Even with the best laid Local Government Infrastructure Plan (or Water Netserv Plan, or Priority Infrastructure Plan, or Headworks Planning Scheme Policy, or other statutory infrastructure plan), delivering the right size and specification infrastructure at the right time is not straightforward. Things happen. In the last few years we have seen:

(a) the renewable energy project boom in regional Queensland have significant impacts on State and Council roads;
(b) the development of a declared Priority Development Area trigger the need for new roads, public transport, water, sewer, health and education infrastructure;
(c) development being approved in an emerging community or rural zone (outside the priority infrastructure area) requiring substantial out of sequence infrastructure;
(d) assumptions about development density or sequencing in an infrastructure plan not aligning with the market drivers for development density or the unlocking of developable land;
(e) planning legislation changes standardising requirements for infrastructure charges, credits, offsets, and refunds, and introducing a new process for converting non-trunk infrastructure to trunk infrastructure; and
(f) infrastructure plan reviews not completed within the 5 year statutory time frame.

Each of these matters presents significant challenges for local governments and water businesses in servicing development and managing industry and community expectations.

This presentation will discuss the legal options for responding to infrastructure challenges, including:

(a) conditions for necessary trunk infrastructure, additional payment conditions and conditions for non-trunk infrastructure;
(b) tips and traps for effective infrastructure agreements;
(c) planning scheme provisions to foster infrastructure outcomes; and
(d) conversion applications, including an analysis of the standard conversion criteria and recent case law.

**Speaker biography**

Sarah is a planning and environment lawyer with specialist experience in infrastructure planning and agreements. She acts for local government, state government agencies and government owned corporations.

Sarah acted for Unitywater and the Department of Transport and Main Roads in relation to the infrastructure agreements for the Caloundra South Priority Development Area, and acts for the State in relation to infrastructure planning and agreements for other greenfield development areas. Sarah also acts for private developers in relation to conversion applications.

Keywords: Infrastructure, planning, charges, law, conditions

# Introduction

1.1 Even with the best laid Local Government Infrastructure Plan (or Water Netserv Plan, or Priority Infrastructure Plan, or Headworks Planning Scheme Policy, or other statutory infrastructure plan), delivering the right size and specification infrastructure at the right time is not straightforward. Things happen.

1.2 In the last few years, I have
seen the following issues come across my desk:

(a) the renewable energy project boom in regional Queensland have significant impacts on State and Council roads;
(b) the development of a declared Priority Development Area trigger the need for new roads, public transport, water, sewer, health and education infrastructure;
(c) development being approved in an emerging community or rural zone (outside the priority infrastructure area) requiring substantial out of sequence infrastructure;
(d) assumptions about development density or sequencing in an infrastructure plan not aligning with the market drivers for development density or the unlocking of developable land;
(e) planning legislation changes standardising requirements for infrastructure charges, credits, offsets, and refunds, and introducing a new process for converting non-trunk infrastructure to trunk infrastructure; and
(f) infrastructure plan reviews not completed within the 5 year statutory time frame.

1.3 Each of these matters presents significant challenges for local governments and water businesses in servicing development and managing industry and community expectations.

Overview
1.4 This presentation will discuss the legal options for responding to infrastructure challenges, including:

(a) conditions for necessary trunk infrastructure, additional payment conditions and conditions for non-trunk infrastructure;
(b) tips and traps for effective infrastructure agreements;
(c) planning scheme provisions to foster infrastructure outcomes; and
(d) conversion applications, including an analysis of the standard conversion criteria and recent case law.

2 Infrastructure planning
2.1 Infrastructure planning is achieved through two statutory mechanisms:

(a) the Local Government Infrastructure Plan (LGIP) (or Water Netserv Plan for Unitywater and QUU); and
(b) the planning scheme, in its land use planning function.

2.2 The role of the LGIP is to:

(a) identify the Priority Infrastructure Area (PIA);
(b) state assumptions about population and employment growth;
(c) states assumptions about the type, scale, location and timing of future development;
(d) include plans for trunk infrastructure; and
(e) state the desired standard of service for development infrastructure.

2.3 Council is required to be able to fund the trunk infrastructure identified in its LGIP from a combination of sources including infrastructure charges and rates.

2.4 The planning scheme is to set out integrated State, regional and local planning and assessment policies for a local government area. In practice, this is achieved through zoning and overlay mapping, coupled with local area plans and other assessment provisions.

2.5 The different roles of these two documents is important:

(a) the planning scheme deals with what can be built and where (through performance based planning provisions); and
(b) the LGIP makes assumptions and projections about when that development will be built, in order to plan the infrastructure required to service that development.

3 Infrastructure charges notice
3.1 An Infrastructure Charges Notice (ICN) must be issued after an approval is given where an ‘adopted charge’ applies under the relevant Infrastructure Charges Resolution/Distributor-Retailer’s Board Decision. The charges must be consistent with the State Planning Regulatory Policy (adopted charges) which caps the amounts that may be levied.

3.2 An ICN, like a development approval, attaches to land. The ICN is a land use basis for calculating charges. i.e. for residential development, it involves multiplying the number of house blocks by the applicable rate. The ICN is not intended to reflect the cost of providing infrastructure to the development.

3.3 The ICN may only levy charges for the additional demand generated by the approved development e.g. an ICN for an approval to subdivide
two residential lots into six residential lots, must include a credit for the two existing lots and only charge for the four ‘new’ lots.

3.4 The ICN must state how the levied charge has been worked out and whether an offset or refund applies, and when the refund will be given. This requirement came into effect in 2014 and has overcome the need for infrastructure agreements for some smaller projects.

3.5 The rules for offsets and refunds are complex and depend on the nature of the condition imposed and the LGIP expectations for the land. As a starting point, it is useful to remember that:

(a) a necessary infrastructure condition may trigger either an offset or a refund; but
(b) an additional payment condition can only trigger a refund; and
(c) a non-trunk infrastructure condition will not trigger either an offset or a refund.

3.6 I will first step through the types of infrastructure conditions, then explain the applicable offset and refund triggers.

4 Infrastructure conditions

4.1 Trunk infrastructure is defined as infrastructure of a distributor-retailer (DR)/local government that is:

(a) development infrastructure identified in the distributor-retailer’s water netserv plan/Council’s LGIP as trunk infrastructure; or
(b) development infrastructure that, because of a conversion application, becomes trunk infrastructure; or
(c) development infrastructure that is required to be provided under a necessary infrastructure condition imposed under section 99BRCR(2) of the South East Queensland (Distribution and Retail Restructuring) Act 2009 (Qld) (DR Act) or section 128(3) of the Planning Act 2016 (Qld) (Planning Act).

4.2 If an approval contains conditions about infrastructure, the decision notice must state the provision of either the DR Act or the Planning Act, under which it was imposed.

Necessary infrastructure conditions

4.3 A ‘necessary infrastructure condition’ can only be imposed where:

(a) trunk infrastructure has not been provided, or has been provided but is not adequate;
(b) the trunk infrastructure will be located on:
   (i) the premises the subject of the development application (regardless of whether the infrastructure is necessary to service that premises); or
   (ii) other premises, but is necessary to service the subject premises; and

either

(c) the netserv plan/LGIP identifies adequate trunk infrastructure to service the subject premises, and the condition requires the provision of:
   (i) the infrastructure identified in the plan; or
   (ii) different trunk infrastructure delivering the same desired standard of service; or

(d) the netserv plan/LGIP does not identify adequate trunk infrastructure to service the subject premises, and the condition requires the provision of:
   (i) infrastructure necessary to service the connection/development consistent with the assumptions stated in the plan about the type, scale, location, timing or intensity of future development.

4.4 In either case, the condition will be taken to comply with the ‘relevant or reasonable’ requirement for conditions if the infrastructure is:

(a) the most efficient and cost effective solution for servicing other premises in the general area of the subject premises; and
(b) for infrastructure located on the subject premises, the provision of the infrastructure:
   (i) not an unreasonable imposition on the connection/development; and
   (ii) reasonably required for the connection/development.

---

1 Planning Act 2016 (Qld), section 128(1); South-East Queensland Water (Distribution and Retail Restructuring) Act 2009 (Qld), section 99BRCQ.
2 Planning Act 2016 (Qld), section 128(3); South-East Queensland Water (Distribution and Retail Restructuring) Act 2009 (Qld), section 99BRCR.
3 South-East Queensland Water (Distribution and Retail Restructuring) Act 2009 (Qld), section 99BRCS.
Extra payment condition

4.5 A DR/Council may impose an extra/additional payment condition for additional trunk infrastructure costs if:

(a) the connection exceeds the Netserv plan/LGIP planning through greater demand, bring forward or being outside the PIA/connection area; AND

(b) the connection would impose additional trunk infrastructure costs on Unitywater after taking into account:

(i) levied charges for the trunk infrastructure; and

(ii) trunk infrastructure provided, or to be provided, by the applicant under the approval and any infrastructure agreement.

4.6 The extent of the costs that may be required depends on whether the proposed development is in or out of the PIA.

4.7 The applicant may elect to provide all or part of the trunk infrastructure the subject of an extra payment condition instead of making the payment. The extra payment condition must state any requirements by the Council for providing the trunk infrastructure, including when that infrastructure must be provided.

Non trunk infrastructure condition

4.8 Conditions about non-trunk infrastructure may be imposed where the condition is for non-trunk infrastructure for:

(a) a network, or part of a network, internal to the premises;

(b) connecting the premises to external infrastructure networks; and

(c) protecting or maintaining the safety or efficiency of the water infrastructure network of which the non-trunk infrastructure is a component.

5 Offsets and refunds

5.1 Where a necessary infrastructure condition has been imposed and an adopted charge applied, the developer is entitled to an offset or refund.

IPWEA Knowledge Centre

The new IPWEA Knowledge Centre is a vital resource for anyone working in the public works sector in Queensland.

The Centre is fully searchable by title, speaker/author, subject, keyword, event or date. Resources available in the Knowledge Centre include:

1. Podcasts of state and branch conferences (accessible only to paid conference delegates or conference proceedings subscribers). The podcasts are accompanied by the presenters’ PowerPoint presentation so you can follow the presentation while listening to the podcast.

2. Podcasts with accompanying video of all other IPWEA events

3. Papers submitted for state and branch conferences

4. Articles published in our quarterly e-journal, Engineering for Public Works

5. Articles of relevance to Queensland practitioners sourced by our Information Resources Manager from other states/territories and internationally.

6. IPWEA technical publications including Standard Drawings (accessible only to subscribers)

7. Podcasts of interviews of delegates taken at state and branch conferences

8. Photos of delegates taken at state and branch conferences

The Knowledge Centre is only accessible to IPWEA members. Conference podcasts/videos are only accessible to paid conference delegates. Technical publications are only accessible to subscribers of our technical products.

Join IPWEA today to access this vital resource for the public works sector in Queensland.
5.2 If however, an extra payment condition is imposed, then the developer is only entitled to a refund if the development is completely inside the PIA.

5.3 An offset is not available as a consequence of an extra payment condition.

6 Conversion applications
6.1 A conversion application may be made to convert non-trunk infrastructure to trunk infrastructure where construction of the infrastructure (not the development generally) has not started. The application must be made within 1 year after the relevant approval takes effect.

6.2 A conversion application is decided in accordance with the conversion criteria in Council’s charges resolution or the DRs Board Decision. The Council or DR must have regard to the conversion criteria, and recent case law confirms that compliance with each criterion is not necessary for infrastructure to be properly characterised as trunk infrastructure.  

6.3 The conversion criteria can attempt to protect Council or the DR from the cost of significant infrastructure outside its planning assumptions in its LGIP or Netserv Plan. Some local governments have drafted conversion criteria that explicitly require compliance with all criteria; these conversion criteria have not yet been tested in the Planning and Environment Court.

7 Infrastructure agreements
7.1 Infrastructure agreements play an important role in the delivery of development, particularly where the planning regime does not adequately anticipate the development or its infrastructure requirements. Infrastructure agreements enable infrastructure providers and developers to achieve a commercial agreement about infrastructure.

7.2 An infrastructure agreement is a contract that meets the statutory requirements, attaches to the land (like a development approval) and may override development approvals and infrastructure charges notices.

7.3 Infrastructure agreements have become increasingly prevalent since the introduction of the capped infrastructure charging regime in July 2011. However, infrastructure agreements have long had a role to play in planning and development in Queensland and were formerly described as rezoning agreements or development agreements.

8 Statutory requirements
8.1 An infrastructure agreement is a statutory contract under the Planning Act, the DR Act or the Economic Development Act 2012 (Qld) (ED Act). In order to fulfil the statutory requirements, the infrastructure agreement (IA) must:

- be made pursuant to a relevant section of the Planning Act, the DR Act or the ED Act;
- if obligations will be affected by change of ownership – state how obligations will be fulfilled in that event; and
- if obligations depend on development entitlements that could be affected by a change to a planning instrument - a statement about:
  - (i) refunds or reimbursements, and  
  - (ii) changing or cancelling the obligations if development entitlements are changed without the obligee’s consent.

8.2 If the land owner(s) consents, the infrastructure agreement will attach to the land and bind successors in title.

8.3 The IA will override a development approval or charges notice to the extent of any inconsistency.

8.4 If the IA does not satisfy the statutory requirements, it can still play an important role in the delivery of a development e.g. coordinated projects under the State Development and Public Works Organisation Act 1971 (Qld).

8.5 An IA is not limited by the currency period of the development approval.

9 Key considerations for infrastructure agreements
Determine the infrastructure requirements early.

---

5 R v BCC, ex parte Read [1986] 2 Qd R 35-36 per Thomas J.
9.1 Technical staff for the Infrastructure Provider and Developer should document broad agreements about infrastructure requirements before legal drafting begins.

9.2 Identify areas of uncertainty, such as:
(a) the scale of development;
(b) sequencing of the development;
(c) sequencing of other development using the trunk infrastructure;
(d) timing and standard of the trunk infrastructure i.e. when will it service and who; and
(e) regulatory risks e.g. could the development be called in or declared a Priority Development Area (PDA).

Approvals and legislative context
9.3 The approvals and ICN should be considered, and supported or altered where necessary.
9.4 Be careful that silence on an issue is not treated as no requirements on an issue.
9.5 The IA may require additional ‘contractual’ approvals to address uncertainty in the legislative regime over the life of the IA.
9.6 The IA cannot (generally) override a legislative approval process.
9.7 Consider discretion, fetter and changes to development entitlements:
(a) an IA is not invalid because its fulfilment depends on the exercise of a discretion about an existing or future development approval;
(b) this does not allow a local government/DR to contractually fetter its discretion, but does allow an approval to be a condition precedent to obligations being triggered;
(c) if the IA provides improper incentives to the Council/DR that do not relate to the development, then an approval granted following the IA may be challenged on the basis that the IA provided an irrelevant consideration in the assessment of the application; and
(d) conversely, the Council/DR may properly consider the infrastructure the subject of an IA, in the assessment of the application, if that infrastructure would deliver a benefit to the community.

9.8 Trunk infrastructure is often required external to a development site. The Council/DR should carefully consider whether it has power to acquire land if it is requested to do so.

The purpose of the agreement
9.9 An IA may serve a range of purposes, including:
(a) providing certainty:
   (i) Developer can deliver the infrastructure on their own timetable, not subject to Council’s infrastructure scheduling constraints; and
   (ii) mitigate the risk of legislative or planning change;
(b) override planning constraints:
   (i) facilitate development outside of the Planning Infrastructure Area or Connection Area;
   (ii) support a development application by detailing how the development will be serviced; and
   (c) coordinate multiple interests:
      (i) provide for infrastructure refunds for the lead developer;
      (ii) cost sharing arrangements, but not without risk; and
      (iii) overlapping jurisdiction e.g. Minister for Economic Development Queensland (MEDQ).

10 Conclusions
10.1 Infrastructure planning is a difficult task due to the complexity of the task itself and the uncertainties involved. Infrastructure providers need to be able to engage with a range of tools in order to plan for and respond to infrastructure needs in their jurisdiction.

10.2 Infrastructure agreements are a popular and sometimes essential tool for development proposals to proceed.

10.3 Lawyers need a range of skills: project management, negotiation and communication, knowledge about complex infrastructure charging laws, drafting.

10.4 The teamwork between engineers, planners, inhouse and external lawyers, as well as with their counterparts, will greatly contribute to the success of an agreement.

Acknowledgements
I am grateful for the assistance from my colleague Alesia Shard in preparing this paper.