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LAWYERS

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envisage

Editorial

Welcome to the Autumn edition of Envisage.

Since the commencement of the *Planning Act 2016* on 3 July 2017, a number of commentators have weighed in on whether the Act will bring about any significant change to the planning regime established by the former *Sustainable Planning Act 2009*, and whether that change will be for better or worse. David's article titled "In defence of the Planning Act 2016" kicks off our new edition of Envisage and is well-timed, coinciding with a series of noteworthy decisions in the Planning and Environment Court that have begun to form a body of law about the Planning Act and its application. The decisions in *Jakel Pty Ltd & Ors v Brisbane City Council & Anor*, *Ayre v Brisbane City Council* and *Fairmont Group Pty Ltd v Moreton Bay Regional Council* are important to an understanding of the Planning Act's operation. This edition of Envisage includes an article by Thomas about *Fairmont Group*, with *Jakel Pty Ltd* having been the subject of a previous article.

The early months of 2018 have also seen the State Government introduce a number of key Bills impacting on planning, environment and development. Gemma's article provides an overview of the Parliamentary Committee report on the controversial *Vegetation Management and Other Legislation Amendment Bill 2018*, which was passed on 3 May and received assent on 9 May 2018 (with some provisions having retrospective effect). Robyn's article is the third in our series of alerts in relation to the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018* and summarises aspects of the Committee's report to Parliament on the Bill. That Bill is still before Parliament, with the Minister for Local Government recently foreshadowing that two new provisions would be introduced as amendments to the Bill for Parliament's consideration, namely, an automatic suspension for any Mayor or Councillor charged with one of a series of serious integrity offences, and an expansion of the powers of the Local Government Minister to dismiss or suspend a Council, a Councillor or Mayor in the public interest.

Ben's article discusses a recent and unusual decision of the Minister for State Development, Manufacturing, Infrastructure and Planning to make, on his own accord, Temporary Local Planning Instrument 01/18 for the Ipswich City Council local government area. The TLPI was published in the Queensland Government Gazette on 6 April 2018 and applies to development applications for new or expanded waste activities within the Swanbank/New Chum industrial area. Its stated aim is to provide protection to residential and other sensitive receiving uses from adverse impacts associated with waste activities.

Rounding out this edition are case law updates from Olivia, James and Gemma relating to Court of Appeal decisions that have important implications for potential purchasers of land. Olivia's article about *Trevorrow v Council of the City of the Gold Coast* discusses the Court of Appeal's decision to uphold the decision of the Supreme Court to the effect that a non-applicant land owner can be liable for unpaid infrastructure charges. The Court of Appeal's decision in *Central Highlands Regional Council v Geju*, as discussed by James and Gemma, is significant to both potential purchasers and local governments, as it provides some clarification around the extent of a Council's liability for issuing an erroneous planning and development certificate.

Please enjoy our latest edition of Envisage. We hope it is the highlight of your week (although we suspect that perhaps a certain Royal Wedding might be a bigger drawcard)!

SARAH MACOUN, PARTNER

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LAWYERS

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In defence of the Planning Act 2016

DAVID NICHOLLS

An article recently published by Griffith University argues that the *Planning Act 2016* (**PA**) reduces accountability, public access and influence over planning processes "to a minimum" (The Conversation - author Philipa England, Senior Lecturer at Griffith Law School).

One of the article's main criticisms relates to the power given to assessment managers when assessing code assessable development applications to approve applications that do not comply with some of the assessment benchmarks - PA s60(2)(b).

The article incorrectly suggests that development which does not comply with all of the assessment benchmarks may be approved. S60(2)(b) clearly states the power arises only in respect of "*some*" of the assessment benchmarks.

The reason why s60(2)(b) of the PA introduces flexibility to approve where some assessment benchmarks are not met, is explained in the two examples included in the sub-section:

1. An assessment manager may approve an application for development that does not comply with some of the benchmarks if the decision resolves a conflict between the benchmarks.
2. An assessment manager may approve an application for development that does not comply with some of the benchmarks if the decision resolves a conflict between the benchmarks and a referral agency's response.

Given the complexity and size of current planning schemes, such flexibility is essential. Planning schemes identify numerous codes as assessment benchmarks. Some codes are specific, such as a local or neighbourhood plan code, while others apply across the whole planning scheme area and are triggered, for example, by an overlay map.

If there is an inconsistency between a location specific code and one which applies generally, which one should prevail? There has to be a mechanism for resolving such problems other than mandated refusal, as was the positon under the *Sustainable Planning Act 2009* (**SPA**). Under the SPA, mandated refusal was relaxed where there were "*sufficient grounds*". Those rules were removed under the PA because of the legal and technical complexity they caused, reflected in several decisions of the Planning and Environment Court (**P&E Court**) and Queensland Court of Appeal.

The article's second criticism relates to the removal of the SPA's mandated refusal/sufficient grounds rules, referred to above. The article suggests that the introduction of "*any other relevant matter*" into the assessment framework results in the PA failing to give priority to planning schemes.

I disagree with the author's analysis on this subject.

It implies that the word "relevant" permits other factors to overwhelm clear planning intent expressed in a planning scheme, and fails to recognise the PA's requirement to assess against the relevant assessment benchmarks and then to decide the application based upon that assessment (See PA s45(3) and (5)). I would be very surprised if the category of factors falling under the expression "other relevant matter" becomes as expansive as the author of the article implies. "Other relevant matters" will surely be interpreted in the context of the overall statutory framework.

The examples provided in s45(5) suggest that such matters will be akin to what were previously "*grounds*" under the *Integrated Planning Act 1997* (**IPA**) and the SPA. The exclusion of "personal circumstances, financial or otherwise" implies that such considerations must be appropriate in the context of the statutory planning and development assessment framework, and thus have a public interest flavour, as was the case under the previous legislation.

In my respectful opinion, the article indulges in somewhat alarmist speculation, and is inaccurate in the respects outlined above. It would have been preferable to wait until we have some judgments from the P&E Court dealing with these questions, rather than to speculate. Applications made under the PA since last July are working their way through the system and it will not be long before we will know what the Court has to say on these issues.

"In my respectful opinion, the article indulges in somewhat alarmist speculation, and is inaccurate in the respects outlined above."

Committee reports on the *Vegetation Management and Other Legislation Amendment Bill 2018*

GEMMA CHADWICK

The *Vegetation Management and Other Legislation Amendment Bill 2018* (**the Bill**) was introduced into Queensland Parliament on 8 March 2018. The controversial Bill was referred to Committee, with its report released on 23 April 2018.

We have previously written about the Bill, which has major implications for development across Queensland due to the proposal to re-establish controls on regrowth vegetation and to prohibit certain clearing associated with agricultural activities.

Concerns with those issues, and others, were canvassed in the Committee report. However, as outlined below, the Committee has not recommended any changes to the Bill, instead, endorsing it to be enacted into law without amendment. The Bill was passed on 3 May 2018 without substantial amendment and commenced on 9 May 2018.

Key reforms

The Bill contained many components of the previous vegetation clearing "re-instatement" Bill introduced in 2016, (which was defeated on the floor of parliament).

- The Bill increased the level of control on clearing by changing some areas of vegetation that were unregulated (Category X on the regulated vegetation maps) to regulated areas (Category C or R);
- The new Category C area controls now apply to "high value regrowth vegetation", defined as vegetation that has not been cleared for 15 years.
- Restrictions will also apply to clearing native vegetation that is essential habitat for protected wildlife that is 'near threatened', not just endangered and vulnerable. Offsetting requirements will also apply.
- The Bill also proposed changes that will prohibit clearing for some agricultural activities.

Notably, many of the changes proposed already had effect due to the operation of the transitional provisions of the Bill.

Submissions

The Committee received 777 submissions on the Bill, which reportedly represented the largest number of submissions to an inquiry ever received by any committee of the Queensland Parliament. The number of submissions is also particularly notable, given the formal consultation period was also quite short - the Bill was introduced on 8 March 2018 and the formal submission period closed on 22 March 2018.

It is no real surprise that the proposed amendments were supported by environmental groups and (for the most part) opposed by agricultural producers, the mining and development sectors and even some local governments (particularly those in far north Queensland).

There were also real concerns, voiced by Councils and community groups, about the effects on employment and development activities, particularly for Indigenous Australians in Cape York. In response, the Committee recommended the Government "*prioritise the investigation of options to support the establishment of Indigenous Community Use Areas under the Cape York Peninsula Heritage Act 2007*".

If implemented, that would potentially increase the scope for certain activities (including agriculture) on Aboriginal land in the Cape York Peninsula. This is the only recommendation of real substance in the Report.

Key issues

In terms of the key reforms outlined above, the opposing views as noted in the Committee report can be summarised as follows:

High value regrowth vegetation

When introducing the Bill, the Minister stated that restoring the pre-2013 high value regrowth mapping would protect approximately 630,000 hectares of land, and that the changes proposed to the definition of "high value regrowth" would protect an additional 232,275 hectares. Environmental groups supported the amendments which they see as providing significant biodiversity benefits.

Opposition was strongest from agricultural groups, local Councils, landholders and the development sector. Questions were raised about the science behind the 15 year threshold included in the amended Category C definition, and whether it will actually achieve the stated conservation values. A former principal scientist from the Department of Primary Industries and Fisheries noted that regrowth plant composition differs markedly from the original woody stand. Submitters also pointed to issues in the mapping of the new Category C areas, citing inaccuracies with the 2009 mapping layer prepared after a "desk-top" review.

Essential habitat for near threatened species

The extension of the essential habitat mapping to include near threatened wildlife species was again welcomed by environmental groups. In fact, many called for the amendments to go further.

The Committee report notes that landholders and agricultural groups raised a number of concerns about the inclusion of near threatened species in the essential habitat mapping layer. Submissions noted that the *Nature Conservation Act 1992* already regulates endangered, of concern and near threatened species in Queensland and that the Commonwealth's *Environmental Protection and Biodiversity Conservation Act 1999* provides a federal level of protection for significant species. The accuracy of the mapping was again questioned, given the lack of ground-truthing.

A peak development body expressed serious concerns about the flow-on effects to local government planning schemes, noting that the inclusion of near threatened wildlife in the definition of essential habitat and associated changes to the definition of high-value regrowth vegetation would significantly impact the extent of development that can be achieved in urban areas. The submission went on to note that, where development can be achieved, it would come at an increased cost due to the expanded offset requirements.

Agricultural activities

The prohibition on clearing for high value and irrigated high value agriculture is extremely contentious. The Government flagged the changes as a necessary response to 'broad scale clearing' especially in northern Queensland. Environmental groups heralded environmental benefits associated with the amendments, but those arguments were countered by farmers, various local governments and the resource sector.

Opposition to the amendments was based on concerns that the amendments would stifle rural and agricultural development and reduce local employment opportunities. This includes areas already suffering from a downturn in the resources sector, at a time where the State is looking to transition away from a reliance on mining. Concerns were also raised about the proposed changes to regulation of thinning activities.

The term 'thinning' has been replaced with the new concept of 'managing thickened vegetation'. The practice is currently covered by an interim acceptable development code, but that code will be withdrawn, meaning a development application will then be required for 'managing thickened vegetation'. The ability to 'manage thickening vegetation' has important implications for pasture, and other agricultural activities.

Recommendations

Despite the concerns raised, the Committee did not recommend any amendments to the Bill. Most of the Committee's recommendations are directed towards providing resources and increasing education around the reforms to the vegetation management framework.

The Committee did recommend that:

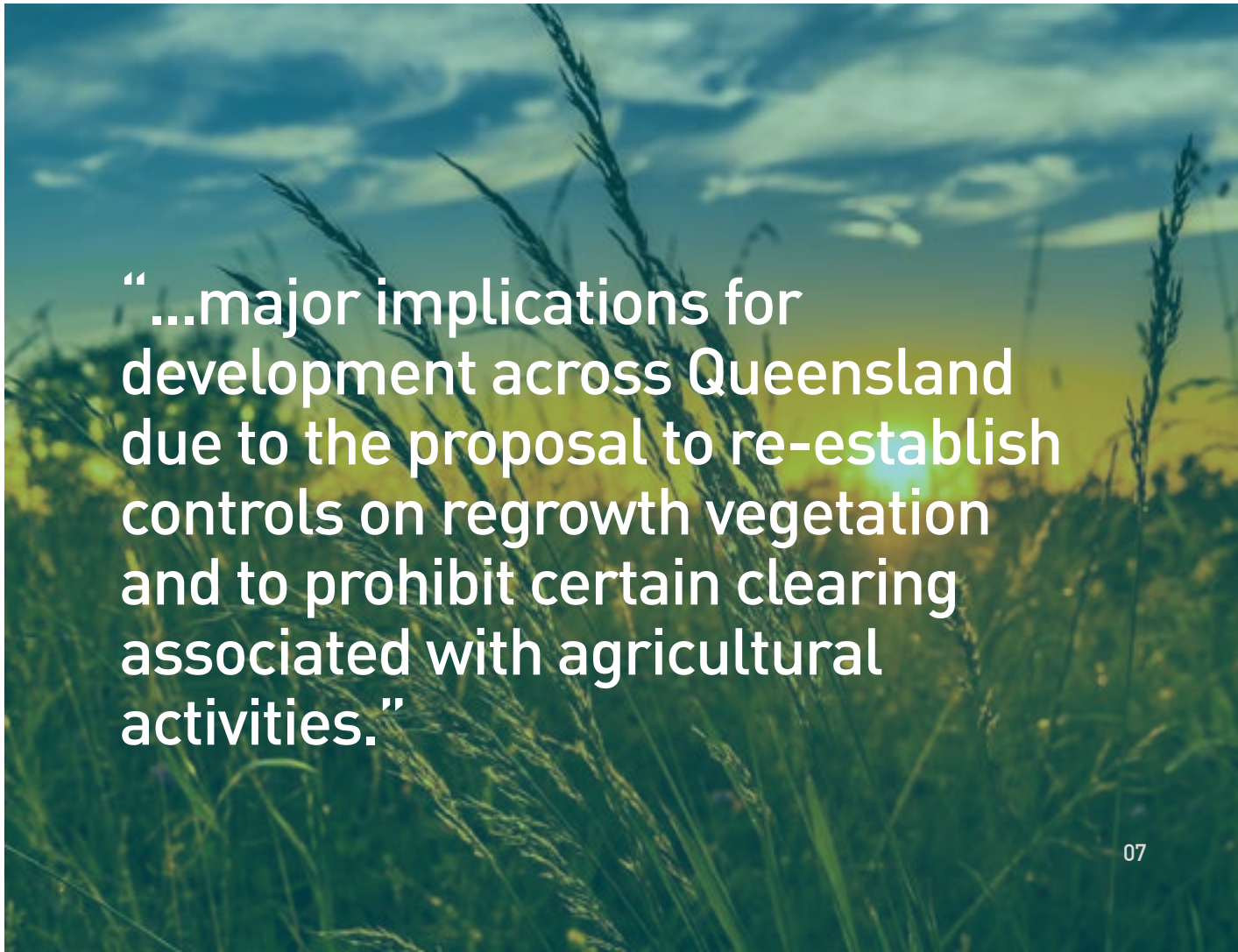
- the Department of Natural Resources, Mines (**DNRME**) explore options to streamline the processing and costs of development applications for vegetation clearing; and
- the Minister review the operation of accepted development vegetation clearing codes within three years.

DNRME also rejected a call from leading development industry bodies to extend the 'urban development/urban purpose' exemption into planning schemes, and the Committee did not recommend any changes in that regard.

Final implications

The Bill was passed on 3 May 2018, without substantial amendment, and commenced on 9 May 2018. For landholders who missed the opportunity to lodge a 'lock it in' PMAV (a property map of assessable vegetation), there are now limited opportunities to challenge the new mapping.

The Committee Report notes that DNRME is working with the Queensland Herbarium and the Department of Environment and Science to apply their expertise to improve the accuracies of the high value regrowth mapping. Where there is an obvious error (i.e. one that can be seen from imagery such as Google Earth), DNRME has indicated that it can be removed free of charge. Where errors require further investigation or ground-truthing, the only option is a landholder-driven PMAV application, supported by documentation which correctly identifies the location of the vegetation, or notes the correct vegetation category.



Clearing category X vegetation in Queensland

THOMAS BUCKLEY

In Queensland, there are a number of statutory controls which protect vegetation and regulate clearing activities. There is a plethora of legislation, government instruments and policies which each require consideration depending upon the type of vegetation to be cleared, and the purpose for which it is to be cleared. Indeed, to clear one patch of vegetation in Queensland might require separate approvals from all three levels of government.

In most development scenarios, the primary considerations are the *Planning Act 2016* (**Planning Act**) and *Planning Regulation 2017* (**Planning Regulation**), and planning schemes. What is important is the interplay of these instruments. While an approval might not be required under one instrument, it does not necessarily follow under the others. This is particularly so when it comes to State mapped 'category X vegetation'. Generally, a development approval is not required to clear category x vegetation. However, that doesn't stop a local government from regulating the same vegetation under its planning scheme.

A recent decision of the *Planning and Environment Court* (**P&E Court**) in *Fairmont Group Pty Ltd v Moreton Bay Regional Council* [2018] QPEC 20 (**Fairmont case**) provides a useful insight into this framework and emphasises the primacy of local government planning instruments in the regulation of vegetation.

The case

The applicant sought declarations from the P&E Court about its right to clear vegetation without an approval on land at Morayfield. The land was mapped 'category x vegetation' under the State government's regulated vegetation management map. Clearing category x vegetation is defined as exempt clearing work under the Planning Regulation (for which an approval is not required). However, the clearing of native vegetation was also made assessable development under the *Moreton Bay Planning Scheme 2016* (**Planning Scheme**), for which an approval was required.

Amongst other things, the applicant argued that, because the proposed clearing work was defined as exempt clearing work under the Planning Regulation, it must be 'accepted development' for the purposes of the Planning Regulation, and in those circumstances no development permit was required under the Planning Regulation or the Planning Scheme.

The regulatory framework

The Planning Act nominates three categories of development - prohibited development, assessable development and accepted development.[1] An approval is required for assessable development, but not for accepted development. Prohibited development, as the name suggests, cannot be undertaken on land. A categorising instrument, which includes the Planning Regulation and the Planning Scheme, can nominate particular development to be one of these three categories of development.[2]

Under the Planning Regulation, operational work that is clearing of native vegetation is assessable development.[3] An exception to this rule is if the clearing works fall within 'exempt clearing work' (which includes clearing category x vegetation). Exempt clearing work is categorised as being neither 'prohibited development' nor 'assessable development.[4] As discussed above, operational work that is the clearing of native vegetation is also made assessable development under the Planning Scheme.

The argument advanced by the applicant was that, because 'exempt clearing work' under the Planning Regulation is neither prohibited development nor assessable development, then it must be accepted development. In those circumstances, the clearing work cannot then be made assessable development under the Planning Scheme because that would be inconsistent with the Planning Regulation.

The decision

The P&E Court held that either the Planning Regulation or the Planning Scheme could categorise the clearing work as assessable development. To the extent that the Planning Regulation did not expressly categorise the clearing work as prohibited development, assessable development or accepted development, and to the extent it did not prohibit the Planning Scheme from categorising the clearing work as assessable development, the Planning Regulation left the door open for the Planning Scheme to categorise the clearing work as assessable development.[5]

In essence, it did not follow that exempt clearing work was 'accepted development'. It was just not assessable development under the Planning Regulation. That did not stop the Planning Scheme categorising the clearing work as assessable development, which it did. Therefore, a development approval was still required under the Planning Scheme to clear the vegetation.

The takeaway point

The point to remember is that planning schemes can capture forms of development that are either not captured by the Planning Regulation, or are not made assessable development under the Planning Regulation. This is particularly so when it comes to vegetation clearing. Planning schemes in most local government areas will regulate vegetation that might otherwise be exempt clearing work at the State level.

As the P&E Court noted in the *Fairmont* case, in determining whether your proposed clearing requires an approval, it is necessary to have reference to both the Planning Regulation and any relevant categorisation under a planning scheme.[6]

Finally, as a further complication, a number of local governments will also regulate vegetation clearing through local laws, which must be considered in addition to the Planning Regulation and a planning scheme.

1. Planning Act, s44

2. Note that planning schemes are prohibited from stating some development activities as assessable development - Schedule 6 of the Planning Regulation

3. Planning Regulation, Schedule 10, Part 3, Item 5

4. Planning Regulation, Schedule 10, Division 1 & 2

5. *Fairmont Group Pty Ltd v Moreton Bay Regional Council* [2018] QPEC 20 at [12]

6. Ibid at [44]

Minister makes TLPI

SARAH MACOUN, BEN LANSKEY

In April 2018, the Minister for State Development, Manufacturing, Infrastructure and Planning (**the Minister**) took the unusual step of making, on his own accord, Temporary Local Planning Instrument 01/18 for the Ipswich City Council local government area (**Ministerial TLPI**). TLPIs are often used by local governments to react quickly to urgent or emerging planning issues in their local government area. As far as we are aware, this is the first time the Minister has exercised the power to make a TLPI on behalf of a local government. TLPIs are significant as they apply to the extent of any inconsistency with a Local Government's Planning Scheme.

The Ministerial TLPI was published in the Queensland Government Gazette on 6 April 2018. It applies to development applications for new or expanded waste activities within the Swanbank/New Chum industrial area (**the Area**), and aims to provide protection to residential and other sensitive receiving uses from adverse impacts associated with waste activities.[1] Among other things, the Ministerial TLPI includes a land use code; the 'Swanbank/New Chum Waste Activity Code' (**the Code**),[2] which provides for overall and specific outcomes for development.

These outcomes focus on limiting the impacts on amenity, and include a number of design and construction requirements around the development of new or expanded waste facilities.[3] Significantly, the TLPI's Table of Assessment and Relevant Assessment Criteria provides that a Waste Activity Use involving Compost Manufacturing Unenclosed (as defined in TLPI 01/18) in the activity area or buffer area is an inconsistent use which is impact assessable. One of the specific outcomes in the Code is that this use does not occur in the buffer area or the activity area.[4] The TLPI 01/18 will have effect in accordance with the *Planning Act 2016* (**PA**) for a period not exceeding two years from 6 April 2018 or such longer period as may be permitted by law or unless otherwise repealed sooner.[5]

Waste has been in the spotlight recently, with the Queensland Government commissioning an investigation into the transportation of waste into Queensland,[6] following allegations raised about the movement of waste from New South Wales in an ABC TV Four Corners program in August 2017.[7] According to the Lyons Report into the waste industry in Queensland, tabled in parliament last month, landfill facilities in New Chum and Swanbank accounted for one quarter of all waste disposed in Queensland landfills.[8]

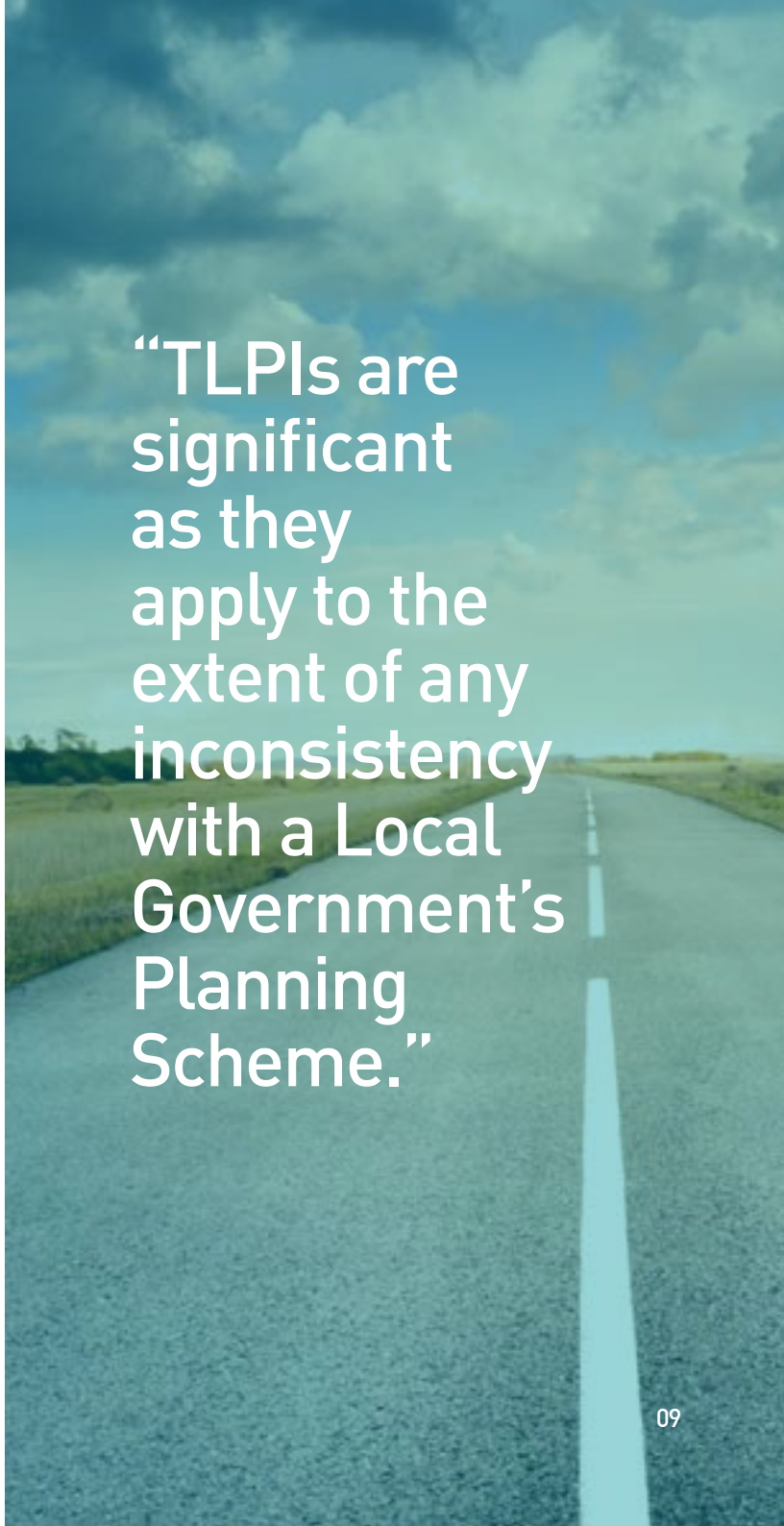
There is scope for the Minister to direct a local government to take an action to amend its planning scheme or prepare a TLPI,[9] but in this case the Minister has used powers in section 27 of the PA, which give the Minister the power to take urgent action in circumstances where the Minister considers that action is required to protect, or give effect to, a State interest.

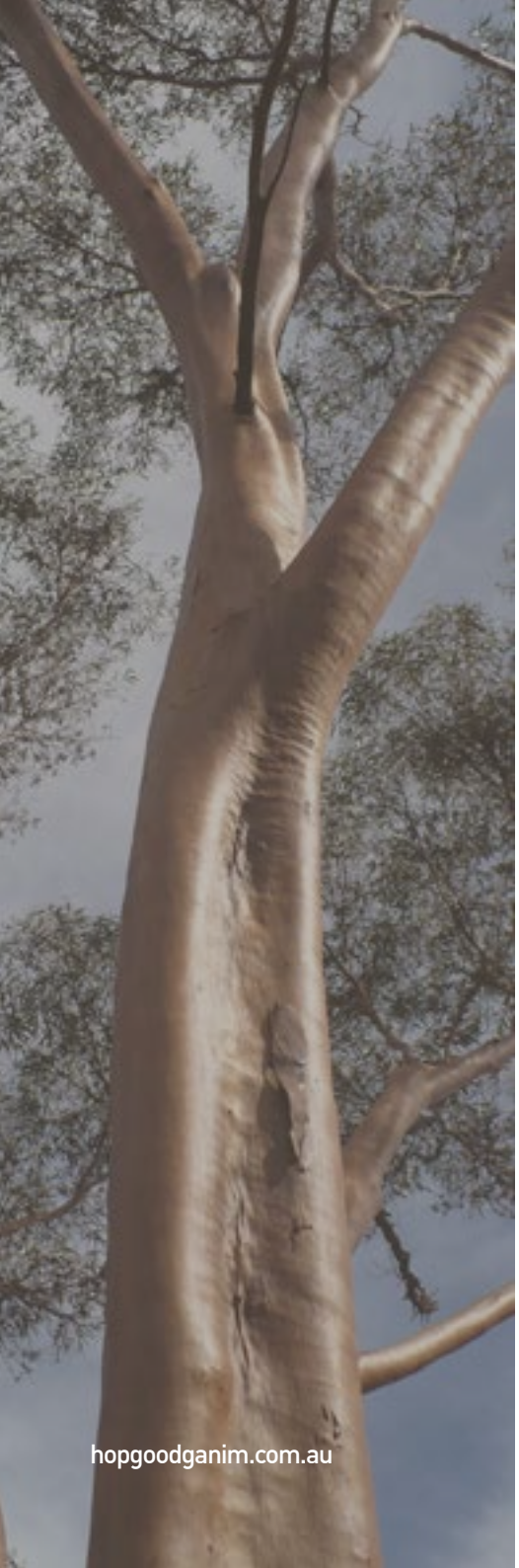
The Minister must give notice to the local government, which sets out the actions the Minister intends to take and the reasons for taking the actions, but there is no requirement under section 27 for the Minister to consult with the local government.[10] The Explanatory Notes to section 27 indicate that the intention was to ensure the Minister could act urgently to protect State interests and facilitate effective promotion of State interests through local planning instruments.[11]

In this case, it appears there was considerable consultation between the Minister and the Ipswich City Council in the lead up to the Ministerial TLPI. In media releases, the Minister indicated that the Ministerial TLPI implemented comments from the Ipswich City Council and demonstrated how the State and local governments could work together to address community concerns.

The Ministerial TLPI indicates the State economic, social and environmental interests are at significant risk of being impacted by current and expected waste activity proposals in the Area.[12] It is notable that the Minister decided to use the power under section 27 to respond to current and expected applications, rather than calling them in under Chapter 3, Division 3 of the PA as and when they arise. The scope of the power in section 27 is broad, encompassing, for instance, the Minister taking action to make, amend or repeal a planning scheme as well as a TLPI. Section 27 is certainly a powerful tool for the Minister to compel change upon local government planning instruments in circumstances where urgent action is required, or where the local government may be reluctant to instigate the required action themselves.

1. TLPI 01/18, s3.1
2. TLPI 01/18, Attachment B
3. TLPI 01/18, Attachment B, Part 4
4. TLPI 01/18, Attachment B, s4(3)
5. TLPI 01/18, s4.2
6. Investigation into the transport of waste into Queensland, 17 November 2017 (**the Lyons Report**)
7. *Queensland Government response to Investigation into the transport of waste into Queensland*, March 2018 (p. 2)
8. The Lyons Report, p. 5
9. PA, s26
10. PA, s27(2) and (3)
11. *Planning Bill 2015*, cl. 27
12. TLPI 01/18, s2.2





Implementing Belcarra - Report of the Economics and Governance Committee

SARAH MACOUN, ROBYN LAMB

In this follow up article in our series on the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018* (**Bill**), we focus on the Economics and Governance Committee Report No. 7 in relation to the Bill that was tabled on 23 April 2018. Our previous articles in relation to the Bill are "*Part one: Managing councillor conflicts of interest*" and "*Part two: Developer donations*".

Despite the relatively controversial nature of the Bill, the Committee's report only recommends one amendment, namely the insertion of a purpose statement in the *Electoral Act 1992* and otherwise recommends that the Bill be passed.

There has been widespread concern about potential difficulties associated with the Bill's definitions of "property developer" and "close associate". Our article on this topic suggested that the definition of "property developer" ought to be revisited as it may be capable of capturing unintended parties (e.g. consultants involved in making planning applications for companies).

The Committee's report includes commentary that notes advice that

> *"...whether a person or business will be covered by the definition of property developer will depend on the type and frequency of their activities, their corporate structures, and their governance and shareholding arrangements. The committee also notes that a person or business who is unsure of their status under the proposed legislation can make application to ECQ for a determination".*

The response is a recommendation by the Committee that the relevant Departments develop examples (which will be included in the legislation or another format) of a "property developer" and "close associate", and what constitutes "regularly" in making relevant planning applications, to assist affected parties, the Electoral Commission and the Courts in determining the application of the Bill. However, this recommendation does not, in our view, entirely resolve the uncertainty and complexity associated with these definitions. While providing examples may be of assistance, there is also no information about what the examples may be or the legal status of the examples (e.g. as part of the Act or in a guideline).

The Committee also considered the submission by the Crime and Corruption Commission (**CCC**) that extending the ban on donations from property developers to the State level was a departure from the recommendations contained in the Belcarra report. The CCC's submission noted that it had not contemplated the ban would be extended to the State without consideration of corruption risks in State elections and decision-making, and that a proper public consultation process would be highly desirable. The Committee's report notes the Department's advice in response to the issues raised regarding the banning of property developer donations at the State level:

> *Following the release of the Belcarra Report, the Premier stated "I will not make rules for local Councils that I am not prepared to follow myself, so any changes we make will apply to state, as well as local Government". The Bill gives effect to this commitment.*
>
> ...
>
> *Further, the Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs, the Honourable Stirling Hinchliffe stated in his explanatory speech "corruption in relation to donations from property developers, at both local government and state government levels, has been investigated and reported on by the New South Wales Independent Commission Against Corruption (**ICAC**)...consistent with the approach adopted in New South Wales following a number of ICAC investigations and to address the risk of corruption and undue influence that political donations from property developers has the potential to cause at a local government and state government level, the Bill applies at both a local and state government level".*[1]

The recommendation associated with this discussion is that a purpose statement be inserted in the *Electoral Act 1992*. In our view, neither the Committee's report, nor the recommendation, squarely addresses the issue raised by the CCC's submission (and submissions of others).

It is anticipated that the extension of the ban on donations to the State level will remain in the Bill without any detailed consideration of corruption risks or proper consultation, even though there has not been an investigation warranting the extension or public consultation. Investigations that have been carried out in New South Wales are arguably unrelated to circumstances in Queensland.

The Bill will now be debated by Parliament.

1. At page 16 of the Committee's report referencing the Department, correspondence dated 6 April 2018, Department of Local Government, Racing and Multicultural Affairs' response to submissions, p 21

Liability for infrastructure charges - Risks of granting owner’s consent confirmed

OLIVIA WILLIAMSON

The Queensland Court of Appeal has upheld the decision of the Supreme Court that a non-applicant land owner can be liable for unpaid infrastructure charges.

The decision of *Trevorrow v Council of the City of the Gold Coast* [2018] QCA 19 confirms that there are dangers for landowners who purchase land with the benefit of a development approval or who give their consent to another party making a development application in respect of their land.

In arriving at this conclusion, the Court of Appeal highlighted that an owner of land remains free to decide whether the land would be burdened by an infrastructure charge which flows from a development approval. In other words, the owner of the land can control whether or not approved development takes place on the land. Given this aspect of control, the Court of Appeal considered that the owner can therefore protect its interests through appropriate avenues of recourse to the applicant for unpaid infrastructure charges such as through an infrastructure agreement or some other contractual arrangement with the applicant.

In our article published just over 12 months ago in respect of the Supreme Court decision at first instance , we identified a number of practical tips and ramifications for landowners to avoid exposure to pay outstanding infrastructure charges in circumstances where a current land owner was not the applicant for the development approval, which gave rise to the charges. This latest decision of the Court of Appeal does not change those observations.

We also note that our earlier observations remain unchanged, notwithstanding the commencement of the *Planning Act 2016* (**PA**) on 3 July 2017, as provisions regarding the attachment of development approvals to land and levied charges for infrastructure being rates for the purpose of its recovery, continue in the PA. Further, the transitional provisions in the PA specify that the *Sustainable Planning Act 2009* (**SPA**) continues to apply to a broad range of infrastructure charges notices (including adopted infrastructure charges notices) in force on 3 July 2017 and infrastructure charges levied under the SPA.

Erroneous Planning and Development certificates - compensation and liability

JAMES IRELAND, GEMMA CHADWICK

The Court of Appeal recently clarified the extent of a Council's liability for issuing an erroneous planning and development certificate.

The case of *Central Highlands Regional Council v Geju Pty Ltd* [2018] QCA involved an appeal against a decision of the District Court, ordering the Council pay damages to the purchaser of vacant land at Capella, Central Queensland. The issue on appeal was whether the Council owed a duty of care to a prospective purchaser, when issuing a planning certificate to the current owner of the land.

Factual background

Mayfair Group became the owner of the land in December 2007. At that time, the land was zoned rural, but had the benefit of an approval for a material change of use which would allow industrial development on the land. That approval was due to lapse on 24 August 2011. After purchasing the land, Mayfair Group wrote to the Council requesting a limited planning and development certificate. Council sent the certificate to Mayfair Group's solicitors on 4 February 2008. It incorrectly recorded that the land was zoned "town" and included in the "industrial" precinct. The land remained in the rural zone.

On 5 June 2008, Geju Pty Ltd entered into a contract with Mayfair Group to purchase the land. At some time between February and June 2008, one of the principles of Mayfair Group had given the limited certificate to its real estate agent. The real estate agent ultimately passed the certificate on to Mr Birch, a controller of Geju, during a social visit sometime between February and May 2008. Mr Birch did not look at the certificate closely, but saw that it recorded that the land was included in an industrial precinct. The contract settled on 1 August 2008.

Geju engaged solicitors after entering into the contract, but the trial judge found that if Geju had learned of the correct zoning of the land, it could have extricated itself from the contract. The contract was conditional upon finance. The trial judge held that the land would have been more valuable if it had been zoned industrial instead of being in the rural zone, with the benefit of a material change of use approval. Finance would not have been approved if the correct zoning of the land (and hence the true market value of the land) was known.

The trial judge concluded that Council owed a duty of care to a class of persons comprising "potential purchasers" of the land, when issuing a planning and development certificate. He awarded damages in the amount of $852,205.50.

Legal background

At the time the Council issued the certificate, the *Integrated Planning Act 1997* (**IPA**) was in force. It required a limited planning and development certificate to contain:

- a summary of planning scheme provisions applying to the land (included any infrastructure charges schedule);
- a description of any state planning regulation provisions which applied to the land; and
- a description of any designations applying to the land.

IPA went on to provide that a person who suffered financial loss because of an error or omission in a planning and development certificate was entitled to be paid reasonable compensation by the local government. The claim for compensation could be made at any time after the certificate was issued.

Geju did not rely upon the compensation provision in IPA, but instead brought proceedings against the Council seeking damages for negligent misrepresentation. The Court therefore had to consider whether Council owed a duty of care to Geju.

The Court of Appeal examined, in detail, the extent of the duty of care owed to a person who not only requests information, but also a person who receives that information. The classic statement of the High Court, from the case of *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 is:

> *"mere foreseeability of the possibility that a statement made or advice given by A to B might be communicated to a class of which C is a member and that C might enter into some transaction as a result thereof and suffer financial loss in that transaction is not sufficient to impose on A a duty of care owed to C in the making of the statement or the giving of the advice."*

However, a duty may arise, if:

- the defendant knew or ought reasonably to have known that the information or advice would be communicated to the third party, either individually or as a member of an identified class;
- the information or advice would be communicated for a purpose that would be very likely to lead that third party to enter into a financial transaction; and
- if the third party did enter into that transaction (in reliance on the information or advice given) it would be at risk of incurring economic loss if the statement was untrue or the advice unsound.

The Court of Appeal's decision

Ultimately, the Court of Appeal considered that the class of person identified by the trial judge ("potential purchasers of the property the subject of the certificate") was too broad. Fraser JA, who delivered the lead judgment, concluded that the class would include owners as well as tenants, lenders and investors who might regard the zoning of the land as a material factor in serious financial decisions.

He held that, while it was foreseeable that Mayfair Developments might pass on the zoning information in the certificate to people who might rely upon that information in making serious financial decisions (a very broad class), there was no basis for concluding that the Council knew, or ought to have known, that Mayfair Developments would do so and much less that the Council intended, knew, or ought to have known, that a person would buy the land in reliance upon the zoning information in the certificate.

The Council's appeal was allowed on the basis that it did not owe Geju a duty of care.

Conclusion

The case has important implications for Councils, and potential purchasers.

While the Court of Appeal considered the Council did not owe a duty of care in the circumstances, it noted that Geju's claim was not for breach of a statutory duty, or for compensation under the IPA. The Court commented, in *obiter*, that the right to compensation under IPA was not limited only to the person who applied for and received the certificate. The Court also noted that the absence of limitations about the right to seek compensation under IPA stood in stark contrast to the common law restrictions upon rights to sue for financial loss resulting from reliance on misstatements. Notably, the compensation provision in the Planning Act mirrors that in IPA, although there is now a six year time limit on claiming compensation.

For potential purchasers, the Court noted that Geju could have sought a warranty from the Mayfair Group that the land was, in fact, zoned industrial. The common law restrictions that defeated Geju's claim would not have applied if Geju itself had requested a planning and development certificate from Council, rather than relying on a certificate requested by Mayfair Group.

The case is an important reminder to Councils to take great care in issuing accurate planning and development certificates, and for potential purchasers to undertake proper due diligence before purchasing a site.

"...the right to compensation under IPA was not limited only to the person who applied for and received the certificate."

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