, Melbourne, 2011) at 9.

(PBP).[4] These commentaries highlight that the reform agenda theme was about simplicity and flexibility, but the Government's focus on the various aspects of the planning laws changed over time. The IPA introduced flexibility and a simpler development assessment system, but planning schemes became lengthier and more complex.[5]

The Sustainable Planning Act 2009 (Qld) (the SPA) aimed to address this issue by introducing the Standard Planning Scheme Provisions (SPSPs). Acknowledging that the SPSPs fell short of achieving their goals,[6] Queensland's latest legislative reforms remove the SPSPs, but some of their content is to be continued in regulation.[7] Still, the question about how complex and lengthy planning schemes will be addressed by the latest reforms is largely left open.

It is too early to speculate about the triumphs or failures of the new regime and there is no silver bullet that will provide all of the answers to questions about simplifying planning schemes. Simplicity is not that simple. Planning law deals with a range of complex issues and requires that the (often competing) economic, social and ecological considerations are balanced against each other.[8] It seems inevitable that there will be some level of complexity in planning laws and planning schemes. However, unnecessary complexities create forbidding and elaborate documents that are inhospitable to the community.[9] The law should respond to avoidable complexities that fail to add value to the quality of the instrument.[10]

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4 See for example Philippa England "From Revolution to Evolution: Two Decades of Planning in Queensland" (2010) 27 EPLJ 53; Douglas C Baker, Neil G Sipe and Brendan J Gleeson "Performance-Based Planning: Perspectives from the United States, Australia, and New Zealand" (2006) 25 Journal of Planning Education and Research 396; David Nicholls "The Integrated Planning Act 1997 – A Lawyer's Picnic and a Developer's Nightmare" (paper presented to the Urban Development Institute of Australia, 2003); Alan Fogg "IPA – Does its Reach Exceed its Grasp?" (2005) 10 QEPR 63; and Travis Frew "The Implementation of Performance Based Planning in Queensland under the Integrated Planning Act 1997: An Evaluation of Perceptions and Planning Schemes" (PhD Thesis, Queensland University of Technology, 2011).

5 England, above n 4, at 58.

6 Department of Infrastructure, Local Government and Planning (Qld) *Better Planning for Queensland: Next Steps in Planning Reform Directions Paper* (May 2015) at 6.

7 The Standard Planning Scheme Provisions are not carried forward in the Planning Act 2016 (Qld).

8 Sustainable Planning Act 2009 (Qld), s 8; and Planning Act 2016 (Qld), s 3.

9 Leslie Stein *A Review of International Best Practice in Planning Law: For the New South Wales Department of Planning* (Centre for Environmental Legal Studies, May 2012) at 12.

10 See generally Patrick Mayhew "Can Legislation Ever be Simple, Clear, and Certain?" (1990) 11 Stat LR 1.

Research shows that risk aversion contributed to the production of complex and lengthy planning schemes in Queensland.[11] In response, this article asks whether adopting a risk-based approach would be constructive in the context of preparing PBP schemes.

II QUEENSLAND'S REFORM JOURNEY: THE EARLY DAYS

In order to understand Queensland's experience with PBP, it is important to appreciate the history and context of Queensland's planning reform journey, leading up to its inception. Gaining an insight into the history of Queensland's planning reform journey helps to provide a better understanding about how and why PBP came to be a pivotal part of Queensland's planning law system and how it came to shape Queensland's planning schemes.

The year of 1934 saw the start of zone-based planning in Queensland. The City of Mackay and Other Town Planning Scheme Approvals Act 1934 (Qld) (The Mackay Act) was assented to on 22 November 1934. It enabled the Mackay City Council (and other local governments) to "execute and enforce" Queensland's first planning scheme.[12] It was zone-based and amounted to less than 10 pages in length. The birth of Queensland's first planning laws was marked by the introduction of its first planning scheme.[13] However, the Mackay Act was repealed before any other planning schemes were prepared under it and the Local Government Act 1936 (Qld) continued the zone-based regulatory planning system in Queensland for the next 60 years,[14] with no comprehensive review of planning legislation in Queensland until the 1990s.[15]

In 1990, the Local Government (Planning and Environment) Act (Qld) (LGP&E Act) commenced. Although, at that time, there were calls for change to planning laws, this Act was not ground-breaking in the sense that the historic model of zone-based planning endured. Planning schemes under the LGP&E Act continued to be prescriptive in their structure and substance.[16] A significant change under the LGP&E Act was that the role of planning was broadening to begin to

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11 Travis Frew, Douglas Baker and Paul Donehue "Performance based planning in Queensland: A case of unintended plan-making outcomes" (2016) 50 Land Use Policy 239.

12 City of Mackay and Other Town Planning Scheme Approvals Act 1934 (Qld), s 5.

13 Reynolds and Anderson, above n 2, at 2.

14 Originally, the Local Government Act 1936 (Qld) applied to Brisbane but Brisbane was later separately regulated by various Acts, including the City of Brisbane (Town Plan) Act 1959 (Qld) and the City of Brisbane Town Planning Act 1964 (Qld).

15 Department of Housing and Local Government (Qld), above n 1.

16 Stafford Hopewell "The Role of Planning Schemes in Development Control under the Integrated Planning Act 1997" (paper presented to Queensland Environmental Law Assocation, Brisbane, 2 December 2002) at 2.

encompass environmental protection concepts.[17] Although it only played an adjunct role, environmental protection was starting to play a larger role in planning.[18]

Still, Queensland's old zone-based planning system is known for its inefficient and duplicative approvals system and its failures to address modern community concerns such as ecological sustainability.[19] By the 1990s, the certainty that it promised became a myth and there were calls for change.[20]

III DISSATISFACTION AND CALLS FOR CHANGE

By the 1990s, there was growing dissatisfaction with the planning system and the planning mood had changed in Queensland. Kevin Yearbury, the (then) Director General of the Department of Local Government and Planning, said that the planning system was "highly dysfunctional" and reform was demanded.[21] Russell discussed zoning and said: "What can be said for a system that is riddled with exceptions, is ignored with impunity, and, when followed to the letter, frequently produces results that no one likes?"[22]

This sentiment is reflected in the planning commentary in discussions about that era. It tells a story of calls for flexibility, integration and ecological sustainability.[23]

A Calls for Integration

It was accepted that the LGP&E Act failed to adequately address the inefficiencies of the development assessment system.[24] Under the LGP&E Act, multiple approval systems existed for a

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17 See for example Local Government (Planning and Environment) Act 1990 (Qld), ss 1A.1.1, 2.19(2) and 5.1(1), which provided that state planning policies could deal with environmental matters of state significance and the environmental impact of a development proposal became a relevant consideration in deciding a rezoning or subdivision application. Further, s 8.2(1) of the Act required local governments to take account of deleterious environmental impacts when considering whether to approve a proposal.

18 Michael Leong "Planning Schemes as a Mechanism to Deal with Environmental Issues" (2003) 8 QEPR 138 at 144.

19 Kevin Yearbury "The Integrated Planning Act: Planning for the New Millennium" (1998) 35 Australian Planner 197.

20 Reynolds and Anderson, above n 2, at 4.

21 Yearbury, above n 19, at 197.

22 Joel Russell "Rethinking Conventional Zoning" (1994) 15 Planning Commissioners Journal 6 at 6.

23 See for example Baker, Sipe and Gleeson, above n 4, at 404; Frew, Baker and Donehue, above n 11, at 242; Fogg, above n 4; Alan Fogg "Old Wine in New Bottles" (2006) 46 Queensland Planner 3; Queensland *Parliamentary Debates* Legislative Assembly, 30 October 1997 at 4086–4089 (Mr McCauley); and Stan Wypych "Performance Based Planning Queensland Style" (paper presented to the Integrated Resource Management Conference, British Columbia, 12 November 2003) at 3.

24 Queensland *Parliamentary Debates*, above n 23, at 4086–4089.

single development application. Partly as a result of an increasing awareness of environmental protection,[25] there were 23 Acts incorporating 111 forms of approval that could be relevant to a proposed development.[26] Because of the various jurisdictions for approval requirements, there were several possible approval bodies and a mystifying array of development assessment criteria. It was duplicative, confusing, poorly coordinated, inefficient, costly and uncertain.[27]

Problems arose because a developer could (and sometimes would) get development approval for their proposal but would be unable to obtain the necessary environmental approval.[28] The laws were piecemeal and the interrelationships between different parts of a development proposal were not assessed.[29] Accordingly, the focus was to simplify the law to create a system that could deal with a development proposal as a whole.[30]

B Calls for Flexibility

For its entire history, up until the 1990s, Queensland had a zone-based system and the fundamental structure and approach to planning experienced minimal change.[31] In 1993, the Queensland Government said that there was a need to encourage innovation, allow flexibility and move away from a prescriptive planning system.[32] Zoning was said to be rigid and unable to manage the complexities of a changing world.[33]

At its beginning, zoning was not criticised for being complex. But the planning context in Queensland had changed. The Queensland population had grown significantly. Greenfield development sites were becoming scarce. There was a need to adapt to new planning needs. There was a demand for higher density living at the same time as an increased focus on ecological sustainability. The planning and associated professions had to start being creative and resourceful to

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25 See for example other relevant laws which covered matters such as air quality, water quality, fire safety, coastal works, building works, noise control and development of large resorts.

26 Department of Housing and Local Government (Qld), above n 1, at 13.

27 At 13.

28 Jeanette Davis "Planning Legislation and Practice in Queensland: Swings or Roundabouts?" (paper presented to the Southern Downs Regional Council, Toowoomba, 11 July 2011) at 4–5.

29 Department of Housing and Local Government (Qld), above n 1, at 21.

30 At 11–35.

31 Queensland *Parliamentary Debates*, above n 23, at 4086.

32 Department of Housing, Local Government, and Planning (Qld) *New Planning and Development Legislation: A Discussion Paper* (1993) at 22–23.

33 William Eggers *Land Use Reform through Performance Zoning* (Policy Study, Working Paper, May 1990); Department of Housing and Local Government (Qld), above n 1, at 65; and Baker, Sipe and Gleeson, above n 4, at 403–404.

meet the needs of a growing population. It was no longer appropriate to expect that there was only a single way to achieve a good outcome, as anticipated by zoning. It was thought that PBP allowed for flexibility and innovation, and this was consistent with the new legislative goal of seeking to achieve ecological sustainability.[34]

C Calls for Ecological Sustainability

In the early 1990s, the concept of ecologically sustainable development was gaining international attention. The Report of the World Commission on Environment and Development (the Brundtland Report) acknowledged the importance of sustainable development.[35] This was followed by an Australian awareness of the concept of ecologically sustainable development (ESD). In 1992, every state and territory signed the National Strategy for Ecologically Sustainable Development 1992 (NSESD).[36] Relevantly, the NSESD provided that "decision making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations" and discussed the precautionary principle.[37] This shift was soon to have an influence on the future of decision making in planning law, which would call for laws to reflect concepts of ecological sustainability.[38]

IV INTEGRATED PLANNING ACT 1997: A NEW ERA

After all of the eager calls for reform, Queensland overhauled its planning legislation and introduced the IPA. The IPA represented a fundamental planning reform for Queensland and the first comprehensive review of its planning laws since their inception.[39] But the IPA had ambitious goals and on the whole, despite some improvements to planning laws, the literature points to the IPA falling short of achieving its goals.[40]

The IPA expressly acknowledged the expanded role of planning and, for the first time, the legislation had an identified purpose. The overriding purpose of the IPA, according to s 1.2.1, was to "seek to achieve ecological sustainability". This was a significant change in the context of the role of

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34 England, above n 4; and Yearbury, above n 19, at 198.

35 World Commission on Environment and Development *Our Common Future* (Oxford University Press, Oxford, 1987).

36 England, above n 4, at 55.

37 Ecologically Sustainable Development Steering Committee *National Strategy for Ecologically Sustainable Development* (Australian Government, December 1992).

38 Department of Housing and Local Government (Qld), above n 1.

39 Philippa England "Damage Control or Quantum Leap? Stakeholder Feedback on the Integrated Planning Act (QLD) 1997" (1999) 8 GLR 317 at 317; and Stan Wypych, Neil Sipe and Douglas Baker "Performance-based planning in Queensland" (2005) 42 Australian Planner 26.

40 See for example England, above n 4; Fogg, above n 4; and Nicholls, above n 4.

a planning scheme because ecological sustainability would be mainly addressed in planning schemes, with a requirement that they address ecological sustainability and integrate matters of state interest.[41] Even in the IPA's early days, state interests included matters such as koala protection and wetland protection.[42]

The IPA responded to calls for simplicity through integration and promised to "collapse about 60 approval processes into a single integrated system and sunset about 6,000 pages of regulation".[43] The reform agenda was also shaped by ambitions to improve Queensland's economic performance. There was a belief that the two went hand in hand and that Queensland's economic performance depended on planning laws that were not duplicative and unnecessarily complex. Integration was seen as a key factor in achieving this goal.[44] The IPA came close to integrating the development assessment system, but not without pronounced struggles.

Integration was sought to be achieved in two ways:

(1) streamlining the development assessment process by creating the integrated development assessment system (IDAS); and
(2) integrating assessment criteria into planning schemes.

The IDAS created Queensland's version of a one-stop shop for assessing a development application. This represented a fundamental change to the *process* of making and deciding a development application.[45]

However, the simplicity of the development assessment process also relies upon simple assessment criteria. In other words, it relies on simple planning schemes. As expressed by Wypych, Sipe and Baker:[46]

> The IDAS is the means by which development applications are dealt with administratively; it is the approval process component of the planning system. Surrounding the IDAS process is the policy environment contained in IPA planning schemes (community planning schemes) which provides policy guidance to decision-making.

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41 Integrated Planning Act 1997 (Qld), ss 1.2.1 and 2.1.3; and Philippa England *Sustainable Planning in Queensland* (Federation Press, Sydney, 2011) at 37.

42 See for example SPP 1/97: Conservation of Koalas in the Koala Coast 1.0, which commenced on 3 October 1997 and SPP 4/11: Protecting Wetlands of High Ecological Significance in Greater Barrier Reef Catchments, which commenced on 25 November 2011.

43 Queensland *Parliamentary Debates*, above n 23, at 4088.

44 Yearbury, above n 19, at 197.

45 England, above n 4; and Wypych, Sipe and Baker, above n 39.

46 Wypych, Sipe and Baker, above n 39, at 28.

So, the creation of the IDAS process was only ever going to address part of the puzzle. The IDAS process focused on integrating the plethora of approval systems, which in turn, was expected to simplify the system.[47] But what about planning schemes? Planning schemes were required to deal with issues of ecological sustainability, integrate state interests and shift towards a flexible, performance-based approach.[48] Yet the IPA reforms failed to address how PBP schemes could avoid the complexities of a new system that expected planning schemes to take on this enlarged role.

V PERFORMANCE-BASED PLANNING

The IPA changed planning schemes by encouraging a shift towards PBP.[49] This was, in part, achieved through the fact that the IPA made it unlawful to render outright prohibitions on development.[50] But, because of the shift towards PBP, it also meant that approximately 125 local governments had to prepare a new PBP scheme.[51]

So, what is PBP? It stems from the concept of performance zoning, which was founded by American planner, Lane Kendig, in the 1970s.[52] Commentators agree that PBP is intended to promote flexibility, be outcome driven, encourage pioneering developments and provide innovative solutions to planning issues.[53] It brought an innovative conceptualisation of planning to the world, but research concludes that, in Queensland, PBP has not been well understood.[54] This meant that PBP was often defined by what it was not. PBP is not prescriptive and does not arbitrarily list permitted uses.[55] It does not arbitrarily and uniformly separate land uses. It is not *blunt* or inflexible in its approach.[56] It is not zone-based regulation. Zone-based regulation was aimed at avoiding the negative impacts of

47 Department of Housing and Local Government (Qld), above n 1.

48 England, above n 41; Yearbury, above n 19; and Integrated Planning Act 1997 (Qld), ss 1.2.2 and 2.1.3(1).

49 Philippa England "Judicial Interpretation of Planning Schemes under the Integrated Planning Act 1997 (Qld): The More Things Change" (2005) 22 EPLJ 281.

50 Integrated Planning Act 1997 (Qld), s 2.1.23(2).

51 Frew, Baker and Donehue, above n 11, at 240.

52 Frew, above n 4, at 10.

53 See for example Baker, Sipe and Gleeson, above n 4; Philippa England "Are we there yet? Proposed Reforms to Planning Law in Queensland" (2016) 30 AER 8; Steve Reynolds "Integrated Planning Act – Is It Too Complex?" (paper presented to Queensland Environmental Law Association, Brisbane, 27 October 2003); Wypych, Sipe and Baker, above n 39; and Yearbury, above n 19, at 198.

54 Baker, Sipe and Gleeson, above n 4, at 396; Eggers, above n 33; and Frew, Baker and Donehue, above n 11, at 240.

55 Douglas Porter *Flexible Zoning: A Status Report on Performance Standards* (American Plannning Association, Zoning News, 1998).

56 Baker, Sipe and Gleeson, above n 4, at 396.

incompatible land uses, by ensuring they were separated. Conversely, PBP responded by prohibiting the negative impact but allowing the applicant flexibility in terms of how they do it.[57]

PBP aims to tailor land uses to site characteristics.[58] Normatively, it relies on quantifiable performance standards but the means of achievement is flexible, acknowledging that there is more than one way to achieve a planning goal.[59] In its purest form, it allows the market to determine where to build shopping centres, houses, units, industrial buildings and so on. It aims to set performance standards to mitigate the negative effects of development, rather than specifying whether a use can or cannot occur in a specific area.[60]

It is accepted that the IPA adopted a performance-based approach to planning but Queensland's version of PBP is best described as "hybridised".[61] Essentially, the system still relied on land use zones and a combination of prescription and subjectivity, with spatial zones remaining foundational.[62]

Although Queensland did not adopt a pure form of PBP, local governments lost the power to freely prohibit development in their planning schemes. This move was in line with the shift towards flexibility and PBP schemes. The explanatory note to the Integrated Planning Bill 1997 (Qld) provided that planning schemes are intended to be "dynamic documents that are responsive to changing circumstances, rather than absolute pronouncements of policy enshrined in regulation".[63]

VI HOW HAVE PERFORMANCE-BASED PLANNING SCHEMES PERFORMED?

It has been almost 20 years since PBP was introduced in Queensland. So, how has it endured the years? PBP certainly has its purported advantages, but in the context of a focus on planning schemes, the PBP system has not fared well. Critics of the IPA and its performance-based approach were not in short supply, with David Nicholls even describing it as a "lawyer's picnic" and a "developer's

57 Donald Elliott *A Better Way to Zone: Ten Principles to Create More Livable Cities* (Island Press, Washington (DC), 2008) at 23–24.

58 Baker, Sipe and Gleeson, above n 4, at 396.

59 Frew, above n 4, at 9.

60 Eggers, above n 33, at 8.

61 Baker, Sipe and Gleeson, above n 4, at 396; Frew, Baker and Donehue, above n 11, at 247; and Wendy Elizabeth Steele "Strategy-Making For Sustainability: An Institutional Approach to Performance-Based Planning in Practice" (PhD Thesis, Griffith University, 2010).

62 Frew, Baker and Donehue, above n 11.

63 Integrated Planning Bill (Qld) (explanatory note) at 32.

nightmare".[64] Essentially, the criticisms of PBP schemes focused on matters of complexity but more specifically, PBP schemes have been criticised as:

(a) lengthy and cumbersome;[65]
(b) lacking consistency;[66]
(c) taking too long[67] and costing too much to prepare;[68] and
(d) advancing uncertainty.[69]

VII WHY THE FAILURES?

Although the shift towards PBP coincided with lengthier and more complex planning schemes, this article does not argue that the *concept* of PBP is solely to blame for complex planning schemes. Instead, the failures arise because of a combination of factors, discussed below.

A An Enlarged Role for Planning

From the outset of the IPA reforms, Queensland planning schemes had an enlarged role. In promoting the reform agenda from the perspective of the environmental movement, it was made known that PBP schemes would need to explain how areas of ecological significance were to be managed and protected.[70] More broadly, the IPA required local governments to prepare their planning scheme in a way that seeks to achieve ecological sustainability.[71] This was not a straightforward task. Introducing the requirement for planning schemes to not just regulate development, but to balance the environmental, social and economic consequences of development during a phase of rapid population growth in Queensland was ambitious.[72]

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64 Nicholls, above n 4.

65 Fogg, above n 4, at 66 identifies that, under the Local Government Act 1936 (Qld), the average planning scheme was approximately 20 pages long and under the LGP&E Act it grew to about 120 pages. IPA planning schemes were up above 500 pages long (for example: Maroochy Plan 2000).

66 Frew, above n 4, at 61.

67 In June 2007, there were still four Queensland local government areas without an IPA compliant planning scheme. It was not until 2009 (almost 12 years after the IPA commenced) that the last of the IPA compliant planning schemes commenced.

68 For example, the Integrated Planning Bill 1997 (explanatory note) at 49 provides that it was estimated by the Local Government Association of Queensland (LGAQ) that approximately AUD 25 million had been spent on preparing IPA compliant planning schemes.

69 Frew, Baker and Donehue, above n 11, at 240.

70 Queensland *Parliamentary Debates*, above n 23, at 4087.

71 Integrated Planning Act 1997 (Qld), s 1.2.2.

72 Wendy Elizabeth Steele and Jago Dodson "Made in Queensland: Planning Reform and Rhetoric" (2014) 51 Australian Planner 141 at 141 and 149.

Further, the State required that relevant state planning interests be incorporated into planning schemes. This meant that planning schemes had to cover more issues, which meant more content.[73] It was an exercise in integration and perhaps an example of how extra length is not necessarily equal to extra complexity.

B Queensland Was Flying Blind

In Queensland, PBP was introduced against a backdrop of limited guidance from the State.[74] The law did not explain what it was or how it was to be implemented. When local governments were tasked with the role of preparing PBP schemes, there was no real explanation of how it should be done. The IPA explained that planning schemes would identify desired environmental outcomes for a planning scheme area and facilitation of those outcomes would be achieved through the identification of levels of assessment and codes.[75] But overall, the law was not prescriptive about how to regulate development in a PBP scheme.[76] This flexibility was put forward as a positive, but in reality, at least in the early days, it meant that Queensland was confused about how PBP ought to be expressed and implemented.[77]

Predictably, Queensland's experience was more of an experimental exercise in hybridity than an example of a complete abandonment of the zone-based regulatory system. Local governments muddled their way through the new system, and a hybridised approach to PBP in Queensland prevailed.[78]

C Stretched Resources

The reformed system required a greater administrative effort than zone-based planning and local government resources were stretched. PBP requires that planning staff are capable and willing to exercise discretion. Even as early on as 1999, research revealed that IPA's complexity and administrative burden had exhausted local government resources.[79] Queensland local governments experienced difficulties in attracting and retaining staff which meant that there were fewer skilled planners to prepare planning schemes.[80]

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73 Integrated Planning Act 1997 (Qld), s 2.1.3.

74 Frew, Baker and Donehue, above n 11, at 242.

75 Integrated Planning Act 1997 (Qld), s 2.1.3; and England, above n 4, at 57.

76 Fogg, above n 4; and Yearbury, above n 19, at 199–200.

77 Frew, Baker and Donehue, above n 11, at 242.

78 At 239–250.

79 England, above n 39, at 324–325.

80 Fogg, above n 4, at 65.

This sentiment is reflected in research for the Local Government Association of Queensland (LGAQ) in 2003, which revealed that 53 per cent of local governments faced difficulties in attracting appropriately qualified and experienced planning staff. Further, 42 per cent of local governments said that they had difficulty in retaining their planning staff.[81] It is unsurprising that, tasked with the role of preparing planning schemes in a new and uncertain context, planning scheme drafters became risk averse.[82]

D Risk Aversion

Risk aversion has been defined as a "decreasing preference for an increasing risk".[83] In Frew, Baker and Donehue's research, risk aversion has a more specific context. They analysed 17 Queensland planning schemes to determine how land use planning was managed in the framework of a performance-based (IPA) system. Additionally, 41 semi-structured interviews were conducted, with a range of planning professionals, to understand the implementation of PBP in Queensland. The research supports the literature in finding that Queensland adopted a hybridised approach to PBP which produced a risk-averse approach to planning scheme preparation that (attempted to) favour certainty over flexibility.[84]

PBP removed the ability for local governments to freely prohibit development.[85] The inability to prohibit development created uncertainty for local government planning scheme drafters. In order to discourage unwanted development, local government planning schemes were "bullet proofed" and attempts were made to capture all possible scenarios.[86] However, it seemed unmanageable to draft a planning scheme that predicted every possible circumstance. Codes became complex, inconsistent and took longer to draft. This had the result of creating planning schemes that focused on preventing unwanted development rather than promoting innovative and appropriate developments. It also meant that planning schemes were longer and more complex than would have been necessary, if the risk averse behaviour had not ensued.[87]

A long planning scheme does not necessarily mean that it is a complex one. The volume of material that makes up a planning scheme is not the sole indicator of complexity or simplicity.

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81 Michael Leong and Paul Smith "Does IPA Deliver its Promise?" (paper presented to the Queensland Environmental Law Association Conference, Surfers Paradise, May 2003) at 78.

82 Frew, Baker and Donehue, above n 11, at 249.

83 Aldo Montesano "On the Definition of Risk Aversion" (1990) 29 Theory and Decision 53 at 53–54.

84 Frew, Baker and Donehue, above n 11, at 249–250.

85 The power to prohibit was removed under the Integrated Planning Act 1997 (Qld) and only limited prohibitions were allowed under the Sustainable Planning Act 2009 (Qld).

86 Frew, Baker and Donehue, above n 11, at 248–249.

87 Frew, Baker and Donehue, above n 11; and Fogg, above n 4.

Simplicity is not that simple. A large body of law can be useful if it has a purpose (for example, if it clearly explains a message). However, lengthy rules are problematic when their meaning cannot be properly deciphered. There is value in clear, consistent and comprehensible laws.[88] When the IPA was introduced, it was said that for a planning system to perform well, development requirements must be clear.[89] The production of planning schemes in excess of 1,000 pages with a multiplicity of codes increases scope for confusing interrelationships and internal inconsistencies. Further, planning schemes are for the benefit of (and used by) the broader community. If planning schemes are complex, they become inhospitable to the general public and exclusive to specialists. The general community becomes alienated.[90] This all seems to defeat the achievement of Yearbury's goals around clarity.[91]

VIII WHAT WAS DONE TO ADDRESS THE FAILURES?

The IPA reforms aimed to simplify planning laws by creating a one-stop shop and by incorporating flexibility. But the unintended consequence was that planning schemes became increasingly lengthy and complex. The IPA was amended time after time, to the point that the planning profession gave up trying to keep track of the number of amendments that the IPA withstood.[92] Like PBP, the IPA seemed to be an experimental exercise with constant attempts to get it right. Eventually, the State listened to the demands for further reform and shifted its focus to creating laws that produced simpler planning schemes. The Government started to accept that the IPA was not going to deliver on its reform promises until well drafted planning schemes were in place.[93]

The Government's answer was the SPA, which commenced on 18 December 2009.[94] The planning community welcomed back some degree of rigidity, certainty and consistency in the form of SPSPs and limited prohibitions. In the context of planning schemes, these were the most significant reforms under the SPA. The State's shifted emphasis did not change its focus away from simplicity. However, the new version of simplicity was to be achieved through uniformity and more state government guidance. The SPSPs provided a consistent structure and format for planning schemes. It was a requirement that local governments ensured that their planning schemes appropriately reflected the SPSPs. SPSPs were implemented through the Queensland Planning Provisions (QPP), essentially a

88 David Wallis "The Tax Complexity Crisis" (2006) 35 Australian Tax Review 274 at 280.

89 Yearbury, above n 19, at 198.

90 Stein, above n 9, at 12.

91 Fogg, above n 4, at 66.

92 Nicholls, above n 4, at 1.

93 At 2.

94 Sustainable Planning Act 2009 (Qld).

template for preparing a planning scheme. In the name of greater certainty and consistency, the QPP represented a shift towards embracing some degree of prescription in the name of simplicity.[95]

In a shift back towards pre-IPA times, to enhance certainty, the SPA explicitly allowed for limited prohibitions and allowed for local governments to prescribe prohibitions in planning schemes, if consistent with the QPP.[96] The prohibitions were limited and controlled by the State, in order to retain a PBP system. Nevertheless, this change represented a clear swing back towards promoting greater certainty and ended Queensland's experiment with planning scheme drafting under the IPA.[97]

So, did these reforms facilitate the creation of simpler planning schemes in Queensland? Based on the attitude and actions of the Queensland Government, the answer seems to be no. The process of preparing planning schemes was still slow and the planning schemes produced were still criticised as unnecessarily complex and lengthy. As at 15 October 2015, only 21 out of 77 Queensland local governments had prepared QPP compliant planning schemes.[98] While the QPP was a step in the right direction, and the concept of risk was acknowledged as something that needed to be addressed, the Government's acceptance of the continuation of lengthy and complex planning schemes raises the question: while the SPA addressed some of the problems identified as contributing to the problematic implementation of PBP schemes, did it sufficiently address concepts of risk?

IX QUEENSLAND'S LATEST PLANNING LAWS

On 12 May 2016, the Queensland Government passed the Planning Act 2016 (Qld). It is said to be a once-in-a-generation reform of the planning system. There is nothing once-in-a-generation about its promises and they echo those that Queensland has seen before. Similar to previous reforms, the new laws promise an efficient system that delivers sustainable outcomes.[99] Perhaps it will be different in that it will succeed in achieving its goals. In terms of risk, it is worth noting some of the legislative changes under the new regime.

The Planning Act sees the removal of the SPSPs that were introduced, under the SPA, to address planning scheme complexities. However, it is not a complete abandonment of the concepts encapsulated in the QPP. The Planning Act allows for a regulation to prescribe the required contents of a planning scheme and the Planning Regulation 2017 (Qld) prescribes standard zones, use terms

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95 Sustainable Planning Bill 2009 (Qld) (explanatory note) at 33–36; and Steele and Dodson, above n 72, at 147.

96 Sustainable Planning Act 2009 (Qld), s 88 and sch 1.

97 Frew, Baker and Donehue, above n 11, at 240.

98 Department of Infrastructure, Local Government and Planning (Qld) "Schedule of New Planning Schemes" (15 October 2015) <www.dilgp.qld.gov.au>.

99 Planning Bill 2015 (Qld) (explanatory note).

and administrative terms.[100] Queensland's experience has revealed, however, that standardisation has only achieved limited success. Alone, it has not produced simpler planning schemes.

So, what about other changes that could impact on the complexity of planning schemes? Regulated activities are categorised in the context of risk.[101] Planning schemes specify categories (or levels) of assessment.[102] When drafting a planning scheme, decisions must be made about the appropriate categories and levels of assessment for all types of proposed development across various parts of the local government area. Should assessment be code or impact assessable? Should development be regulated by the requirement for a development approval at all? These decisions are based on risk.

The Planning Act changes the decision rules for code assessment. A code assessable development application must be approved if it complies with the assessment benchmarks. It can only be refused if it does not comply with the assessment benchmarks and compliance cannot be achieved by imposing reasonable and relevant development conditions.[103] So, there is a risk that, if codes do not cover off all eventualities, councils might be forced to approve unwanted development. As under the IPA, with this in mind, is there scope for councils to revert back to IPA practices of deciding to elevate categories of assessment to avoid this risk? More impact assessment might be perceived to be less risky?[104] This seems counterintuitive and inconsistent with the Government's intention that impact assessment is directed at more "major" (or higher risk) developments.[105] However, it seems likely that impact assessment would be perceived as less risky, with the decision maker given a much wider discretion, more flexibility and a power to have regard to "any other relevant matter" (other than a person's personal circumstances) in their decision making powers under the new regime.[106]

Escalated levels of assessment appear counterintuitive and decisions about the appropriate levels of assessment should be informed by the appropriate considerations. There have been calls for prescriptive guidance for making decisions about levels of assessment.[107] Rather than prescriptive guidance, could a clear, risk-based framework for making such decisions (or decisions more generally

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100 Planning Act 2016 (Qld), s 16(2).

101 England, above n 41, at 142.

102 Sustainable Planning Act 2009 (Qld), s 88(2) and this is carried forward in Planning Act 2016 (Qld), s 43.

103 Planning Act 2016 (Qld), s 60.

104 Andrew Bullen "Codes: An Effective Instrument for Achieving Performance Based Planning Outcomes?" (paper presented to the Queensland Environmental Law Association, Brisbane, 29 March 2004) at 6.

105 Queensland *Parliamentary Debates* Legislative Assembly, 11 May 2016, 1709 (Mr Walker).

106 Planning Act 2016 (Qld), s 45.

107 See for example the Environmental Defender's Office's comments cited in Planning Bill 2015 (select committee report) at 18.

about setting levels of assessment) avoid the temptation for local governments to raise levels of assessment because it seems like a safer option?

Only time will tell whether the newest reforms will be successful in facilitating the creation of simpler planning schemes. But it seems likely that for the latest reforms to have more success in addressing complex planning schemes, they must adequately address the risk aversion identified as contributing to the complexity of Queensland's PBP schemes.[108] There are some hints of the Government adopting a risk-based approach in its new laws. Positive changes to the development assessment process have the potential to deliver related positive changes to planning schemes.[109] However, the author questions whether the possible application of a risk-based approach to planning scheme preparation has been exhausted.

X WHY SHOULD QUEENSLAND CONTEMPLATE A FORMALISED RISK-BASED APPROACH?

Risk is an interdisciplinary concept. It is studied in engineering, social science, cultural studies, economics, law and science.[110] Theories of risk have been explored by a wide range of commentators such as Ulrich Beck, Mary Douglas, Ortwin Renn, Julia Black, Robert Baldwin and Malcolm Sparrow. This article does not seek to explain the various theories that have arisen out of that research, but argues in favour of further research about the possible application of a risk-based approach to planning scheme preparation in Queensland.[111]

Still, it is useful to consider the meaning of risk. Risk definitions are diverse and depend on the context of their application. In a planning context, risk has been defined as follows:[112]

Risk = Hazard x Exposure x Vulnerability

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108 Frew, Baker and Donehue, above n 11, at 249–250.

109 See for example Planning Bill 2015 (Qld) (explanatory note) at 13 which provides that the Government is intending to ensure that the Bill is "more risk appropriate". It also provides that the decision to provide fewer categories of development is intended to give confidence to a local government to focus on higher-risk development. The explanatory note to the Planning Bill 2015 (Qld) at 50 provides that cl 45 (which deals with categories of development) is intended to establish a risk-based approach to categorising assessable development and s 48(3) Planning Act 2016 (Qld) introduces the ability for developers, in limited circumstances, to choose from a list of appropriately qualified "alternative" assessment managers.

110 Malcolm Sparrow *The Character of Harms: Operational Challenges in Control* (Cambridge University Press, Cambridge, 2008) at 167.

111 However, the existence of economic theories such as the expected utility theory and prospect theory are acknowledged.

112 Laurie Johnson, Laura Dwelley-Samant and Suzanne Frew *Planning for the Unexpected: Land-Use Development and Risk* (American Planning Association, Chicago, 2005) at 3.

This definition acknowledges that risk is intimately connected to the concept of uncertainty. Beck's perception of risk repeatedly discusses the concept of uncertainty, acknowledging that risks are fundamentally uncertain.[113] Uncertainty can be perceived as risk.[114] It is inescapable that some (if not all) decisions are made in the context of imperfect knowledge which creates varying degrees of uncertainty.[115] Risk is a normal part of life and the hazards associated with most risks can only ever be minimised; not completely ruled out.[116] But, rational decision making requires that risk is clearly expressed and weighed against other costs and benefits.[117] With that in mind, it is unsurprising that risk aversion is central to human behaviour.[118] It seems natural that the law has acknowledged risk in its regulatory approach.

The application of risk concepts in regulation has grown significantly over the past 30 years.[119] Risk-based regulation has been widely praised in the context of regulatory reform, in various countries across the world. It has been endorsed as a way of managing risk and uncertainty.[120] It has become central to the goal of *better* regulation.[121] It has been supported by the Commonwealth,[122] and, in the context of enforcement, it has been encouraged by the Productivity Commission.[123] Like a planning

113 See for example Ulrich Beck "Foreword" in Stuart Allan, Barbara Adam and Cynthia Carter (eds) *Environmental Risks and the Media* (Routledge Publishing, London, 2000) xii.

114 Susannah Gunn and Jean Hillier "When Uncertainty is Interpreted as Risk: An Analysis of Tensions Relating to Spatial Planning Reform in England" (2014) 29 Planning Practice and Research 1.

115 Keith Hayes and others "Severe uncertainty and info-gap decision theory" (2013) 4 Methods in Ecology and Evolution 601; and Stanley Kaplan and John Garric "On the Quantitative Definition of Risk" (1981) 1 Risk Analysis 11.

116 Ulrich Beck *Ecological Enlightenment: Essays on the Politics of the Risk Society* (Humanity Books, New York, 1995); and Ulrich Beck *Risk Society: Towards a New Modernity* (Sage Publications, London, 1992).

117 Kaplan and Garric, above n 115.

118 Ruixin Zhang, Thomas Brennan and Andrew Lo "The Origin of Risk Aversion" (2014) 111 PNAS 17777 at 17777.

119 Peterson and Fensling, above n 3, at 2.

120 For example following the Hampton Review, the Better Regulation Task Force endorsed a risk-based approach to regulation in the United Kingdom. More recently, the Regulator's Code 2014 reflects a risk-based approach to regulation and is available at <www.gov.uk>.

121 Peterson and Fensling, above n 3, at 28.

122 Department of Prime Minister and Cabinet, Australia *The Australian Government Guide to Regulation: Cutting Red Tape* (2014).

123 See for example Productivity Commission *Performance Benchmarking of Australian Business Regulation: The Role of Local Government as Regulator* (Research Report, July 2012).

scheme, it provides a formalised framework for decision making, allowing for established criteria to set priorities in an orderly and rational way.[124]

So, what is risk-based regulation? It has more than one meaning. It can broadly cover the regulation of risks to society (for example, risks to the environment, safety or health). Alternatively, it can involve the development of decision making frameworks that prioritise regulatory activities and resources, based on the level of risk that the regulated "firm" poses to the regulator's objective.[125] Baldwin and Black describe it as the application of a systematic framework that uses an evidence-based risk assessment process to give priority to regulatory activities with the highest risk. It follows that resources are allocated to those resources, accordingly.[126] That said, risk-based regulation is not merely a mechanical exercise of using quantitative data to deal with regulatory problems. It varies in its complexity and can be applied along with other regulatory strategies.

Risk-based regulation frameworks vary across countries and vary in their complexity. But they all focus on risks rather than rules. The starting point is the identification of the risks that regulators are seeking to manage. It relies on an acceptance that regulators cannot enforce every rule at all times and decisions must be made about the regulator's focus. Although this concept is not new, risk-based regulatory frameworks make it explicit and provide a system for making those decisions.[127]

Risk-based regulatory theory has been embraced as a regulatory tool in several overseas jurisdictions. Risk-based regulation is growing in popularity amongst regulators and regulatory reforms.[128] For example, the United Kingdom has widely applied risk-based regulation. It has been researched and applied in the context of environmental law, finance and health, amongst others. The Organisation for Economic Co-operation and Development has acknowledged that risk-based approaches to regulation provide benefits such as increased efficiency and better protection from hazards.[129]

A risk-informed approach to building regulation is developing in Australia.[130] The building regulation industry has been applying knowledge about risk-based regulatory theory and exploring

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124 Sparrow, above n 110, at 244–254.

125 Organisation for Economic Co-operation and Development *Risk and Regulatory Policy: Improving the Governance of Risk* (OECD Publishing, OECD Reviews of Regulatory Reform, Paris, 2010) [OECD] at 187.

126 Peterson and Fensling, above n 3, at 2.

127 Julia Black and Robert Baldwin "Really Responsive Risk-Based Regulation" (2010) 32 Law and Policy 181 at 184.

128 Paterson and Fensling, above n 3.

129 OECD, above n 125, at 11, 15 and 33.

130 For example, the Inter-Jurisdictional Regulatory Collaboration Committee convened a 2006 workshop on the use of risk theory in building regulations.

how risk might be used as a basis for drafting performance criteria. Further research would provide insights about whether the lessons learnt in the building regulation context can be used to address the legal problem of complex planning schemes in Queensland. Risk concepts and codes are central to both planning schemes and building regulation.[131] Building regulation is closely aligned with the regulation of planning.[132] Like planning schemes, building regulation relies heavily on the use of codes to convey assessment criteria.[133] Another parallel is that building regulations are legal instruments with the force of law, with both instruments attempting to manage the adverse effects of development in a way that aims to protect the amenity, safety and health of communities. Importantly, similar to the planning context, building regulation operates in a politically driven context. This will be relevant to risk appetite issues.[134] Perhaps most relevantly, building regulations and planning schemes also share a similar history of being prescriptive in nature, but have shifted towards a flexible, performance-based approach, which bolsters its relevance to the problem of complex (performance-based) planning schemes.[135]

But is risk-based regulation appropriate for planning law? A risk-based approach must be fit for purpose and it is important to acknowledge that its success in building regulation (or any other area) does not guarantee its success in the context of planning law. There is no *silver bullet* in terms of its application to every jurisdiction or area of law. The nuances of Queensland's planning laws must be more deeply explored in order to understand if, or how, there is a role for a more explicit risk-based approach. While acknowledging that further research is necessary, the author can see potential for adopting a risk-based approach to the regulation of planning in Queensland.

Concepts of risk and uncertainty and a focus on outcomes (or risks) rather than rules are part of risk-based regulation. These concepts resonate strongly in terms of Queensland's planning laws and provide a foundation for further exploration of how risk and uncertainty are a part of Queensland's planning laws and practice. Further, risk-based regulation is part of the shift away from prescriptive laws to performance-based approaches.[136] Again, this aligns with the regulation of planning since the 1990s.

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131 Inter-Jurisdictional Regulatory Collaboration Committee *The Use of Risk Concepts in Regulation* (report of the IRCC Workshop, San Franciso, October 2006).

132 For example, the carrying out of building work is development pursuant to the Sustainable Planning Act 2009 (Qld), s 7.

133 See for example the Building Code of Australia.

134 Black and Baldwin, above n 127, at 184.

135 Brian J Meacham "Risk-informed performance-based approach to building regulation" (2010) 13 Journal of Risk Research 877.

136 Paterson and Fensling, above n 3, at 6.

Flexibility is central to PBP but there are challenges in finding the appropriate balance between flexibility and certainty (or prescription). Queensland's hybrid interpretation of PBP still relies on some level of prescription (for example, acceptable outcomes).[137] Planning scheme preparation calls for decisions about when prescription should trump flexibility.[138] Risk-based regulation relies on a flexible approach.[139] However, it acknowledges that prescription is limiting because laws cannot effectively anticipate all eventualities.[140] The key may be to understand when prescription is appropriate.

Planning is an exercise in risk assessment and risk management. At least in the context of development control, it is about managing the effects of development, which implies that developments bring about the risk of adverse consequences. Adverse impacts include, for example: negative effects on amenity; risks to people and property from natural processes;[141] risks of environmental harm and unsustainable practices; risks of disorderly development; and pressures on infrastructure provision.[142] There is a need to balance these risks against the need for development,[143] and often, a need to balance these risks against each other.[144] A risk-based approach provides a systematic framework for assessing and managing risks. Risk assessments are complex. Risk management can be challenging because it is influenced by politics and decisions about risk appetite.[145] Would a systematic framework for assessing and managing risks help to simplify those exercises?

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137 Frew, Baker and Donehue, above n 11, at 247.

138 Local governments are limited in their power to prohibit development. Pursuant to the Sustainable Planning Act 2009 (Qld), s 106(1)(c) and the Planning Act 2016 (Qld), s 43(4), a planning scheme can only state that development is prohibited if the standard planning scheme provisions/regulations allow it to do so. Nevertheless, at a state government level, this decision must be made.

139 Neil Gunningham "Two Cheers for Prescription? Lessons for the Red Tape Reduction Agenda" (2015) 38 UNSWLJ 936.

140 Peterson and Fensling, above n 3, at 26; and Black and Baldwin, above n 127, at 203.

141 See for example Department of Infrastructure, Local Government and Planning (Qld) *State Planning Policy* (July 2017) at 47–50.

142 Sustainable Planning Act 2009 (Qld), s 5 and ch 8.

143 Sustainable Planning Act 2009 (Qld), s 326.

144 Sustainable Planning Act 2009 (Qld), s 3 provides that the purpose of the Act is to seek to achieve Ecologically Sustainable Development (ESD) and s 8 explains that the concept of ESD involves the balancing of ecological, economic and social considerations. Equivalent provisions are carried forward in the Planning Act 2016 (Qld) and were in place under the Integrated Planning Act 1997 (Qld).

145 See for example Bridget M Hutter "The Attractions of Risk-based Regulation: accounting for the emergence of risk ideas in regulation" (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, Discussion Paper No 33, March 2005) at 13; and Gunningham, above n 139.

XI CONCLUSION: POTENTIAL FOR A RISK-BASED FUTURE?

Since the introduction of PBP, Queensland's planning schemes have been criticised as complex and lengthy.[146] The IPA reforms introduced Queensland to PBP and responded to calls for simplicity, acknowledging concerns about the complexity of Queensland's planning law system and the urgent calls for reform.[147] Yet, overall, the literature provides a picture of Queensland being left with a complex and lengthy set of planning laws that produced complex and lengthy planning schemes.[148] Emeritus Professor Alan Fogg, said that the life of a developer under the pre-IPA planning system was relatively simple and modern planning schemes are more complex than ever.[149]

PBP promised flexibility over prescriptive regulations and the IPA reforms aimed to address the complexity of the former planning system in Queensland. But there is a tension between flexibility and certainty, and a consistent theme across this body of research is that the two concepts are difficult to reconcile.[150] PBP is said to balance certainty and flexibility by setting quantitative benchmarks but allowing flexibility in the method of achievement of those benchmarks. However, in the case of Queensland's experience with PBP, the theoretical benefits have been questioned.[151]

It is important that planning schemes strike the right balance between flexibility and certainty. As expressed by Reynolds and Anderson:[152]

> The balance between flexibility and certainty is at the nub of any planning system. Mostly, this balance is struck via the documents that are prepared within the system. But the system also has a role, particularly in how it establishes the hierarchy of documents and the rules that govern decision-making.

Legislative reforms have focused on improving the system. In the context of planning law, the *documents* prepared within the system are primarily the planning schemes. Planning schemes are statutory documents with the force of law.[153] If they are uncertain and complex, it causes debate about

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146 See for example England, above n 4; Fogg, above n 4; and Frew, Baker and Donehue, above n 11, at 240.

147 Integrated Planning Bill 1997 (Qld) (explanatory note) at 2.

148 See for example Nicholls, above n 4.

149 Alan Fogg "Regulatory Efficiency and Development Control" (paper presented to the Queensland Environmental Law Association, Brisbane, December 2002) at 12.

150 See for example Philippa England "IPA Planning Schemes: Is there a Difference?" (2006) 23 EPLJ 81; Reynolds and Anderson, above n 2; and Wendy Elizabeth Steele and Kristian J Ruming "Flexibility versus Certainty: Unsettling the Land-use Planning Shibboleth in Australia" (2012) 27 Planning Practice and Research 155.

151 Frew, Baker and Donehue, above n 11.

152 Reynolds and Anderson, above n 2, at 13.

153 Integrated Planning Act 1997 (Qld), s 2.1.23.

their interpretation. A lack of certainty is "potentially fatal" to the successful operation of a PBP system.[154]

Risk-based regulation has been given much attention in other areas of law and is widely endorsed and praised by regulatory reformers.[155] Perhaps it is time for the planning law community to better explore if or how a risk-based approach might address the issue of complex planning schemes.

154 Wypych, Sipe and Baker, above n 39, at 29.

155 Black and Baldwin, above n 127, at 181.