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The Executive Officer
Queensland Environmental Law Association
Level 5, 149 Wickham Terrace
SPRING HILL QLD 4000

Phone: (07) 3832 4865
Fax: (07) 3229 4359
Email: info@qela.com.au

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CONTRIBUTORS

Matthew Dunlop  Master of Laws candidate
QUT Law School

Ben Job  LLB, MURP  Barrister-at-Law

Michael E Rackemann  DCJ  Judge of the Planning and Environment Court
Queensland

Robert Quirk  BCom LLB (Hons), Grad Dip (LP), Grad Dip (MiLaw)  Barrister-at-Law

Michael Walton  BCom, LLB  Partner
Norton Rose Fulbright Australia
EDITORIAL

Welcome to Issue 86 of the Queensland Environmental Practice Reporter. We are privileged to commence with an article from His Honour Judge Rackemann of the Planning and Environment Court. This article examines the legal protections for heritage places in Queensland and shines a light on the story behind the destruction of Hesketh House in Brisbane, which was able to be demolished, despite the apparent protection of heritage listing.

Robert Quirk gives a detailed analysis of the cases of Stevenson Group, BM Alliance Coal and Barro Group, which went to the Court of Appeal. He examines the decisions, in particular considering the issue of jurisdictional error.

Matthew Dunlop makes a case that the Environmental Protection Act 1994 (Qld) is insufficient to protect the Great Barrier Reef from the effects of diffuse pollution from land-based sources. Considering the multiple threats to the Reef, one of the most valuable environmental and economic resources in Australia, it is a timely reminder of the importance of identifying the source of threats, having enforceable environmental protections and getting cooperation of landholders.

Anne Overell
Managing editor
Queensland University of Technology
Warner Village Proprietary Limited v Moreton Bay Regional Council and Ors (No 2) [2013] QPEC 74 (Robertson DCJ - 27 September 2013)

Determination of preliminary issues raised by the appellant before hearing – whether the co-respondent had commenced the public notification period prematurely by providing further information after the period for public comment had commenced – whether circumstances justified excusal of this non-compliance

Facts: On 6 August 2012, the co-respondent Cashmere received approval for a development permit from the respondent Council to extend its shopping centre. On 3 September 2012, the appellant Warner Village appealed against the Council’s decision. On 13 April 2013, the Council issued an information request to Cashmere (during the information and referral stage), seeking an addendum to the Economic Impact Assessment. On 6 May 2013, Cashmere responded by providing further information, but not the addendum, as part of a full response under section 278(1)(a) of the Sustainable Planning Act 2009 (Qld) (SPA). The Notification Stage commenced on 7 May 2013, with public comment open from 9 to 29 May 2013.

Although Cashmere believed that its response to Council was adequate, it engaged a consultant on 8 May 2013 to prepare the addendum, in the event that Council required it. After receiving Cashmere’s response dated 6 May 2013, Council confirmed with Cashmere that it did require the addendum. Cashmere provided the addendum to Council on 20 May 2013, and it was published on PD Online on 21 May 2013. Warner Village reviewed the addendum and responded to it before the end of the public comment period. However, Warner Village submitted that as Cashmere had intended to provide addendum if it was required (which it was), the public notification period had commenced prematurely.

Decision: The Court held, in excusing certain non-compliances under s440 of SPA, that:

1. Cashmere was non-compliant with the provisions of the SPA as a result of the provision of further information after the notification period has commenced;
2. However section 440 of the SPA provides the Court with the discretion to excuse non-compliance. This discretion is wider than that afforded by the former section 4.1.5A(1) of the Integrated Planning Act 1997 (Qld);
3. While the public notification period did commence prematurely, the circumstances are distinguishable from the Ross Neilson case, as:
   (a) Cashmere did not obtain any relevant benefit from the breach;
   (b) the further information was provided within the period for public comment;
   (c) Warner Village was able to review and respond to the further information;
(d) it is highly unlikely that any other potential submitters were disadvantaged by the delayed publication of the addendum; and
(e) the further information that was provided was not an essential component of the information request;

Although Cashmere had been non-compliant, this non-compliance was excused in the circumstances, under section 440 of the SPA.

JAB Gravel and Earthworks Pty Ltd v Brisbane City Council and Ors [2013] QPEC 75 (Robin QC DCJ - 11 November 2013)

Sustainable Planning Act 2009 – s497 – extension of time for developers appeal – whether mistaken discontinuance of a previous appeal led to extension of all appeal rights
Sustainable Planning Act 2009, s497; Planning and Environment Court Rules 2010, r 15

Facts: This was an application by a developer for an extension of time to commence an appeal under s 497 of the Sustainable Planning Act 2009. The appellant lodged a development application on 13 October 2010. The development application was made to “regularise” the applicant’s use of its premises, which had been the subject of previous enforcement proceedings (Brisbane City Council v Bowman & Ors [2012] QPEC 078). The application was refused by Council, by decision notice issued on 29 August 2012.

On 20 October 2012, the appellant filed a Notice of Appeal out of time. On 14 February 2013, a Notice of Discontinuance was mistakenly filed, discontinuing the appeal. On 26 April 2013, a second Notice of Appeal was filed in an effort to remedy the error. The appellant’s solicitor, acting as a favour to the appellant, was inexperienced in the planning jurisdiction and admitted fault for the deficiencies. The appellant argued that:

1. the filing of the Notice of Discontinuance was a mistake which should not preclude it from obtaining Court approval of the development application; and
2. the solicitor who undertook the work was without experience in the planning jurisdiction, leading to inadequacies in procedural requirements and the inadvertent discontinuance.

Council argued that the appellant’s entire conduct of the proceedings had been so dilatory and generally non-compliant that the Court ought not exercise any discretion in allowing the appeal to proceed.

The Tenth co-respondent (a submitter and commercial competitor) argued that the appeal could not be brought at all because the withdrawal of the earlier appeals had exhausted the appellant’s appeal rights.

Decision: The Court held, in granting an extension of time:
dismissing the application would compel a fresh development application resulting in significant expense and essentially repeated proceedings. While this would provide a salutary demonstration of complying with procedural requirements, it was essentially a costly punishment for all parties; there was a genuine mistake leading to the decision to the discontinuance of the first appeal; an appellant who discontinued on determining a Notice of Appeal was inappropriate should be able to lodge a new appeal upon paying the applicable filing fee, within the prescribed time; and leave should be granted to bring the second appeal late in time under s 497 Sustainable Planning Act 2009.

Liston v Tablelands Regional Council and Anor; Pensini v Tablelands Regional Council and Anor [2013] QPEC 76 (Everson DCJ - 29 November 2013)

Planning and environment – planning schemes – construction of planning schemes – whether compromise of provisions seeking to protect GQAL and restrict rural residential development – whether sufficient planning grounds to approve development despite conflict

Integrated Planning Act 1997, ss 3.5.5(2)(d), 3.5.14(2), 4.1.28, 4.1.50, 4.1.52, Schedule 10 Sustainable Planning Act 2009, s 819(2)

Facts: These were submitter appeals against Council’s decision to approve a development application for a preliminary approval for a material change of use (overriding the planning scheme – development consistent with the Rural Planning Area) and a development permit for reconfiguration of a lot (2 into 54 lots) made in respect of land located near Atherton. The proposed development sought to create 53 rural residential lots with an area of between 3,300m² and 6,630m² on rural land which had been used for agricultural purposes in the past. It was mapped as good quality agricultural land (GQAL). The effect of the proposed development would be to alienate the land for agricultural purposes in circumstances where provisions of the Council’s planning scheme and subsequent planning controls sought to preserve it as agricultural land.

The co-respondent argued that the land was compromised for agricultural uses and ideally situated for rural residential development, and that there was a requisite need for the development which justified the loss of land as GQAL.

The Far North Queensland Regional Plan 2009 – 2031 (FNQRP) came into force the year after the development application was lodged. It had been in force for over four years at the time of the appeal. Council had also prepared a new draft planning scheme since the development application was lodged, which had been publicly notified.

The submitters argued that:
(1) the proposed development conflicted with the planning scheme as it was in conflict with the objectives which intended that GQAL be protected and that rural residential development occur in areas which were planned for that purpose;

(2) there were not sufficient grounds to justify approval of the proposed development despite the conflict;

(3) the proposed development conflicted with and did not further the outcomes of the FNQRP, to which substantial weight should be given;

(4) the proposed development would conflict with and cut across the implementation of Council’s draft planning scheme;

(5) there was no need for the proposed development; and

(6) the proposed development was contrary to reasonable expectation.

The respondent and co-respondent nominated a number of grounds as justifying approval of the proposal despite the conflicts with the planning scheme.

**Decision:** The Court held, in allowing the submitter appeals:

1. the proposal was in significant conflict with the planning scheme;
2. not only was there an adequate supply of rural residential land within the shire, but there was also a clear planning strategy to restrict rural residential development and preserve GQAL. The planning grounds in favour of the application as a whole were insufficient to justify the proposed development in light of the significant conflict with the planning scheme;
3. the FNQRP was the pre-eminent plan for the region. It should be given substantial weight in the determination of the appeal. The proposal was in extreme conflict with the FNQRP;
4. the draft planning scheme was also unsupportive of the proposed development. The draft planning scheme should be given weight;
5. evidence that the community would have a reasonable expectation that the land would not be developed for rural residential purposes, given the strong policy of restricting residential development and preserving GQAL was accepted;
6. it was not the role of the Court to interfere with the planning strategies evident in the relevant planning instruments in circumstances where there was already a sufficient supply or rural residential land near Atherton; and
7. the appeals should be allowed.

**Friend v Brisbane City Council [2013] QPEC 77 (Robertson DCJ – 6 December 2013)**

*Council approved mixed use development in Woolloongabba – where submitter appellant raised issues of conflict with City Plan around building height, scale and density and heritage issues – unacceptable amenity impacts in regard to overlooking and shadowing – whether State Government PDA adjacent to the site was relevant in assessment process – weight to be given to draft planning scheme and Temporary Local Planning Instrument promulgated since approval – whether Woolloongabba Centre Neighbourhood Plan provisions had been overtaken by events – whether provisions were ambiguous, inconsistent and/or anomalous*
Facts: This was a submitter appeal against Council’s approval of a development application for a development permit for a multi-unit dwelling, short-term accommodation, hotel and centre activities (shop, office, restaurant) and a development permit for reconfiguration of a lot (18 lots into two). Located on the site was the locally listed heritage place, the Chalk Hotel. The intent of the reconfiguration application was to separate the Chalk Hotel and adjoining building from the rest of the site, which would then be developed for a mixed use development. The mixed use development would involve three towers containing residential units and non-residential uses. The three towers were to be 20, 18 and 12 storeys in height respectively. Surrounding land uses were detached housing, multi-unit dwellings and an office and shop.

The subject land was located predominantly within the Multi-Purpose Centre – MP2 (Major Centre) area designation under Brisbane City Plan 2000 (City Plan), however part of the site containing the Chalk Hotel was located within the MP3 (Suburban Centre) designation. The primary assessment provisions were contained in the Woolloongabba Centre Neighbourhood Plan (Neighbourhood Plan). The land was located within the Urban Footprint of the South –East Queensland Regional Plan 2009 – 2031 (SEQRP). While the SEQRP had no requirements specific to the site or proposal, it did encourage infill development and urban consolidation and envisaged uplift in development intensity in inner city areas and along major corridors.

The proposal was impact assessable and attracted 199 submissions, the majority opposed to the proposal. Several submitters commenced the appeal, however at the time of the appeal only one submitter remained as an active participant.

Since the time the development application was lodged, a new draft planning scheme had been released by Council and the Temporary Local Planning Instrument 01/13 (TLPI), which was designed to facilitate the protection of residential buildings constructed prior to 1911, had taken effect. Three houses on the site, which were proposed to be removed as part of the proposal, fell within the scope of the TLPI. Importantly, the TLPI stated that it did not apply where a current approval permitted the demolition of buildings.

Also of relevance in the appeal was a 10 hectare site located directly opposite the subject site on Stanley Street, which was under the control of the State government as the Woolloongabba Priority Development Area (PDA).

Decision: The Court held, in dismissing the submitter appeal:

1 the Neighbourhood Plan was not drawn with the precision of an Act of Parliament. Where planning provisions were worded vaguely or flexibly and / or where there were no clear or definitive criteria by which the Court could determine whether there was a conflict between a proposal and the relevant planning scheme, the Court had great width in the decision making process;
it was well-established that in performance-based schemes, the Acceptable Solutions did not prescribe limits or were not prescriptive of other solutions which may satisfy the outcomes contemplated by the Performance Criteria;
no conflict could be said to have arisen with respect to heritage issues;
the TLPI should not be given any weight in the assessment process. There was an approval in place which contemplated the removal of the subject houses, although it had yet to take effect because of the appeal;
the Court was not persuaded that the provisions of the Neighbourhood Plan had been overtaken by events. However, it would be unusual, in a planning sense, if a planning area such as the PDA, in the same suburb as the site and separated only by Stanley Street, would not be relevant in assessing the proposal, particularly where height was such an important issue in the case. The Neighbourhood Plan contained provisions that looked out, as it were, to surrounding areas;
with respect to size and bulk, there was no plain conflict with City Plan identified;
no plain conflict with City Plan was identified. Any highly technical and minor conflicts with the Neighbourhood Plan were of such a nature as to be irrelevant.; and
the Court would have been persuaded that there were sufficient grounds to approve notwithstanding any conflict.

Cox and Ors v Brisbane City Council and Anor (No 2) [2013] QPEC 78 (Rackemann DCJ - 13 December 2013)

Planning and environment – costs – application for costs by successful applicant/co-respondent against unsuccessful objector/appellants – where issues related to compliance with the planning scheme and the acceptability of amenity impacts – nature of the parties’ interests – whether ownership of adjoining rental property, the amenity of which may be affected, was a relevant commercial interest – weight to be given to that in circumstances – relative strength/weakness of appellants’ case – where appellants had taken advice as to prospects – where conduct of appellants was reasonable – where not all appellants likely to suffer significant amenity impacts but a respectable unitary case was run – costs of unsuccessful costs application Sustainable Planning Act 2009, s 457

Facts: This matter related to a submitter appeal against Council’s decision to approve a development application for a multi-unit development for special needs accommodation, on a residential allotment currently improved with a single detached character house.

The appeal was originally heard over two days in August 2013. On 6 September 2013, the Court delivered its judgment and made orders that the appeal be dismissed. The co-respondent developer was substantially successful. However, the Court did impose additional conditions on the approval of the development application, including requiring additional screening and ensuring renovation of the existing dwelling would take into account the likely amenity impact of the proposal on the adjoining property at 8 Hetherington Street. The co-respondent subsequently filed an application seeking an order that the appellants (bar one) pay its costs of, and incidental to, the appeal.
The subject appeal was lodged in 2013 and was subject to the new costs provisions under s 457 of the Sustainable Planning Act 2009 (SPA). Under s 457(1), the Court had discretion to awards the costs of the proceeding. The appellants against whom costs were sought were:

1. Ms Lambert, who lived with her husband and children at 10 Hetherington Street. Ms Lambert gave evidence at the hearing by way of an affidavit which expressed concerns about matters of relevant to the town planning issues in the case;
2. the Critendens, who lived at 1 Hetherington Street. Mrs Crittenden gave evidence by an affidavit which set out concerns including the alleged overdevelopment of the site and associated amenity issues;
3. Mr Escott, who was the owner and a former resident of 3 Hetherington Street and did not give evidence at the hearing;
4. the Carrutherses, who lived at 4/2 Hetherington Street and did not give evidence at the hearing; and
5. Mr and Mrs Cox. Mrs Cox had an interest in all but two of the units in the complex immediately north of the subject site. Mrs Cox gave evidence by affidavit, which raised concerns about the impact of the proposal on the privacy and amenity of the units that would overlook the new development.

Costs were not sought against Ms Ernst, the adjoining neighbour at 8 Hetherington Street, as the co-respondent accepted her interest was obvious.

The co-respondent argued that:

1. the appellants against whom an order was sought were not acting to protect their amenity but had commercial motivations or motivations which never became clear during the trial;
2. the co-respondent was a charity and that its costs must come from donations or from the limited resources it received from government; and
3. the issues raised by the appellants were not strongly arguable.

The appellants cross-appealed for their costs of resisting the costs application, submitting that the genuine interest of each of the appellants was readily ascertainable.

**Decision:** The Court held, in ordering each party to bear its own costs, that:

1. the co-respondent’s success was a relevant consideration but not the only one. The interests and conduct of the parties, both leading up to and in the proceeding, were among the matters that may also be considered;
2. Ms Lambert’s interest was obvious. The amenity enjoyed from that property would be affected to some degree, because residents of that property presently look out across the rear of the Ernst house to the backyard of the subject site, where the multi-unit development was to occur;
3. it was accepted that the interest of those who own rental property could be described as commercial for the purposes of s 457(2)(b) of SPA, even though they might not be commercial competitors in the conventional sense.
However, in a case where the interest was an understandable concern for the protection of amenity for the residents of a rental property in close proximity to the proposed development, the Court was not inclined to give the “commercial” nature of the interests of the unsuccessful litigant great weight; the co-respondent’s status as a charity should not have a substantial bearing on the exercise of the discretion; the issues raised at the hearing were bona fide matters of town planning relevance. Insofar as compliance with the planning scheme was concerned, the relevant performance criteria employed language which placed more reliance on evaluative judgment that objective specific measurement. Those were matters upon which reasonable minds could differ. While the Court ultimately concluded that the performance criteria were met, that was not a foregone conclusion; likewise, while the Court found the amenity impacts to be acceptable, it was accepted that another view was open; the level of impact on an individual appellant, considered in isolation, might have been relatively modest, but the co-respondent was not faced with numerous discrete cases. The case was run as a unitary case which was reasonably arguable. That the level of potential direct impact on each appellant was not equal to that on the Ernst residence did not lead to a conclusion that the appellants ought not to have participated in the appeal or that there should be differential costs orders; the appellants, while unsuccessful, had a legitimate interest in the subject matter of the proceeding, raised bona fide matters of town planning relevance, were supported by the professional opinions of a qualified and experienced town planner, acted reasonably both in the lead up to and in the proceeding, including by retaining appropriate professional assistance and taking advice as to prospects before proceeding. Each party should bear its own costs; and the co-respondent had an arguable basis for seeking the favourable exercise of the discretion given its success in the litigation. Each party should bear its own costs of the application.

**Stockland Development Pty Ltd v Sunshine Coast Regional Council and Ors [2013] QPEC 79 (Rackemann DCJ - 13 December 2013)**

**Planning and environment – applicant appeal – Application for preliminary approval overriding the planning scheme – Proposed urban residential development for approximately 950 lots on disused sugarcane farming land – Where site within the urban footprint pursuant to the regional plan but not planned for urban expansion under the existing or draft planning schemes – Whether planning scheme overtaken by events – Flooding – Good quality agricultural land – Visual amenity and character – Town planning and community need – Public benefit – Sufficiency or otherwise of grounds to approve notwithstanding conflict.**

**Integrated Planning Act 1997, ss 2.5A.21, 3.5.5, 3.5.5A, 3.5.14, 3.5.14A, 4.1.52(2)(a)**

**Facts:** In August 2007, Stockland Development Pty Ltd (the appellant) made an application over former sugarcane farmland west of the David Low Way on the Sunshine Coast, for the proposed Twin Waters West development. The development application sought a preliminary approval to vary the effect of the Maroochy Plan 2000 (the Maroochy Plan) to develop the land for a master planned residential estate.
comprising approximately 950 allotments, ranging in size from 200m$^2$ to over 640m$^2$. The master plan proposed to divide the land into five precincts, which included residential dwellings, community and sporting/recreation uses and a 43.7ha precinct designated for conservation purposes.

On 21 July 2009, Sunshine Coast Regional Council (the respondent) refused the Application. The appellant appealed against the respondent’s refusal. The grounds of the appeal were:

1. conflict with the Maroochy Plan (and Council’s new draft planning scheme);
2. flood issues;
3. good quality agricultural land (GQAL);
4. visual amenity;
5. need; and
6. whether there were sufficient grounds to approve the development despite the conflict.

**Decision:** The Court held, in dismissing the appeal:

1. while the inclusion of the land in the urban footprint in the SEQRP was a relevant consideration it did not, of itself, establish:
   1. a point of inconsistency between the Maroochy Plan and the SEQRP;
   2. that the land was necessarily suitable for urban development; or
   3. that provisions should be made for its development to occur at this time.
2. the draft planning scheme was substantially progressed and was deserving of significant weight. The draft planning scheme retained a rural intent for the land along with various constraints to the development of the land;
3. the Mill closure had not led to a change to the respondent’s planning strategy for the land;
4. the development would benefit the flood immunity of the David Low Way, but it would locate an additional residential population, of approximately 2,000 people, into the floodplain, thereby putting those persons at risk and potentially adding to the burden of State Emergency Services. Because of the defined flood risk, an overriding community need in the public interest had to be established if urban development was to be approved;
5. the land was still suitable for agriculture and its proximity to existing residential development did not make future agricultural pursuits on the land impracticable;
6. the land contributed to the rural character of the area. Even with the proposed landscaping treatments, the development would erode the open rural character of the locality;
7. there was some level of need for the proposed development, however the appellant had not established a strong need, far less an overwhelming need;
8. there was sufficient residential land supply designated in the respondent’s planning scheme. Accordingly, residential development of the subject land was not required at this time; and
9. the Court may have held differently, if a substantially stronger need had been demonstrated.
Summit View Meritor Pty Ltd and Ors v South Burnett Regional Council and Ors [2014] QPEC 1 (R S Jones DCJ - 10 February 2014)

Application – Court’s jurisdiction to make declarations – Where applicants sought relief to construct roads and stormwater infrastructure in road reserve without further approvals under the Local Government Act 2009

Facts: This was a hearing of an Application in Pending Proceeding brought by the first respondent, South Burnett Regional Council, within an Originating Application brought by the developer and a number of residents in a partially constructed new housing estate called ‘Memerambi Village’ in Memerambi, Queensland. The Originating Application sought a number of declarations, pursuant to section 456 of the Sustainable Planning Act 2009 (SPA) that related to existing development approvals over estate land. Most of the declarations were not contested by the Council. Those uncontested declarations had been made by the Court at a previous Court mention. However, the Council disputed a declaration being made that provided for the applicants to construct roads and stormwater infrastructure in road reserves without further approval from the Council.

Whilst the Council conceded that the applicants did not require any further approvals under the SPA to carry out the proposed works in the road reserve, it contended that a declaration could not be made by the Court pursuant to section 456 of the SPA, because other approvals were still required from it under the Local Government Act 2009.

Decision: The Court held, in refusing to grant the relief sought and disposing of the Originating Application:

1. it would be wrong to construe section 456 of the SPA in such a way as to purportedly render nugatory the operation of other relevant legislation; and
2. in circumstances where the plans referred to in the Originating Application were not in accordance with, or were inconsistent with, those identified in previous declarations made by the Court, then, absent of satisfactory explanation and/or the consent of all relevant parties, there were strong grounds for refusing the application on discretionary grounds.

Yeats Consulting Pty Ltd T/A Sedgman Yeats v Logan City Council [2014] QPEC 2 (Searles DCJ - 20 February 2014)

Environment and planning – application seeking costs pursuant to s 457 of Sustainable Planning Act 2009 for costs of appeals – reserved costs – incorrectly issued Environmental Protection Orders – appeals invalidly instituted – requirement for internal review of decision to issue Environmental Protection Order – appeal directly to courts from “original decision” only where decision made by CEO personally or local government itself – where Delegated Officer signed on behalf of Chief Executive Officer or local government

Facts: This was an application for costs by the appellants (the applicants) in two appeals against the decisions of the Logan City Council (Council) (the respondent) to
issue Environmental Protection Orders (EPOs) to the applicants. The appeals were both resolved at a mediation chaired by the ADR registrar, however, costs were reserved.

The applicants were engaged as consultants in the development of a parcel of land at Cornubia. On 17 June 2013, the Council issued an EPO (First EPO) to the applicants under section 358(e)(iii) of the *Environmental Protection Act 1994* (EP Act), alleging that the applicants had unlawfully deposited prescribed water contaminants in waters and related matters in contravention of section 440ZG of the EP Act. Subsequently, the Council advised that the First EPO would be withdrawn, and would be re-issued in order to correct a reference in the “grounds” section. The EPO was reissued on 27 June 2013 (Second EPO), however, was erroneously issued to Yeats & Associates Pty Ltd (Yeats & Associates) instead of the applicants. A further typographical error was identified in the Second EPO, and as a result, the EPO was again re-issued to Yeats & Associates on 27 June 2013 (Third EPO). The three EPOs were all issued by the Council’s Development Compliance Team Leader, Daniel Smith.

The Council argued that the Court lacked jurisdiction because the applicants were not entitled to commence the appeals, and therefore, were not entitled to their costs. In this regard, the Council pointed to the requirement under section 521 of the EP Act, that a person dissatisfied with an “original decision” must first apply for an “internal review” of that decision prior to lodging an appeal in the Court. The Council stated that the purpose of the internal review was to identify and resolve technical errors of the type the subject of the appeals. The applicants conceded that they did not apply for an internal review of the decisions made to issue the EPOs. Accordingly, the Council argued that the applicants had no right to appeal and could not recover the costs of invalid appeals.

The applicants contended that the internal review requirement under section 521 of the EP Act did not apply by virtue of section 521(12)(a), which stipulated that the section did not apply to a decision made by the Council itself or the Council’s CEO personally. In this regard, the applicants pointed to the fact that Mr Smith’s signature on each EPO was accompanied by the words “on behalf of Chris Rose, Chief Executive Officer”. The applicants argued that this demonstrated that the CEO of the Council personally made the decisions to issue those documents and it was merely being communicated by Mr Smith, or alternatively, that Mr Smith made the decision but the CEO subsequently adopted those decisions, thereby making them the CEO’s personal decisions. On the contrary, the Council argued that the decisions to issue the EPOs were made by Mr Smith exercising his discretion as a Council delegated officer. The Council led evidence, including extracts of the minutes of a Council meeting, which demonstrated that the Council delegated the authority to issue EPOs under the EP Act to Development Compliance Team Leaders. It also submitted that each of the EPOs end by specifically stating that an internal review is the next appropriate step, which would not have been given if an internal review was not possible.

**Decision:** The Court held, in dismissing the application:

1. Council’s Development Compliance Team Leader was authorised by the Council to issue the EPOs to the applicants, and therefore, to have made the
original decisions to do so for the purposes of section 521 of the EP Act. It was Mr Smith that made the decisions to issue the EPOs as a delegated officer and not the Council itself or the CEO personally;

2. the manner in which a decision is conveyed is not what gives rise to the Court’s jurisdiction under section 521(12) of the EP Act, but rather, the original decision must have actually been made by either the local government itself or the CEO personally. This fact could not be discarded in favour of the applicants’ misconstruction of the relevant documents.

3. in any event, there was little, if any, evidence within the documentation that the decision came from the CEO personally. The wording “on behalf of Chris Rose, Chief Executive Officer” were merely indicative of the fact that Mr Smith worked under the CEO, and also served to identify official correspondence. The attachment of appeal provisions to the EPOs did not equate to a right of appeal, but instead was likely included to notify the recipients of the possibility of appeal should the internal review fail to satisfy them;

4. it could also not be maintained that the Council itself decided to issue the EPOs as there was no evidence of a Council resolution to establish this; and

5. the applicants failed to establish that the Council itself or its CEO personally decided to issue the Environmental Protection Orders the subject of the Appeals. Therefore, the Court did not have jurisdiction to hear those Appeals by virtue of sections 521(12) and 531 of the EP Act and the applicants were not entitled to recover costs for the invalidly instituted appeals. It followed that applications for costs brought by the applicants ought to be dismissed.

Braudmont Pty Ltd and Ors v Gold Coast City Council and Anor [2014] QPEC 3 (Searles DCJ - 20 February 2014)

Application to exclude evidence at resumed hearing on application for declarations involving construction of public accessway by Council allegedly without development permit.

Facts: This judgment concerned the determination of numerous objections to evidence raised by the respondent Council arising from the content of the applicant’s principal issues in dispute.

In May 2009, the respondent (Council) constructed a path along Pacific Parade on the Gold Coast. The path was constructed contiguous with the eastern boundaries of the residential properties fronting Pacific Parade, as part of a network of paths along the beaches from the Gold Coast Seaway to Point Danger. The path was apparently constructed on the landward side of, and partly misaligned, discontinuous boulder walls buried under the coastal dune.

In April 2010, the applicant sued the Council and sought declarations from the Planning and Environment Court that the path had been constructed unlawfully, without an effective development permit under the Integrated Planning Act 1997 (IPA). The applicant also sought consequential orders, including an injunction requiring the Council to remove the path and restore the coastal dune to its original conditions, as near as practicable.
The litigation process was complex as a result of various amendments sought to the Originating Application (OA). The history of the litigation and the amendments were as follows:

(1) the OA was filed on 22 April 2010;
(2) on 20 August 2010 the OA was amended by the Amended Originating Application (AOA). The AOA abandoned some allegations and raised new allegations;
(3) on 10 September 2010, leave was granted to the applicants to file a Further Amended Originating Application (FAOA);
(4) on 4 November 2010, the applicants sought leave to deliver a Second Further Amended Originating Application (2nd FAOA). Some of the amendments were opposed and argued resulting in the Third Further Amended Originating Application (3rd FAOA) being delivered on that date;
(5) on 4 May 2011, the hearing of the matter commenced on the basis of the then current 3rd FAOA. At that hearing the applicants sought further amendments to the pleadings with respect to the construction of the subject path. The application was opposed and the Court delivered its decision dismissing the application on that day;
(6) on 5 May 2011, the applicants sought further amendments and produced a further proposed draft Fourth Further Amended Originating Application (Draft 4th FAOA). The Court refused leave to make the further amendments. Other issues were abandoned and the Fourth Further Amended Originating Application (4th FAOA) reflected the amended hearing. The hearing was adjourned part heard;
(7) on 11 October 2011, the applicants wrote to the Council and provided unsolicited particulars with respect to paragraphs 14 and 15 of the 4th FAOA alleging that the construction of the path increased the risk of erosion to the frontal dune and increased the risk of injury to persons and residential property during significant storm surge events;
(8) on 4 November 2011, the applicants issued subpoenas against Council’s CEO and various Councillors;
(9) the hearing of the matter was resumed on 14 November 2011. On that day the Court heard Council’s application to set aside the five subpoenas issued by the applicants;
(10) on 16 November 2011, the Court set aside the subpoenas as an abuse of process and the applicants were ordered to pay costs. The decision was appealed by the applicants to the Court of Appeal;
(11) on 29 May 2012, the Court of Appeal dismissed the appeal and awarded costs; and
(12) at the Court’s instigation, the matter was set down for further hearing in December 2013.

The pleading before the Court was the Fifth Further Amended Originating Application (5th FAOA). At the hearing, the Council raised objections to evidence proposed to be relied upon by the applicants with respect to an Outline of Principal Issues which had been provided to the Council prior to the resumed hearing.
The primary objections raised were in relation to particulars 14(e) and (f) and 15(e) and (f) of the 5th FAOA which, among other things, concerned the misalignment and discontinuity of the path. It was alleged that the evidence related to the same particulars that had been previously dealt with by the Court of Appeal. The Council’s submissions were such that the only documents they considered were relevant to the boulder sea walls, were those that established the location of those sea walls and that they were misaligned and discontinuous.

The applicants made submissions that the evidence relevant to the particulars in question were admissible on the basis that, among other things, the Court had wide discretion to allow the type of relief sought by the applicants, and that evidence should not be confined to merely establishing that the boulder seawalls were misaligned and discontinuous, but that it should extend to the actions of Council or other entities which caused the seawalls to be dangerous.

**Decision:** The Court held, in upholding the primary objections:

1. there was no issue on the pleadings that the malalignment and discontinuous nature of the boulder wall under the path caused or contributed to the alleged environmental harm;
2. it would indeed be a highly undesirable and unacceptable situation if a party, being unsuccessful in amending its pleadings to agitate a particular issue, to then claim relief based on that rejected amendment to support an argument that it thereby becomes an issue and the Court should receive evidence to assist it in ordering that relief;
3. there was no issue before the Court as to the history of the construction of the boulder walls or any environmental harm said to have been caused as a result of their construction including resulting from their malalignment or discontinuity;
4. the function of particulars was not to expand the issues defined by the pleadings, but “to fill in the picture of the plaintiff’s cause of action with information sufficient detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial”; and
5. the evidence the subject of successful objections by Council, should be excluded.

**Mark John Sorraghan v Logan City Council [2014] QPEC (Jones DCJ - 20 February 2014)**

*Environment and Planning – Application – where applicant sought for appeal to be dismissed for want of prosecution*

**Facts:** This was an application by the Logan City Council (Council) to have an appeal dismissed for want of prosecution. The subject appeal, which was filed by Mark Sorraghan (the respondent to the application) on 13 August 2010, was against the Council’s decision to refuse a development application for a material change of use. Since that time, the respondent had not taken a step in the proceeding since 10 August 2011, and had failed to comply with numerous orders of the Court, including orders requiring nomination of its expert witnesses, attendance at a without prejudice
conference, production of individual expert reports and had failed to attend Court on 12 separate occasions.

The respondent did not dispute these facts, and contended that the reason for his failure to comply with the orders and progress the appeal was because of a number of health issues (including depression) and the fact that he was essentially impecunious.

**Decision:** The Court held, in allowing the application:

1. the health and financial state of affairs of the respondent were relevant considerations, however, in this case, they were not sufficient to explain the unsatisfactory conduct of the respondent to date. The appeal was characterised by periods of delay that were wholly attributable to the respondent. It was also a significant consideration that the respondent accepted that there was no prospect of him taking any meaningful step in the proceeding in the foreseeable future;

2. the respondent’s concession (and the Council’s acceptance) that the appeal should be dismissed on the basis that Council did not pursue cost orders and that the parties conduct further without prejudice discussions (despite the appeal being dismissed), was a matter to be taken into account by the Court, but was by no means decisive in relation to the orders made; and

3. the appeal should be dismissed.


*Application for declaratory relief – Court’s jurisdiction to make declarations – Where originating application was doomed to fail – where incorrect instituting of proceedings – whether leave should be granted for failure to file an appeal within sufficient time - costs*

**Facts:** This was the hearing of an application brought by the applicant, Redland City Council, to have the respondent’s (Mr Wood’s) originating application dismissed with costs. Mr Wood was a fisherman who operated a commercial business from his residential premises at Cleveland, which included the cooking, storage and sale of seafood. Those activities had been permitted pursuant to a town planning consent permit dated 22 September 1997. However, that permit contained a sunset clause which had passed, causing the approval to lapse. Mr Wood’s subsequent attempts to obtain a new development approval for his commercial operations (of which there had been many) were unsuccessful.

The originating application brought by Mr Wood sought a declaration that the use of his premises for the purposes of processing, cooking, storage and transport to the point of sale of seafood and a development permit for a material change of use be granted. His application sought relief pursuant to section 680F of the *Sustainable Planning Act 2009* (SPA). That section was concerned with the registration of uses which generate emissions likely to affect urban amenity. Upon discovering the limitations of section 680F to achieve the desired declarations, Mr Wood sought to amend his originating application, by instead seeking relief pursuant to sections 481
and 482 of the SPA. Those sections related to the rules for making an appeal to the Court.

Redland City Council submitted that the originating applications, in all forms, were doomed to fail. It sought orders that Mr Wood’s application be dismissed with costs.

**Decision:** The Court held, in dismissing Mr Wood’s originating application and awarding costs to Redland City Council:

1. section 680F of the SPA had no relevance to the matter;
2. Mr Wood’s amended application failed to meet in the most fundamental way, the requirements of sections 481 and 482 of the SPA;
3. the Court’s leave was required to prosecute a notice of appeal and no meaningful attempt was made to convince the Court that good grounds might exist to justify leave being granted;
4. the Court had no jurisdiction to make the declarations or grant the relief sought by Mr Wood; and
5. Redland City Council was entitled to costs under section 457 of the SPA, because:
   (1) costs were appropriate in the circumstances to indemnify the successful party, which had incurred costs to defend proceedings prosecuted against it; and
   (2) Redland Shire Council wrote to the respondent prior to the hearing advising him that his application was doomed to fail and offering to bear its own costs, if he discontinued his application.

**Boral Resources (Qld) Pty Ltd v Bundaberg Regional Council [2014] QPEC 8 (Rackemann DCJ - 13 March 2014)**

*Planning and Environment – where the applicant requested a permissible change to a development approval relating to a quarry – where approval is limited by condition to a time about to expire – where applicant will be seeking a substantive extension to the period for which the approval has effect – where applicant sought interim extension of the permit to enable determination of the substantive application for approval*

**Facts:** This was a request by the applicant for a permissible change to a development approval relating to the applicant’s quarry located in Bundaberg. The applicant’s existing approval was the subject of a permissible change request to extend the period to which the approval had effect over the quarry for a further five years. The matter was brought before the Court because the development approval to which the applicant sought the extension was to expire. The change sought at the hearing was to extend the period for which the approval had effect, pending the determination of the broader request.

**Decision:** The Court held, in allowing the change:

1. it was unlikely that any person would make a properly made submission objecting to the change if the circumstances allowed; and
2. the change which would extend the life of the permit, only for so long as was necessary, for the matter to otherwise be determined.
Andrew Parker and Anor v Professional Certification Group Pty Ltd and Anor [2014] QPEC 9 (Rackemann DCJ - 24 March 2014)

Planning and environment – appeal from a decision of the Building and Development Dispute Resolution Committee – where appellants applied to the respondent for a permit to facilitate the construction of a retaining wall and new boundary fence – where Committee’s reasons contained reference to issues which were not raised in the grounds of appeal nor the hearing – where the Committee made findings on the basis of a private meeting and inspection with adjoining owners conducted after the hearing and without notice to the parties – whether appellants were denied procedural fairness and a reasonable opportunity to be heard

Facts: This was an appeal against a decision of the Building and Development Dispute Resolution Committee (the Committee) pursuant to section 479(1) of the Sustainable Planning Act 2009 (SPA), which confirmed an earlier decision of the respondent private certifier to refuse a development application for building works. The building works application was retrospective, in that it was for a wall and fence that had already been constructed. The respondent elected not to take part in the appeal. Brisbane City Council was a co-respondent to the appeal.

The issues for the Court to consider were:

(1) whether the appellants were afforded procedural fairness by the Committee;
(2) whether the Committee correctly applied the assessment of the building application against a condition in a higher-order development approval applying to the land, which referenced the Filling & Excavation Code in City Plan 2000; and
(3) whether the Committee was correct in finding that the appellants had filed their Notice of Appeal against the decision notice out of time, pursuant to section 527 of the SPA.

Decision: The Court held, in allowing the appeal and remitting the matter back to a reconstituted Committee:

1. the Court must be conscious in considering an appeal against a Committee hearing that such hearings are not ordinarily governed by the same rules as the Planning and Environment Court. However, a Committee must give all persons appearing before it a reasonable opportunity to be heard;
2. the appellants were not afforded procedural justice by the Committee because the appellants:
   1) were not present when the Committee met with adjoining owners;
   2) were not given an opportunity to respond;
   3) had not themselves viewed the wall and fence from the adjoining owners’ premises; and
   4) were not given any opportunity to make submissions about the amenity of the wall and the fence as viewed from the adjoining property, and in particular, from the verandah, which the Committee visited;
3. the Committee had overlooked the fact that compliance with acceptable solutions in the Filling and Excavation Code was not mandatory, or, alternatively, it had failed to turn its mind to, or give reasons as to, how conflict with the Filling and Excavation Code was established, in its mind, in the absence of considering the relevant performance criteria; and

4. the appellants had not been given any notice by the Registrar pursuant to section 554(4) of the SPA that the Notice of Appeal had been filed out of time. In addition, at no time prior to the decision, including at the hearing, were the appellants advised that the timing of the filing of the notice was in issue, and they were not given an opportunity to be heard or make submissions on the issue.

Anderson v Logan City Council and Anor [2014] QPEC 10 (Rackemann DCJ - 12 March 2014)

Planning and Environment – submitter appeal against council’s decision to approved a development application for a material change of use to permit a home based upholstery business – procedure where appellant fails to appear – where home based business activities potentially suitable under the planning scheme subject to impact assessment – whether approval would result in adverse amenity impacts

Facts: This was a submitter appeal against the decision of the Logan City Council (Council) to approve the co-respondents’ development application for a material change of use to permit a home based upholstery business at South Maclean. The upholstery business was operated out of a shed on the co-respondents’ property, in a rural residential type area. The co-respondents had already started the business under the mistaken assumption that no approval was required. The appellant’s residence was located to the immediate west of the subject site.

There was no appearance by the appellant or any person on the appellant’s behalf at the hearing. The appellant had alleged in the grounds of appeal that the proposal would cause various amenity impacts including noise, traffic and other environmental impacts, particularly, air pollution and dust. The Notice of Appeal did not rely on any specific contravention of provisions of the relevant Beaudesert Shire Planning Scheme 2007 (Planning Scheme). However, the relevant provisions of the Planning Scheme were the subject of examination by the Council’s town planning expert.

The co-respondent and Council contended that there would be no significant adverse acoustic, air, quality, traffic or amenity impacts as a result of the proposal. The conditions attaching to the Council approval required, among other things, limitation on vehicle movements and hours of operation, a limitation of two non-resident employees, and extensive landscaping. Neither the appellant nor the co-respondent engaged experts in the appeal.

The appellant’s husband had acted as the appellant’s agent throughout the appeal up until the hearing. On the day prior to the hearing, the appellant’s husband informed the Court that he had resigned his agency and had recommended that the appellant have professional advice due to her “medical condition”. The appellant did not seek an application for an adjournment.
**Decision:** The Court held, in dismissing the appeal:

1. while it was the appellant that had not appeared, the appellant did not bear the onus in the appeal. The onus lay on the co-respondent and the appropriate course was to proceed with the trial and provide the co-respondents with an opportunity to discharge their onus in the usual way;

2. the proposal would not cause noise or air quality impacts or adverse traffic consequences of any significance given the limited scope of the proposal, the number of employees to be engaged and the limits placed on vehicle movements;

3. the Planning Scheme contemplated activities such as the proposal as being potentially suitable subject to impact assessment. To the extent that there might be thought to be any tension with any part of the more detailed provisions of the Planning Scheme, there were sufficient grounds to justify approval for the proposal notwithstanding any conflict, given that the proposal was entirely appropriate and would not result in adverse amenity impacts; and

4. the development application should be approved subject to conditions which would be amended from those which the Council had set. Those conditions related to the proposal’s compliance with the Parking and Servicing Code required under the Planning Scheme.
Bremer Waters Pty Ltd v Ipswich City Council [2013] QCA 392 (Muir and Morrison JJA and Applegarth J - 20 December 2013)

Environment and planning – conditions requiring developer contributions – where the respondent Council approved a development application for a material change of use of land for a retirement community – where the approval was subject to conditions, including condition 24 which required the payment of infrastructure contributions – where, at relevant times, the source of power to impose a condition regarding infrastructure was s. 6.1.31 of the Integrated Planning Act 1997 – where, in response to the applicant’s request to change condition 2 of the development approval to acknowledge limited occupancy of the dwelling units, Council changed conditions 2 and 24 – where the primary judge dismissed the applicant’s application for declaratory relief under the Sustainable Planning Act 2008 to the effect that the conditions were beyond power – where the applicant contended that there was no power to impose condition 24 as the relevant planning scheme policies (the 1999 policies) were not validly adopted as the Council did not substantially comply with the Sch 3 processes, as required by s. 2.1.12 of the IPA – where the applicant contended that s. 6.1.31(2)(c) of the IPA maintained the Council’s legal position as if the Local Government (Planning and Environment) Act 1990 (Qld) (the P&E Act) had not been repealed – where the applicant contended that there was no power under the P&E Act to impose conditions requiring contributions to the cost of infrastructure other than water supply and sewerage infrastructure – where the applicant contended that the 1999 water supply and sewerage policy was invalid as it was not self-contained, as required by s. 6.2 of the P&E Act – where the applicant contended that condition 24 could not lawfully require the applicant to pay contributions in accordance with the 2004 policies which were not in force when condition 24 was imposed – where the applicant submitted that the Council had no power to unilaterally change condition 24 following the applicant’s request to change condition 2 – whether there was an error of law sufficient to warrant the granting of leave to appeal under s. 498 of the SPA

Integrated Planning Act 1997 (Qld), ss 2.1,19, 2.1.20, 3.5.32(1)(b), 3.5.33, 6.1.1, 6.1.31, Sch 3, Sch 10 Local Government (Planning and Environment) Act 1990 (Qld), s 6.2; Sustainable Planning Act 2009 (Qld), s 498

Facts: This was an application for leave to appeal against part of an order of the Planning and Environment Court dismissing an application which would have had the effect of determining that certain requirements to make monetary contributions towards the cost of providing infrastructure, imposed on the applicant (Bremer) by the respondent (Council), were unlawful.

On 13 February 2002, Council issued a negotiated decision notice approving a development application for a material change of use of land for a retirement community containing 161 residential units and a manager’s residence. The development approval was subject to conditions, including Condition 24 which required the payment of infrastructure contributions in accordance with “relevant
Planning Scheme Policies”. Both Council and Bremer brought proceedings in the Planning and Environment Court for declaratory relief. Bremer sought declaratory relief to the effect that the condition was beyond power, and an order for the refund of monies paid by it in respect of the conditions. An issue in the proceeding was the lawfulness of the “relevant Planning Scheme Policies”.

There were four relevant policies in existence in February 2002 (the 1999 Policies), dealing with contributions for roadworks, social infrastructure, open space and water supply, and sewerage infrastructure. The source of power to impose a condition on a development approval requiring payment of a contribution towards the cost of supplying infrastructure was found in s. 6.1.31 of the Integrated Planning Act 1997 (IPA).

In November 2007, Bremer requested that Council change Condition 2 of the development approval to limit occupancy to two persons per dwelling. The letter also sought deletion of the requirement to pay contributions with respect to a community building, as set out in Condition 24. In 2008, Council changed Conditions 2 and 24. By the time the conditions were changed, new policies were in force (the 2004 Policies). Bremer contended at first instance that:

1. the 1999 Policies were not validly made;
2. Condition 24 was not validly imposed;
3. if Condition 24 was validly imposed, it could only lawfully authorise the imposition of contributions under policies in force when the condition was imposed; and
4. the Council had no power to change Condition 24 in 2008.

The primary Judge found for Council in respect of contentions (1), (2) and (4) and, in respect of (3), held that Condition 24 could lawfully require contributions to be paid under policies in force at the date of payment (Ipswich City Council v Bremer Waters Pty Ltd [2013] QPEC 20). The grounds of appeal in the Court of Appeal were:

(A) That the 1999 Policies were not validly made pursuant to ss. 2.1.19 and 2.2.20 or Schedule 3 of the IPA and as such that there was no power to impose Condition 24 (the s. 2.1.20 ground).

Section 2.1.19 and Schedule 3 of the IPA set out the process for making or amending a planning scheme policy. Section 2.1.20 of the IPA provided that a planning scheme policy made or amended in substantial compliance with Schedule 3 was valid to the extent that any non-compliance had not adversely affected the public’s awareness of the nature or existence of the policy or amendment, and had not restricted the opportunity to make submissions about the policy or amendment.

The primary Judge found on this issue that Council had substantially complied with the process for making planning scheme policies set out in Schedule 3 of the IPA and that s. 2.1.20 of the IPA had been satisfied.
Bremer argued that s. 2.1.20 of the IPA could not be relied upon in relation to the issue of substantial compliance, as Council had not even purported to follow the process required by s. 2.1.19 and Schedule 3 of the IPA.

(B) There was no power to impose conditions requiring a contribution towards the cost of supplying infrastructure other than water supply and sewerage infrastructure (the s. 6.1.31(2)(c) ground).

Bremer argued that the Council’s power under the transitional provisions of IPA to impose conditions requiring contributions was limited to that which was previously available under the Local Government (Planning and Environment) Act 1990, and that power did not go beyond conditioning for water supply and sewerage headworks.

The primary Judge had accepted Council’s argument that if the legislature had intended to limit the conditions power under IPA to water supply and sewerage headworks it would have done so expressly.

(C) The 1999 water supply and sewerage policy was invalid because it was not self-contained and directed the reader to a register of charges in order to ascertain the charges to use to calculate the contribution (the s. 6.2 ground).

Bremer argued that the primary Judge had erred in finding in favour of Council. It argued that when a price was required to be fixed by statute the price must be fixed in the body of the legislation itself, not by some extraneous document and that subordinate legislation was invalid if it directed the reader to another document to ascertain the law, particularly if the extraneous material contained something essential, rather than subsidiary.

(D) Condition 24 could not lawfully require contributions to be paid in accordance with the 2004 Policies which were not in force when Condition 24 was imposed (the 2004 Policies ground).

(E) Council had no power to change Condition 24 when it changed Condition 2 on Bremer’s request pursuant to s. 3.5.33 of the IPA (the s. 3.5.33 ground).

Decision: The Court held, that:

In relation to the s. 2.1.20 ground:

1 whether there was substantial compliance with Schedule 3 of the IPA was not dependent on the Council’s intention or on whether it purported to act under a particular head of power;
2 even if the process followed by the Council was “confusing”, it did not follow that the requirements of s. 2.1.20 were not satisfied;
the primary Judge carefully considered the process followed and concluded that there had been substantial compliance; and
it had not been demonstrated that the primary judge was not entitled to reach the conclusion.

In relation to the s. 6.1.31(2)(c) ground:

there was power under the P&E Act to impose conditions requiring contributions towards the cost of road works, infrastructure, social infrastructure and open space infrastructure.

In relation to the s. 6.2 ground:

the contribution amount was determined under a policy and not fixed by the register of charges. The policy incorporated the register only as a means of identifying a sum for insertion in the formula for calculating infrastructure charges contained in the policy.

In relation to the 2004 Policies ground:

there was no reason why a condition could not be expressed so as to apply a policy in force from time to time rather than a policy in force at the time of imposition of the condition.

In relation to the s. 3.5.33 ground:

if the request was a development application, Council would have been entitled to have regard to infrastructure policy and whether any conditions should be imposed requiring a contribution towards the cost of supplying infrastructure in assessing and deciding the application. The Council was also entitled to have regard to such matters when assessing a request for a change to conditions; and
acceptance of Bremer’s argument would substantially constrain local authorities in dealing with applications for changes in conditions. If the granting of a change in a condition, although reasonable in itself, would produce the result that other conditions would no longer be adequate, appropriate or desirable, the local authority would need to decide between refusing the application and granting it, with the resultant creation of an unsatisfactory state of affairs in relation to other conditions.

Gillion Pty Ltd v Scenic Rim Regional Council and Ors [2014] QCA 21 (McMurdo P and Fraser and Morrison JJA DCJ - 21 February 2014)

Environment and planning – development control – matters for consideration of consent authority – consideration of planning schemes – application for development permit for commercial groundwater extraction – conflict with planning scheme – where Council’s refusal was upheld by the Planning and Environment Court – whether primary judge erred in law
Facts: This was an application for leave to appeal against the Planning and Environment Court’s decision to uphold Council’s refusal of a development application for a development permit for a material change of use for “Commercial Groundwater Extraction” on land at Mt Tamborine.

During the appeal to the Planning and Environment Court, the applicant had acknowledged that the proposed use conflicted with the planning scheme. The question for the Planning and Environment Court to decide was therefore whether “sufficient grounds” existed to justify approval of the application, despite the conflict. The primary judge found that the grounds relied upon by the applicant were insufficient to overcome the significant conflict with the planning scheme.

The planning scheme divided the planning scheme area into six zones. The subject site was within the Tamborine Mountain Zone, which was divided into 17 precincts. The subject site was within the Village Residential Precinct. Overall Outcome OO46, listed under the heading “Precinct Intent” for the Tamborine Mountain Zone, was relevant to the Village Residential Precinct and stated that “Development within the Village Residential Precinct is typically urban residential in character with a moderate to high level of amenity on lots not served by a reticulated water and sewerage system. The Precinct, in close proximity to the Business Precinct, provides the principal location for additional urban residential accommodation”.

The applicant contended that the primary judge had erred in law in finding that OO46 applied “across the Shire”. The applicant argued that the error led to the primary judge unreasonably characterising the existing development in the Village Residential Precinct as an area which did not “perfectly” fit OO46, when there was no fit at all. The applicant also argued that the error influenced the primary judge’s decision that there were no sufficient grounds to overcome what was regarded as a significant conflict with the planning scheme.

The applicant further contended that the primary judge did not take into account that various provisions of the Tamborine Mountain Zone Code were general provisions applicable to any development characterised as “Commercial Groundwater Extraction”, and that the proposed use did not include each of the elements contemplated by that use definition.

The applicant also contended that the primary judge erred in law by not taking into account the outcome of his detailed assessment of the applicant’s proposal against specific provisions of the planning scheme, such as the Overall Outcomes for the zone.

Decision: The Court held, in refusing leave to appeal with costs:

1. the applicant’s argument in relation to OO46 placed too much weight on the primary judge’s use of the work “Shire” rather than “Zone”. The substantial point was that the statement of precinct intent in OO46 did not apply only to the area immediately surrounding the land. It was plain that the primary judge appreciated that the relevant planning scheme provisions related to the Tamborine Mountain Zone rather than any other zone within the shire;
2. it was apparent that the primary judge’s analysis of the deficiency in the statement of precinct intent set out in OO46 did not contribute to any error in the primary judge’s conclusion that the exclusion of Commercial Groundwater Extraction from the consistent table of uses in the Tamborine Mountain Zone was significant because it was the result of a deliberate policy decision. The finding was open on the evidence;

3. the generality of the “default provisions” in the Tamborine Mountain Zone Code did not of itself indicate that the conflict found by the primary judge was not significant. The fact that not all elements of the definition were in play was of no significance in circumstances in which the proposed use nevertheless fell within the definition;

4. the primary judge did take into account his assessment of the proposal against the Overall Outcomes for the zone and other provisions of the planning scheme;

5. the applicant had not established that the primary judge made any error of law; and

6. the appropriate order was that the applicant’s application for leave to appeal be refused with costs.

   Michael Walton and Ben Job

By M.E. Rackemann

Introduction
Queensland has long had a statutory regime to recognise and protect heritage places. This paper provides an overview of those controls at State and local levels and contrasts them with planning scheme provisions which protect buildings for their contribution to character, rather than because of heritage significance. Finally, the paper tells the story of the fate of Hesketh House, a building which was demolished without approval, notwithstanding its entry on heritage registers at National, State and Local levels.

The Legislation
The Queensland Heritage Act 1992 (QHA) is the principal legislation in relation to the conservation of Queensland’s cultural heritage. The object of the Act is:2

… to provide for the conservation of Queensland's cultural heritage for the benefit of the community and future generations.

The QHA establishes the Queensland Heritage Council, to perform functions under the Act.3 In exercising powers conferred by the QHA, the Minister, chief executive, Queensland Heritage Council and other persons and entities concerned in its administration must seek to achieve:4

(a) the retention of the cultural heritage significance of the places and artefacts to which it applies; and
(b) the greatest sustainable benefit to the community from those places and artefacts consistent with the conservation of their cultural heritage significance.

The QHA is not the only legislation dealing with cultural heritage. In particular, the Aboriginal Cultural Heritage Act 2003 and the Torres Strait Islander Cultural Heritage Act 2003 deal with cultural heritage matters specific to those cultures. They are not however, the focus of this paper.

Queensland Heritage Register
The chief executive must keep a register called the Queensland Heritage Register (Register) which includes a record of the following5:

(a) State Heritage places;

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1 This paper was presented at the Australasian Conference of Planning and Environment Courts and Tribunals 2014, Hobart
2 QHA s 2.
3 QHA Part 2 Division 1.
4 QHA s 2(3).
5 QHA s 31(1) and (2).
(b) archaeological places; and
(c) protected areas.

The Register is required to be available for inspection, free of charge and is searchable on the Department’s website.\textsuperscript{6} This paper focuses on State Heritage places of which there are currently more than 1,600 on the Register.

Insofar as State Heritage Places are concerned, the criteria for entry is satisfaction of one or more of the following criteria\textsuperscript{7}:\textsuperscript{8}

(a) the place is important in demonstrating the evolution or pattern of Queensland’s history;
(b) the place demonstrates rare, uncommon or endangered aspects of Queensland's cultural heritage;
(c) the place has potential to yield information that will contribute to an understanding of Queensland's history;
(d) the place is important in demonstrating the principal characteristics of a particular class of cultural places;
(e) the place is important because of its aesthetic significance;
(f) the place is important in demonstrating a high degree of creative or technical achievement at a particular period;
(g) the place has a strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;
(h) the place has a special association with the life or work of a particular person, group or organisation of importance in Queensland's history.

The wording of the criteria is quite broad. It is not unknown for one to be able to find a heritage expert who can make a case for inclusion in the Register of almost anything. In such cases it is relevant to bear in mind that the criteria are qualified by expressions which require a place to be “important” in certain respects, or to have a “strong” or “special association” of some kind or to demonstrate a “rare, uncommon or endangered” aspect of Queensland’s cultural heritage. To take criterion (a) for example, it is not sufficient for the building to have been part of the evolution or pattern of Queensland’s history. It must be important in demonstrating one of those things.\textsuperscript{8} Such qualifications can sometimes be overlooked or given inadequate weight by heritage enthusiasts.\textsuperscript{9} In approaching these qualifications, the court has been careful not to create a gloss on the words used, but it has been observed that the words “rare, uncommon or endangered” in criterion (b), for example, clearly take the application of that criterion beyond the commonplace.\textsuperscript{10} It has also been observed that the ordinary meaning of the word “important” is “of much significance or consequence”.\textsuperscript{11}

\textsuperscript{6} QHA s 32.
\textsuperscript{7} QHA s 35(1).
\textsuperscript{8} See Reelaw Pty Ltd v Queensland Heritage Council [2004] QPEC 79 at para 114.
\textsuperscript{9} See Reelaw Pty Ltd v Queensland Heritage Council (supra) at para 95.
Places may be entered or removed from the Register on application to the chief executive, by any person or entity. Notice of the application is given to, amongst others, the owner of the place (if the owner is not the applicant). Public notice is also given of the application and submissions may be made on the basis that the place, the subject of the application, does or does not satisfy the criteria. After considering the relevant material, the chief executive must give a written recommendation to the Queensland Heritage Council about whether the place should be entered, removed, or stay on the register as the case may be. The ultimate decision, however, is made by the Queensland Heritage Council. In making its decision, it may have regard to whether the physical condition or structural integrity of the place prevents its cultural heritage significance being preserved.

The owner of the place may appeal, to the Planning and Environment Court, against the following decisions:

1. to enter a place, as proposed in the heritage recommendation, in the register;
2. to enter the place, as varied from the heritage recommendation, in the register;
3. to remove the place from the register;
4. to vary the entry of the place in the register.

The owner may not appeal against a decision not to enter a place or to leave a registered place in the register. The ground of any appeal is limited to whether the place, the subject of the appeal, does or does not satisfy the cultural heritage criteria. The appeal to the Planning and Environment Court proceeds as a full merits review, with the appellant bearing the onus.

Development and Heritage Places

Pursuant to the Sustainable Planning Act 2009 and the Regulation thereto, all aspects of development (including demolition) on a Queensland Heritage Place is assessable, other than development:

1. for which an exemption certificate under the QHA has been issued;
2. that is liturgical development under s 78 of the QHA; or
3. is carried out by the State; or

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12 QHA s 36.
13 QHA s 38.
14 QHA s 39.
15 QHA s 42.
16 QHA s 44.
17 QHA s 53.
18 QHA s 51(3).
19 QHA ss 161, 54(3) and 53.
20 QHA ss 162(1). In The Corporation of the Sisters of Mercy of the Diocese of Townsville v Queensland Heritage Council [2013] QPEC 53 Robin QC DCJ expressed the view that the court was not thereby prevented, in conducting an appeal (proceeding by way of a hearing anew) from itself considering whether the physical condition or structural integrity of the place prevents its cultural heritage significance being preserved. This decision is subject to an appeal in the Queensland Court of Appeal.
22 QHA ss 231 and 235; Sustainable Planning Regulation 2009 Schedule 3.
23 QHA Part 6 Division 2.
The exemption for liturgical development is discussed later in the context of the story of Hesketh House.

Under the Integrated Development Assessment System, the chief executive may either be the assessment manager or a referral agency as the case may be. Insofar as a State Heritage Place is concerned, the chief executive must assess the application against the object of the QHA. If the chief executive is satisfied that the effect of approving the development would be to destroy or substantially reduce the cultural heritage significance of a State heritage place, the chief executive must, unless satisfied there is no prudent and feasible alternative to carrying out the development, either refuse the application (if the chief executive is the assessment manager) or require the assessment manager to refuse the application (if the chief executive is a concurrence agency). In either case, the decision on the development application is appealable to the Planning and Environment Court.

Local Heritage Places
Historically, the QHA was solely concerned with heritage places of significance at a State level. Protection of local heritage places was left to individual local governments via their planning schemes. This has led to the situation where local heritage controls exist in some planning schemes but not in others. Further, the heritage controls are not consistent as between local government areas.

In approaching heritage provisions of planning schemes, it is necessary to bear in mind they are understandably concerned with significance either at a local government or local level, rather than at a State level. For example, the provisions of the Heritage Register Planning Scheme Policy for Brisbane, which is called up in Brisbane’s City Plan 2000, use substantially the same criteria as appears in s 35 of the QHA but, instead of referring to “Queensland’s” history or cultural heritage, it refers to the city or local area. Obviously, what is of “importance” at one level (e.g. the local level) will not necessarily be of importance at another (e.g. State level), thus the importance bar is set differently in the planning scheme.

There are other differences between the planning scheme controls and those in the QHA. The controls in Brisbane, for example, include places of natural heritage significance. Further, assessment against the Heritage Place Code is triggered not only by development on premises that includes a heritage place or within a heritage precinct, but also development adjoining such a place or precinct (since adjoining development may impact upon the value of the heritage place or precinct).

Heritage controls in planning schemes also involve different processes and rights in relation to listing or removal of a property (or precinct) from the register. The content of a register in, or referred to in, a planning scheme, is primarily a matter for the local government. A place may be entered or removed without application and without necessarily giving the owner any notice. Subject to any different provision in a

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24 QHA s 68(1).
25 QHA s 68(2) and (3).
26 See Cowan v Brisbane City Council & Ors [2012] QPEC 81 at para 34.
27 See Brisbane City Plan 2000, Volume 1 Chapter 5 Heritage Place Code, page 89.
particular planning scheme, a disgruntled owner is left to make an informal submission to persuade the Council to alter the register or to make a development application to demolish or develop the place notwithstanding its inclusion in the register.

In the case of Brisbane, a development application to demolish a place on the register calls up the Heritage Place Code, against which an application is assessed. That Code includes relevant performance criteria which assume the cultural heritage significance of the place on the register and direct attention to the impact of the proposal on that significance. Nevertheless, the court has accepted that, where evidence establishes that a place has no cultural heritage significance, its entry on the register would not be an insurmountable hurdle to approval of an application for demolition. In such circumstances the conflict with the planning scheme provisions would be textual, rather than substantive, and there would be a sufficient basis to grant approval notwithstanding the conflict.28

More recently, the State has taken an interest in local controls. By reason of the Queensland Heritage and Other Legislation Amendment Act 2007, which commenced in 2008, the QHA was amended to, amongst other things, include a new Part 11. That part makes provision for places of cultural heritage significance in local government areas. Those provisions apply to all local governments other than those prescribed by regulation. A local government may only be exempted from the application of Part 11 (by being prescribed) where the chief executive is satisfied that:

(a) the local government has, in its planning scheme, identified places of cultural heritage significance in its area; and
(b) the local government’s planning scheme satisfactorily provides for the conservation of places of cultural heritage significance in its area.

Twelve local governments have been prescribed.30 In those areas protection of local cultural heritage is left to the relevant planning scheme. Whilst Brisbane has heritage provisions in its planning scheme, it is not prescribed. Accordingly, the regulation of local heritage within Brisbane is dealt with both under its planning scheme provisions (which are not invalidated by the fact that Brisbane is not prescribed) and under the provisions of Part 11 of the QHA. That is a somewhat confusing and cumbersome arrangement.

Under Part 11 of the QHA, all local governments, save for those prescribed, must keep a register (Local Heritage Register) of places of cultural heritage significance in its area.31 Enquiries of the Department suggest that, whilst the new provisions have been in force since 2008, not all local governments have completed compilation of such a register. The obligation, under s 113 of the QHA, is for a local government to keep a register of places of cultural heritage significance “in its area”. That leaves unclear whether the register is to be a register of those State Heritage Places which are located within the local area or a register of places of cultural heritage significance at the local level. Sections 115 and 116 however, in describing places which may be

28 Cowan v Brisbane City Council & Ors [2012] QPEC 81.
29 QHA s 112.
30 Queensland Heritage Regulation 2003 s 7 and Schedule 1.
31 QHA s 113.
proposed for entry on a local heritage register, refer to a place of cultural heritage significance “for a local government area”, which suggests that the register is for places of significance at a local government area level. Further, the code which is called up for assessment of development on a Local Heritage Place does not apply if the place is a State Heritage Place.\(^{32}\)

A local government may, on its own initiative, propose to enter a place in its Local Heritage Register and must propose to enter a place if the chief executive recommends that it do so. It must also propose to remove a place from that register if it is satisfied that the place is no longer a place of cultural heritage significance for its area.\(^{33}\) The owner must be given notice of a proposal to enter or remove a place from the register.\(^{34}\) Any submission must be considered.\(^{35}\) The final decision is made by the local government.

There is no provision for an appeal from a decision to enter a place on the register. However, by reason of s 124, entry on the register is taken to be a change to the local government’s planning scheme and triggers the compensation provisions of s 704 of the *Sustainable Planning Act*. Those provisions give an owner the opportunity, during a limited period of time, to make a development application which Council is requested to assess and decide as if the place had not been entered on the register. The Council may elect either to assess the application on that basis (in which case there is no compensation) or may decide to assess the application on the basis of the new listing. If it does the latter, and refuses the application, then a claim for compensation for the change to the planning scheme may be made.

Aside from potentially triggering compensation, the effect of entry on the local heritage register is to engage a state-wide code against which applications for development on a local heritage place are considered. The purpose of that code is to ensure that development on a local heritage place is compatible with the cultural heritage significance of the place by:\(^{36}\)

\[\text{(a) preventing the demolition or removal of local heritage places, unless there is no prudent and feasible alternative to the demolition or removal; and} \]
\[\text{(b) maintaining and encouraging, as far as practicable, the appropriate use of local heritage places; and} \]
\[\text{(c) protecting, as far as practicable, the materials and setting of local heritage places; and} \]
\[\text{(d) ensuring, as far as practicable, development on a local heritage basis compatible with the cultural heritage significance of the place.} \]

Like the Brisbane City Plan provisions, the code assumes that the listed place does indeed have cultural heritage significance. It is yet to be determined whether the court’s approach to the corresponding aspect of the Brisbane provisions will be applied in respect to the code under the QHA.

\(^{32}\) *Queensland Heritage Regulation* Sch 2 Part 1 s 2.
\(^{33}\) QHA s 116.
\(^{34}\) QHA s 117.
\(^{35}\) QHA s 119.
\(^{36}\) *Queensland Heritage Regulation 2003* Sch 2.
Character Controls

Cultural heritage value is not the only basis upon which preservation of buildings might be desirable. Town planning schemes may contain controls on the demolition or development otherwise of buildings which are of importance because of their contribution to a distinctive character. Brisbane’s City Plan 2000 is a particular example of that.

The built form character of any city evolves over time and features elements which are of different eras. Sometimes however, there is a particular style of building, from a particular period, which becomes synonymous with the traditional character of the city or a part thereof. In the case of Brisbane, it is the pre WWII buildings, particularly the “Queenslander” style of housing, which is synonymous with the traditional building character of Brisbane. It is described in the following passage from the Demolition Code under Brisbane’s City Plan 2000:

The predominant traditional building form of pre–1946 housing is a solid core with attached or integrated verandahs raised above the ground on timber supports. Enclosed areas under houses generally maintain the street appearance of lightweight supports to upper floors and reflect the layout of upper floor verandahs. Roof forms are medium pitched pyramids, hips or gables. This style is often referred to generically as the Queensland vernacular.”

City Plan goes on to recognise some other building forms from this period which are also subject of some protection. City Plan also contains an “explanation” of traditional character, which speaks of building form and scale, street context, materials and detailing and setting. What is sought to be protected is not so much the outstanding buildings, but the typical buildings from that era, where they contribute to the relevant character. The value of character houses lies not so much in the value of each house considered in isolation, but rather in the contribution they make to a streetscape of traditional character. Accordingly, one of the purposes of the Demolition Code is to [emphasis added]:

ensure the preservation of buildings where they form an important part of a streetscape where the buildings and streetscape were constructed and/or established in or prior to the end of 1946.”

The Code contemplates buildings being demolished where they either do not represent traditional building character (perhaps as a result of earlier substantial modification), or do not contribute positively to the visual character of the street (perhaps because the street more generally no longer features traditional building character). In assessing such matters, the court assumes the position of a hypothetical average person walking the street and looking about, with a perception which falls somewhere between that of a PhD in Architectural History on the one hand and that of a philistine on the other.37

37 Lonie v Brisbane City Council & Ors [1998] QPELR 206 at 212.
The position is different in the case of buildings (whether residential or commercial) built prior to 1900. City Plan recognises the importance of such buildings, considered in isolation. By reason of Temporary Local Planning Instrument (TLPI) 01/13, protection is now extended to all residential buildings constructed prior to 1911, which are within a Demolition Control Precinct (or on a list published with the TLPI). In addition to residential buildings, the City Plan also recognises the contribution of commercial character buildings. In all cases, buildings may be demolished where they are structurally unsound and not reasonably capable of being made structurally sound.

The Planning and Environment Court has heard many cases involving applications to demolish (wholly or partially) buildings under the City Plan provisions. Usually the cases are in relation to residential character buildings constructed in or prior to the end of 1946. The following principles emerge from the court’s decisions:

(3) in cases where the determining features are such concepts as building character, the court must bear firmly in mind that it must act on the evidence and not its own opinions, and that the view is not evidence, but merely an aid to understanding the evidence;

(4) it is not necessary that the street or dwelling is “pristine” in order for demolition to be refused;

(5) alterations might not deprive a building of its traditional building character. Whether they do is a question of fact and degree to be assessed in each case.

(6) the Demolition Code does not require a pre-1947 (i.e. 1946 or earlier) house to have architectural merit.

(7) it is not necessary that a house exhibit each of the features identified in the explanation of traditional building character in order for it to represent that character.

(8) there is no requirement that a pre-1947 building be “remarkable”, “unique” or “even good”.

(9) the court must be astute to prevent aesthetic considerations from intruding. A pre-1947 building, even if ugly, is to be assessed only on the factor recognised in the Demolition Code as important.

(10) while the explanation of the term “traditional building and character” in the Code and the various elements of that explanation may be seen as a useful guide, it is only an explanation. It is not, and does not purport to be, a definition. It speaks in generalities. The Code does not suggest that “traditional building character” denotes some kind of prototype from which only minor variations of style are permitted.

(11) the presentation of a house to the street may be given greater weight than what may have occurred at the rear, out of view from the street.

(12) unsympathetic alterations which are of a kind which are easily reversible might not prevent an informed observer readily imagining the original presentation of the house, but such alterations remain relevant.

(13) that a site might be suitable for redevelopment for broader reasons and is capable of being sympathetically redeveloped does not satisfy the requirements in order to justify demolition; and

38 Which applies for up to 12 months, pending the new planning scheme in Brisbane which is due this year.

(14) it is relevant to inquire whether the street in question has been robbed of its traditional character by the extent of redevelopment.

The controls on the demolition of such buildings are complemented by other provisions in City Plan, particularly the Residential Design – Character Code, against which new development in residential areas in demolition control precincts must be assessed. The purpose of that Code is to:

5. encourage development in demolition control precincts to reflect or strengthen pre-1946 housing character through compatible form, scale, materials and detailing;
6. in conjunction with the Demolition Code, ensure that precincts in pre-1946 houses are retained and redevelopment in those precincts complements the pre-1946 houses.

In this way, City Plan attempts to preserve the traditional character and amenity of these older parts of Brisbane, not by freezing built form in time, but by a mixture of preservation of built form, where appropriate, while facilitating complementary development and redevelopment.

The Story of Hesketh House: a Case of Divine Intervention?

It will be seen from the above that, for more than two decades, Queensland has had a statutory regime for the protection of buildings of cultural heritage significance at a State level. This has been complemented by provisions which seek to protect cultural heritage significance at a local level in a number of planning schemes. More recently, the legislation has obliged local governments, other than those prescribed by regulation, to maintain a Local Heritage Register. Further, buildings with no cultural heritage significance may be required, by a planning scheme, to be retained because of their contribution to character or amenity. The case of Hesketh House, however, demonstrates that sometimes things can “slip through” the web of protection.

Hesketh House was a multi-storey, red brick building which stood on land adjacent to St Stephen’s Cathedral in Elizabeth Street, Brisbane. The cathedral was built in the second half of the 19th Century. Hesketh House was constructed for the Commercial Travellers Association in two stages in 1914 to 1915 and 1927 to 1928. In 1994, the Catholic Church, which had been redeveloping the cathedral precinct, purchased Hesketh House with a view to its demolition, in order to extend the precincts of the cathedral. At the time of its acquisition, the land on which Hesketh House stood was owned by the Australian and Overseas Telecommunications Corporation (AOTC) in whom the land had vested, from Telecom, by statute on 1 February 1992.

Earlier, on 15 June 1990, the Heritage Buildings Protection Act 1990 (Qld) had been assented to. It was the precursor of the Queensland Heritage Act 1992, which came into force on 21 August 1992. Both St Stephen’s Cathedral and Hesketh House were listed in the 1990 legislation and, upon the commencement of the QHA, were taken to have been provisionally entered on the Heritage Register under that Act. Hesketh House became entered permanently on the Heritage Register on 21 October 1992. The

40 There is an inconsistency in City Plan which, in some places refers to buildings built on or prior to 1946 and in other States and pre 1946 builders.
Church’s plan to demolish Hesketh House faced the apparently significant hurdle of the building’s permanent entry on the Heritage Register. The building also appeared on the National register (which had no ‘teeth’) and was listed in the then 1987 town plan for Brisbane.

In an attempt to overcome the hurdle of registration under the QHA, the Church made application for the removal of Hesketh House from the Register. That application was unsuccessful and an attempt to appeal the decision to the Planning & Environment Court failed for want of jurisdiction (a decision to leave a place on the Register not being appealable). Having been unsuccessful in removing the building from the Register, attention then turned to exemptions and, in particular, to the exemption for development for liturgical purposes which was then provided for in s 33(2) of the QHA as follows:

(2) Approval of development is not required under this division in relation to a church or the precincts of a church if –

(a) Written notice of the proposed development is lodged with the Council at least 30 days before the development starts; and

(b) The note is accompanied by a certificate by an official of the church, authorised by the church to give the certificate, that the development is genuinely required for liturgical purposes.”

An official of the Catholic Church provided a certificate that the intended development (being the demolition of Hesketh House) was genuinely required for liturgical purposes in relation to the precincts of a church, namely St Stephen’s Cathedral. The Queensland Heritage Council thereupon commenced proceedings in which it contended that the certificate did not authorise demolition of Hesketh House because:

(a) Such a certificate would only be effectual in relation to development of St Stephen’s Cathedral or its (present) precincts, rather than development to enlarge its precincts by demolishing a separate registered building (Hesketh House) adjoining the site of St Stephen’s Cathedral and its existing precincts; and

(b) The certificate was false because the development was not genuinely required for liturgical purposes.

In the course of preparation for meeting those arguments, the Church discovered another basis to challenge the listing of Hesketh House. It has already been observed that the Church acquired the property on which Hesketh House stood from AOTC in which the property had vested from Telecom. Section 33 of the Commonwealth AOTC Act provided as follows:

Rules relating to buildings, structures and facilities
33. A law of a State or territory that relates to:

(a) The standards applicable to:

(i) The design; or

(ii) The manner of the construction;

of a building, structure or facility; or

(b) The approval of the construction of a building, structure or facility; or
(c) The occupancy, or use, of a building, structure or facility; or
(d) The alteration or demolition of a building, structure or facility;
does not apply to a building, structure or facility that is a property of AOTC if:
(e) The building, structure or facility was occupied or in use; or
(f) The construction, alteration or demolition of the building, structure or facility had commenced;
before the succession date.

It was clear that on and after 1 February 1992, being the succession date under s 33, and at all times after that date until its transfer to the church on 8 November 1994, Hesketh House was the property of AOTC and was “occupied or in use” within the meaning of s 33(e) of the AOTC Act. Accordingly, a law of the State that “relates to” any of the matters in paras (a)-(d) of s 33, including in relation to the demolition of a building, did not apply to the building. The consequence, the Church contended, was that Hesketh House was not validly listed on the Register.

The trial of the action took place before Derrington J who, on 26 November 1999, gave judgment dismissing the action with costs. In doing so, his Honour concluded that:

(i) While the certificate was genuine, it was inoperative because it related not to the Church or its precincts but to an adjacent separate building, but
(ii) Hesketh House was invalidly entered on the Register.

The consequence was that, whilst Hesketh House was not then a State Heritage Place, immediate steps could have been taken to commence the process for it to be lawfully entered on the Register. A decision to enter it on the Register would, however, have entitled the Church to an appeal on the merits to the Planning & Environment Court.

The Queensland Heritage Council, being dissatisfied with the decision at first instance, appealed to the Court of Appeal in relation to the validity of the registration of Hesketh House. This provoked the Church to reagitate the certificate issue. On 15 September 2000, the Court of Appeal delivered judgment which found for the Church both on the certificate issue and on the validity issue. The consequence was that not only was Hesketh House not validly on the register, but there was no point in initiating steps to lawfully enter it on the register, since the Church could, in any event, demolish it on the strength of the certificate.

While that was the end of the seemingly significant hurdle of the State listing, there remained another problem for the Church. Hesketh House had not only (invalidly) appeared on the State Register, but also on the table of heritage places under the then 1987 Town Plan for the City of Brisbane. This appeared to be another significant hurdle. A careful analysis of the provisions, however, revealed a surprising unintended loophole. The heritage provisions were inserted into the 1987 Town Plan

at a time when it otherwise regulated the erection of buildings or structures and their use (or the use of land), but not demolition. Accordingly, “development” was defined in a way which did not extend to demolition. When the heritage provisions were inserted, Council provided as follows [emphasis added]:

22.4 Certain development and works to be permissible development
   (a) Notwithstanding any other provision of the plan, for the purposes of the plan the carrying out of any works in or in relation to the heritage place which are not or is not otherwise development shall be deemed to be permissible development and design in which the heritage place is situated. …”

Accordingly, whilst not generally regulated by the town plan, the carrying out of works for demolition were “permissible” (i.e. something in respect of which a consent was required) if carried out in respect of a heritage place. Subsequently, it was decided to amend the Town Plan to include the first controls on demolition of character buildings. Those amendments included an amendment to the expression “development” to include “the demolition or removal of a building or other structure”. While understandable in the context of introducing those controls, the effect of including demolition within the definition of “development” without amending the heritage provisions was to remove demolition from the scope of things for which consent was required with respect to a heritage place. Accordingly, whilst works by way of renovation would require approval, demolition would not. Hesketh House was able to be demolished without any approval under the Town Plan, notwithstanding its entry in the table of heritage places.

Unsurprisingly, the liturgical exemption in the QHA is now in different terms. The intended development, the subject of a certificate must be “in a place, or the precincts of a place, that is a place of public worship and a Queensland heritage place.”43 The heritage provisions of Brisbane’s City Plan now expressly extend to demolition.

One could certainly say that the Church had the “rub of the green” in its successful attempts to demolish Hesketh House. It discovered, well after purchasing the property, that the building was (invalidly) listed at a time when, by reason of the identity of its predecessor-in-title, the building could not be entered on the Register. It was also provoked by Queensland Heritage Council’s unsuccessful appeal against the validity issue, into successfully cross appealing on the certificate issue. As if that was not enough, it then discovered an amazing loophole in the then Town Plan for the City of Brisbane, which enabled it to demolish a listed property without consent. Whether that was all just coincidence and good fortune for the Church, incompetence of draftspersons, divine intervention or a combination of those is a matter for you to decide.

M. E. Rackemann

43 QHA s 78.
2. Court Review in Planning Matters: Observations re Stevenson’s Case, Jurisdictional Error, and Unlawfulness

By Robert A. Quirk

Introduction

This paper examines the Court of Appeal’s decision in Stevenson Group Investments Pty Ltd v Nunn (Stevenson) and whether it remains good law having regard to the Court of Appeal’s decision in BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd (BM Alliance), and the Court’s earlier decision in Barro Group Pty Ltd v Redland Shire Council (Barro). The paper will first review the judgments in the Planning and Environment Court (PEC) and the Court of Appeal, and then consider a potential jurisdictional error not dealt with in those proceedings. It will then review the Court of Appeal’s decisions in BM Alliance and Barro, and discuss court review generally for unlawfulness and jurisdictional error. Lastly, the writer will identify some markers to look for when considering whether a decision maker has made a jurisdictional error.

The Stevenson Case

In Stevenson the Court of Appeal (Margaret McMurdo P, Fraser JA and Mullins J agreeing) dismissed an application for leave to appeal from a decision of the PEC. The PEC had given summary judgment against the applicant dismissing its application for declaratory relief. The applicant had sought to have a development approval for building work for a 16 unit development dated 28 July 2004 (building approval) declared void and of no legal effect. The main responding parties were described as the “Tangalooma respondents”.

The Court of Appeal considered the merits of the grounds of appeal in determining whether to grant leave, with the consent of the parties. The applicant relied upon three main grounds, which it said were errors of law that materially affected the PEC’s decision:

5. The failure to refer the development application to the Queensland Fire and Rescue Service (QFRS), as an advice agency (referral failure);
6. Approving the building application which was inconsistent with the existing development approval for a material change of use (planning approval), contrary to section 5.3.4 of the Integrated Planning Act 1997 (Planning Act) (now repealed and replaced by the Sustainable Planning Act 2009), in that it was not generally in accordance with the plans in the planning approval (inconsistency failure); and
7. The building certifier’s decision conflicted with the Building Act 1975 pursuant to section 3.5.13(3)(a) of the IPA, because it was contrary to that...

44 Barrister-at-Law. I thank those who have provided comments on this paper.
45 Stevenson Group Investments Pty Ltd v Nunn [2012] QCA 351.
46 BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd [2013] QCA 394.
49 Stevenson Group Investments Pty Ltd v Nunn [2012] QCA 351 at [7].
50 Stevenson Group Investments Pty Ltd v Nunn [2012] QCA 351, [8], [10]-[13].
Act by failing to include a condition required by section 22 of the *Standard Building Regulation* 1993 (SBR) (condition failure).

Another challenge to the PEC’s decision was that the PEC erred in holding that a court would not exercise its discretion to make the declaration sought, which is relevant to this paper due to inadequate reasons (inadequate reasons ground).51

It should be noted, at this stage, that in relation to the inconsistency failure it was alleged that, amongst other things, the building approval allowed an extra 13,000m² of floor space, being an increase of 37 per cent, and approved commercial/retail development in one of the buildings, where only residential development was involved in the planning approval (use facts).52

There was an additional matter raised during argument in the Court of Appeal relating to a failure to comply with the conditions of the planning approval contrary to section 4.3.3(f) of the Planning Act. The Court of Appeal considered there were a number of problematic issues with this argument, and did not consider it in a substantial way.53

**Decision in the PEC**

The PEC held that the relevant noncompliances were within the jurisdiction to certify.54 Although it was not strictly necessary for it to deal with the issue, the Court concluded that even if the applicant established that the approval was void *ab initio*, it would not grant the declaration sought.55 In this regard, it considered the types of matters that were referred to in *Warringah Shire Council v Sedevcic*.56 As a result, the PEC took the rare, if not unique, step in the PEC of granting summary judgment. In doing so, given its conclusions on matters of law, and in relation to whether a court would make a declaration, the granting of summary judgment was not remarkable.57

The PEC seems to have accepted the Tangalooma respondents’ submission with respect to the inconsistency failure that it was a matter of opinion and therefore could not be a jurisdictional error, with reference to *Buck v Bavone*.58 There appear to be scant reasons for the acceptance of this submission, given the principle relied upon from *Buck v Bavone*, which is set out below. This will be considered further.

**Court of Appeal**

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51 Stevenson Group Investments Pty Ltd v Nunn [2012] QCA 351, [57].
52 Stevenson Group Investments Pty Ltd v Nunn [2012] QCA 351, [11]; Stevenson Group Investments Pty Ltd v Nunn [2011] QPEC 151, [13]-[14], [41]. The inconsistency failure also included an allegation that the building approval was inconsistent with an earlier planning approval.
53 Stevenson Group Investments Pty Ltd v Nunn [2012] QCA 351 at [12].
54 Stevenson Group Investments Pty Ltd v Nunn [2011] QPEC 151, [90].
55 Stevenson Group Investments Pty Ltd v Nunn [2011] QPEC 151, [108].
56 Warringah Shire Council v Sedevcic (1987) 10 NSWLR 335, 339-341 was referred to in Stevenson Group Investments Pty Ltd v Nunn [2011] QPEC 151 at [92].
57 Stevenson Group Investments Pty Ltd v Nunn [2011] QPEC 151, [110]-[111].
58 Buck v Bavone (1975-76) 135 CLR 110, 118-119; Stevenson Group Investments Pty Ltd v Nunn [2011] QPEC 151, [65]-[66], [90].
The Court of Appeal set out some general observations as to the construction of the Planning Act before dealing with each of the grounds relied upon by the applicant. Central to the Court’s reasoning was the following [emphasis added]:

[37] It is significant that there is no express provision in IPA to the effect that any non-compliance with IPA provisions (whether generally or as specified) results in the invalidity of a subsequent decision. It is true that many provisions of IPA, including many relating to IDAS, use the word "must". But as Project Blue Sky recognises, that does not mean non-compliance with those provisions would necessarily result in a subsequent decision approving a development application being liable to be declared void and of no legal effect. That is especially so where, as here, the declaration is not sought until many years after the decision was made and the development completed and on-sold.

[38] On the contrary, the legislature has given the Planning & Environment Court power in s 4.1.5A to excuse partial compliance or non-compliance with any provision in IPA where the absence of compliance has not substantially restricted the opportunity to exercise rights conferred under IPA or other Acts. This provision strongly militates against the applicant's construction.

[39] I am unpersuaded that any of the alleged contraventions were errors depriving Mr Nunn of jurisdiction under the IPA to issue the permit in the sense discussed in Craig v South Australia and Minister for Immigration and Multicultural Affairs v Yusuf. I consider the permit was not a nullity vitiated by jurisdictional error. It authorised the development to occur until the permit was set aside. Accepting that the applicant was able to establish its proposed case, the permit would remain valid and effective until the grant of the declaration. That is because s 3.1.5(3) states that a permit authorises assessable development to the extent stated in the permit. It follows that the permit was valid during the construction period: see Calvin v Carr. And even if any of the alleged non-compliances amounted to jurisdictional error, I remain unpersuaded that the intention of IPA is that the permit was necessarily void and of no legal effect in the circumstances here where the declaration was not sought until long after the building was completed and on-sold.

Significant to the President’s reasons for finding that there was no jurisdictional error on the part of the private certifier was also the following:

- The referral of a development application is not always critical, and the failure in this case to refer to an advice agency, where the certifier was not required to adopt any QFRS recommendation or advice, cf. that of a concurrence agency which may impose conditions or refuse the development application; and that it seemed unlikely that the failure to refer the development application "necessarily" resulted in invalidity of the development approval, or deprived the certifier of jurisdiction to make a decision.

Stevenson Group Investments Pty Ltd v Nunn [2012] QCA 351. Footnotes omitted in all extracts in this paper.

Stevenson Group Investments Pty Ltd v Nunn [2012] QCA 351, [49].
• Whether the development application was inconsistent with the current development approval involved matters of degree and judgment and “[i]t follows that, consistent with Buck v Bavone, the applicant could only succeed in overturning his decision if it showed one of the following: that he did not act in good faith; that he acted arbitrarily or capriciously; that he misdirected himself in law; that he failed to consider relevant matters or took irrelevant matters into account; or that his decision was one that no reasonable assessment manager could have arrived at. It follows that any error made by Mr Nunn [the certifier] in issuing the permit on the basis that he wrongly considered the building works to be consistent with the earlier approved plans, was not an error amounting to the exceeding of his jurisdiction thereby depriving his decision to grant the permit of legal effect”.61

• The failure to include a condition required by section 22 of the SBR was not something that went to the certifier’s jurisdiction to grant the development approval (although it may be if "significant").62

It is interesting to note that in relation to each argument raised by the applicant, the Court indicated that given the long delay in applying to the PEC it would if called upon exercise the excusal power,63 waive any non-compliance or reissue the development approval.64 This raises the question of whether the Court has power to effectively grant a development approval, if the decision maker has committed a jurisdictional error in doing so. These issues will be discussed further below.

The Court of Appeal also did not give any reasons as to why the inconsistency failure, having regard to the use facts, did not give rise to a decision that no reasonable certifier could come to. In relation to the inadequacy of the PEC’s reasons the Court of Appeal reviewed the PEC’s consideration of the discretion, which referred to the discretion guidelines in Warringah Shire Council v Sedevcic,65 and determined that the challenge based on the inadequate reasons ground failed.

Discussion
As with the application for summary judgment before the PEC, I will rely on the facts as alleged by the applicants and as stated by the Courts. It may be that the Tangalooma respondents had complete answers to the applicant’s case, however, the case was to be determined on the basis of the applicant’s pleaded facts.66

Referral failure
In Stevenson the Court of Appeal said [emphasis added]:

The first prong is the alleged referral agency failure. Accepting that the developer, contrary to the mandatory terms of s 3.3.3, did not provide a copy of its material to the QFRS, it is difficult to understand why this made the

61 Stevenson Group Investments Pty Ltd v Nunn [2012] QCA 351, [53].
62 Stevenson Group Investments Pty Ltd v Nunn [2012] QCA 351, [55].
63 In that case, under section 4.1.5A of the Planning Act, now found in section 440 of the current Planning Act.
64 Stevenson Group Investments Pty Ltd v Nunn [2012] QCA 351, [50], [54], [55].
66 Stevenson Group Investments Pty Ltd v Nunn [2011] QPEC 151, [3].
subsequently issued permit void and of no legal effect. The scheme of IPA, does not envisage that failure to provide a copy of the development application to a referral agency like QFRS is an absolute prohibition on the assessment manager deciding the application. The four stages of IDAS are only "possible stages" and not all stages or parts of a stage apply to all applications (s 3.1.9). The information and referral stage is not always critical.

The following is, in my submission, at least one reason why the building approval was void in relation to the referral failure. The Court had earlier identified that the failure to refer an application within 3 months meant that it would lapse. As a result of the time in which the building application was processed, just over two months, the building application had not lapsed at the time that the building certifier purported to decide the application.

If the date of the building approval was as alleged by the Tangalooma respondents, and there had been no referral within the referral period, the building application would have lapsed before a decision was made by the private certifier. That would mean that there was nothing to decide. This would, of itself, be a jurisdictional error.

However, despite there being an extant application, because there was a referral agency the information and referral stage had not ended, and the decision stage had not started, no decision could be made on the application. The Planning Act explicitly states this. This was a jurisdictional error because an essential event had not occurred or been satisfied, being at the very least, the commencement of the decision stage. Accordingly, it appears the application lapsed under a month after the building certifier purported to grant the building approval.

In short, the building certifier assumed jurisdiction to make a decision that the Planning Act did not grant to him. This was not an act done in breach of a condition regulating the exercise of the power to decide. This means that applications that unlawfully, but notionally, pass through the IDAS stages do not avoid the lapsing provisions. The alternative is that if you can get the assessment manager to make a quick decision, you can avoid compliance with the Act. It is submitted this cannot be the proper construction of the Planning Act.

That the failure to refer led to a lapsing of the development application was recognized in Morgan & Griffin Pty Ltd v Fraser Coast Regional Council (M&G No 1), although that decision was under the Sustainable Planning Act 2009 (current Planning Act). In that case, the PEC concluded that the failure to refer the development application to a referral agency (concurrence agency cf. advice agency

67 Stevenson Group Investments Pty Ltd v Nunn [2012] QCA 351, [10].
68 See Further Amended Statement of Claim on eCourts, [29]-[30].
70 Stevenson Group Investments Pty Ltd v Nunn [2011] QPEC 151, [45].
71 Craig v South Australia (1995) 184 CLR 163, [12].
73 Craig v South Australia (1995) 184 CLR 163, [12].
74 See Morgan & Griffin Pty Ltd v Fraser Coast Regional Council [2013] QPEC 2.
75 Morgan & Griffin Pty Ltd v Fraser Coast Regional Council [2013] QPEC 2.
in *Stevenson*) led to the development application lapsing. The Court used the excusatory power to retroactively revive the development application. 76 This ensured that the development approval was not invalid. If this had not been done, albeit retroactively, there would have been no application for the assessment manager to decide.

It can also be observed that the passages relied upon by the Court of Appeal from *Project Blue Sky*, 77 and that case itself, relate to whether an act done in breach of a condition regulating the exercise of the power is invalid, and not the question of jurisdictional error. Jurisdictional error was not an issue in *Project Blue Sky*.

**Inconsistency failure**

Both the PEC and the Court of Appeal relied upon *Buck v Bavone*. 78 The Tangalooma respondents referred the PEC to the following passage from *Buck v Bavone* with respect to decisions of the type under challenge: 79

> [T]he courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached.

The Tangalooma respondents submitted that as a matter of opinion was involved, the arguable error could only be within jurisdiction. 80 This was accepted by the PEC. 81 This conclusion was despite the clear statement in *Buck v Bavone* that what was required was a finding that the applicant did not satisfy the Court that no reasonable private certifier could have come to the decision.

The Court of Appeal said “[t]he question whether the application was inconsistent with the current approval involved matters of degree and judgment for Mr Nunn as assessment manager”, it then referred to the same part of *Buck v Bavone* 82 and concluded:

> It follows that any error made by Mr Nunn in issuing the permit on the basis that he wrongly considered the building works to be consistent with the earlier approved plans was not an error amounting to the exceeding of his jurisdiction thereby depriving his decision to grant the permit of legal effect

The Court of Appeal did not explain why this was so. Given it was alleged that the building application involved development with an additional 13,000m², 37 percent, in floor space and the inclusion of a commercial element, it is submitted that it is not

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76 Morgan & Griffin Pty Ltd v Fraser Coast Regional Council [2013] QPEC 2, [92].
78 *Buck v Bavone* (1975-76) 135 CLR 110, 118-119.
79 Stevenson Group Investments Pty Ltd v Nunn [2011] QPEC 151, [65].
80 Stevenson Group Investments Pty Ltd v Nunn [2011] QPEC 151, [65]-[66].
81 Stevenson Group Investments Pty Ltd v Nunn [2011] QPEC 151, [87], [88], [90].
82 The Court of Appeal also referred to *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* and *Timbarra Protection Coalition Inv v Ross Mining NL* at [53].
obvious, or able to be dismissed out of hand, as to why no reasonable private certifier could have come to this decision.

With respect to this issue, it is acknowledged that the use facts must be considered in the context of the approved plans. However, as *Buck v Bavone* states, just because a matter of opinion is involved does not mean that it cannot be shown that no reasonable decision maker could come to the decision; it is just difficult. It is submitted that given the application for summary judgment proceeded on the basis of the inconsistency alleged by the applicant, including the use facts, an explanation as to why it was not possible to conclude that no reasonable certifier could come to the decision, was required. It may have been that the courts considered that there was no significant inconsistency, however, that is not clear from the judgments.

**Condition failure**
The Court of Appeal stated that this was not a jurisdictional error. It is not proposed to consider this issue in any further detail. Whether or not it involved a jurisdictional error is probably due a paper in itself, given the types of matters that can potentially impact on the conclusion. It is noted, however, in *Glastonbury v Townsville City Council* the PEC held that a failure to provide a statement of sufficient grounds under section 3.5.15(2)(l) was not a matter going to the jurisdiction of the decision maker.

**Potential jurisdictional error not dealt with by the proceeding**
Under section 3.2.2 of the Planning Act where a structure or works may not be used without a development approval for a material change of use, there is no development approval for a material change of use, and there is no separate application for the material change of use, the application is deemed to include an application for a material change of use. Given the use facts, one would normally expect that a development approval for a material change of use would have been required. It appears that both parties' experts agreed that there was a material change of use. If there was, it may have also been impact assessable. However, the PEC did not deal with the issue because it did not form part of the applicant’s pleading at the time that the Tangalooma respondents made their application. The applicant sought to rely on the material change of use in defence of the submission that the Tangalooma respondents could rely on the excusatory power. The PEC would not permit this because it involved a question of fact that was not pleaded. This was also a basis upon which the Court of Appeal distinguished the

83 Stevenson Group Investments Pty Ltd v Nunn [2012] QCA 351, [55].
85 *Glastonbury & Anor v Townsville City Council & Ors* [2011] QPEC 128, [223]. The grounds must be identified in the decision otherwise that will be a jurisdictional error: *Holcim (Australia) Pty Ltd v Brisbane City Council* [2012] QPEC 32, [79].
86 See also section 265 under the current Planning Act. See also *Knobel Consulting Pty Ltd v Gold Coast City Council* [2005] QPEC 082.
87 See section 1.3.5 of the Planning Act – “material change of use”.
88 Stevenson Group Investments Pty Ltd v Nunn [2011] QPEC 151, [106(vii)].
89 Stevenson Group Investments Pty Ltd v Nunn [2011] QPEC 151, [106(vii)].
90 Stevenson Group Investments Pty Ltd v Nunn [2011] QPEC 151, [106(vii)].
91 Stevenson Group Investments Pty Ltd v Nunn [2011] QPEC 151, [106(vii)].
92 Stevenson Group Investments Pty Ltd v Nunn [2011] QPEC 151, [106(vii)].
PEC’s decision in *Hooper*. If the building application included an application for a material change of use, it was an application that was beyond the power of the building certifier to determine because the council would have had to approve the material change of use. Whether there is a material change of use, and whether section 3.2.2 applied, are not matters of opinion. In addition, if there was a material change of use included in the building application, for IDAS timings, it was taken not to have been received by the building certifier at the time that he decided it. Accordingly, there would have been a clear excess of the “theoretical limits” of the functions and powers granted to the private certifier, and a jurisdictional error.

**The BM Alliance Case**

**Jurisdictional error generally**

Fortuitously, the Court of Appeal recently considered jurisdictional error and its consequences in *BM Alliance*. In that case the Court of Appeal said [emphasis added]:

[71] Whatever the position might be if the parties to an adjudication make no complaint about the adjudication decision, the decisions of the High Court relied on by BMA make it plain that **once a court determines that a decision of the type in question is affected by jurisdictional error, the decision cannot give rise to legal consequences.**

[72] On 13 November 2012, not only did the primary judge find jurisdictional error resulting in the invalidity of the adjudication decision, he declared the decision void. **Even without the declaration, it necessarily followed from the findings in the 13 November reasons, that the adjudication decision had no legal effect.** It is difficult to see how the declaration that the decision was void could have been revoked, but no issue about that was raised in the grounds of appeal or in argument.

....

[74] In order to justify the revocation of the 13 November 2012 declaration and the making of the 22 March 2013 orders, the primary judge relied on the existence of a discretion as to whether to grant declaratory relief even though a legal basis for the making of the subject declaration existed. His Honour identified as a relevant circumstance the existence of —alternative and adequate remedies for the wrong of which complaint is made.

[75] The primary judge then, with respect, proceeded to deny BMA the **remedy dictated by the finding of jurisdictional error.** In so doing, the primary judge was motivated by a desire to allow BGC to retain the amounts which the adjudicator had allowed and to which BGC would have been entitled had there been no jurisdictional error. **In his Honour’s view, —[s]uch a course advances the policy of the Act.** It is not clear what connection, if any, existed between this rationale and the existence of an alternative and adequate remedy.

[76] As previously discussed, there is nothing in the Act which would support the denial to a respondent to a payment claim of its rights and entitlements.

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93 *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351, [44].
94 See section 5.3.5 of the Planning Act, section 31 of the *Building Act 1975*.
95 Section 3.2.2 of the Planning Act.
96 Section 5.3.5(5)(b) of the Planning Act.
97 *Craig v South Australia* (1995) 184 CLR 163, [12].
under the Act except to the extent that the Act expressly or implicitly so provided. **Nor is there any principle identified which would authorise a court to deny a litigant a legal right or remedy on the grounds that the policy of an Act would thereby be advanced.** ….  

[77] … His Honour also erred in finding in his 22 March 2013 reasons that the adjudication decision, which he held to be affected by jurisdictional error, retained effect until he exercised his discretion to grant a declaration or make an order quashing or setting aside the decision.  

[78] For the above reasons, the primary judge’s orders of 22 March 2013 should be set aside.

The Court of Appeal also said in *BM Alliance* that [emphasis added]:

[62] In Bhardwaj, Gaudron and Gummow JJ, with whose reasons McHugh J relevantly agreed, said:  

There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. **A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all.** Further, there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be other than as recognised by the law that will be applied if and when the decision is challenged. A fortiori in a case in which the decision in question exceeds constitutional power or infringes a constitutional prohibition.

[63] To like effect, Hayne J said:  

In general, judicial orders of superior courts of record are valid until they are set aside on appeal, even if they are made in excess of jurisdiction. By contrast, administrative acts and decisions are subject to challenge in proceedings where the validity of that act or decision is merely an incident in deciding other issues. If there is no challenge to the validity of an administrative act or decision, whether directly by proceedings for judicial review or collaterally in some other proceeding in which its validity is raised incidentally, the act or decision may be presumed to be valid. But again, that is a presumption which operates, chiefly, in circumstances where there is no challenge to the legal effect of what has been done. Where there is a challenge, the presumption may serve only to identify and emphasise the need for proof of some invalidating feature before a conclusion of invalidity may be reached. It is not a presumption which may be understood as affording all administrative acts and decisions validity and binding effect until they are set aside. For that reason, there is no useful analogy to be drawn with the decisions of the Court concerning the effect of judgments and orders of the Federal Court of Australia made in proceedings in which that Court had no constitutionally valid jurisdiction. This is not to adopt what has sometimes been called a ‘theory of absolute nullity’ or to argue from a priori classification of what has been done as being ‘void’, ‘voidable’ or a ‘nullity’. It is to recognise
that, if a court would have set the decision aside, what was done by the Tribunal is not to be given the same legal significance as would be attached to a decision that was not liable to be set aside. In particular, it is to recognise that if the decision is set aside for jurisdictional error, the statutory power given to the Tribunal has not been exercised ... Nothing in the Act requires (or permits) the conclusion that despite the jurisdictional error, some relevant legal consequence should be attributed to the September decision. In particular, the fact that the Federal Court had only limited jurisdiction to review the decision does not lead to the conclusion that the September decision is to be treated as having some effect. **Once it is recognised that a court could set it aside for jurisdictional error, the decision can be seen to have no relevant legal consequences.**

[64] In Plaintiff S157/2002, Gaudron, McHugh, Gummow, Kirby and Hayne JJ, referring to passages from the reasons of Gaudron and Gummow JJ, McHugh J and Hayne J in Bhardwaj said, ‘this Court has clearly held that an administrative decision which involves jurisdictional error is regarded, in law, as no decision at all’ (citations omitted).

[65] Finkelstein J observed in Leung, in a passage implicitly approved by Gleeson CJ in Bhardwaj:

There is no doubt that an invalid administrative decision can have operational effect. For example it may be necessary to treat an invalid administrative decision as valid because no person seeks to have it set aside or ignored. The consequence may be the same if a court has refused to declare an administrative decision to be invalid for a discretionary reason. In some circumstances the particular statute in pursuance of which the purported decision was taken may indicate that it is to have effect even though it is invalid or that it will have effect until it is set aside.

[66] BGC relied on these observations and on a number of decisions of the Full Court of the Federal Court, including Jadwan, which expressed the view that whether jurisdictional error on the part of a tribunal or decision maker will render the decision nugatory for all purposes may depend on the terms of the statute under which the decision was made. **That proposition, with respect, may be accepted but, absent statutory provisions necessitating a contrary conclusion, the general principle identified in paragraphs [62]–[64] above applies.**

A number of matters can be taken from/confirmed by BM Alliance. They are:

[2] once a court finds that a decision is affected by jurisdictional error it cannot give rise to legal consequences, subject to a statutory provision(s) “necessitating” a contrary conclusion;

[3] it is unnecessary for the court to make a declaration that the decision is void or invalid, that arises from the finding;

[4] as a result, the discretion to refuse relief is necessarily very limited in the case of jurisdictional error; and

[5] relief cannot be denied because the policy of the relevant Act would be advanced.
The Barro Case
The decision, and reasoning, in Stevenson is also contrary to what the Court of Appeal (Keane JA, McMurdo P and Wilson J agreeing) said in Barro [emphasis added]:

[54] Finally in relation to this aspect of Barro's argument, the very circumstance that s 4.1.5A is made available to the P & E Court on an appeal from a decision of the local authority to cure non-compliance with the requirements of the IPA is itself an indication that non-compliance with the requirements of the IPA may well be fatal to a development application. Barro's submissions recognise that the predecessor of s 4.1.5A was introduced into the then applicable town planning legislation as a response to the decision in Scurr's Case. But they do not recognise that s 4.1.5A is predicated, as was its predecessor, upon the consequences which might otherwise ensue from a substantial failure to adhere to the legislative scheme that permits the alteration of land use rights.

Both Stevenson and Barro involved construction of the Planning Act, consideration of the excusatory power and the effect its existence had on the construction of other provisions in the Act, and the effect of noncompliance. Unfortunately, it is clear that the construction of the Planning Act, and the holding with respect to the effect of noncompliance, in Stevenson cannot sit with that in Barro. They lead to different conclusions with respect to the effect of noncompliance or substantial noncompliance.

The High Court said in Nguyen v Nguyen\textsuperscript{98} that [emphasis added]:

20. The extent to which the Full Court of the Supreme Court of a State regards itself as free to depart from its own previous decisions must be a matter of practice for the Court to determine for itself. …

21. Where a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasions upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v. The Commonwealth (1977) 139 CLR 585 per Aickin J at pp 620 et seq.

22. … now that appeals to the High Court are by special leave only, the appeal courts of the Supreme Courts of the States and of the Federal Court are in many instances courts of last resort for all practical purposes. … In these circumstances, it would seem inappropriate that the appeal courts of the Supreme Courts and of the Federal Court should regard themselves as strictly bound by their own previous decisions. In cases where an appeal is not available or is not taken to this Court, rigid adherence to precedent is likely on occasions to perpetuate error without, as experience has shown, significantly increasing the corresponding advantage of certainty.

The Court of Appeal is not strictly bound by its earlier decisions.\textsuperscript{99} Accordingly, if the Court of Appeal was going to depart from its decision in Barro, on the construction of the Planning Act, it should have done so “cautiously and only when compelled to the

\textsuperscript{98} Nguyen v Nguyen (1990) 91 ALR 161.

\textsuperscript{99} See for example in Barro Group Pty Ltd v Redland Shire Council [2010] 2 Qd R 206 at [72]-[86].
conclusion that the earlier decision [was] wrong”. The reasons in Stevenson do not indicate that the Court gave consideration to the Court of Appeal's reasoning in Barro with respect to the construction of the Planning Act, and its holding in relation to the effect of noncompliance, and decided to overrule it, in the manner suggested by the High Court in Nguyen v Nguyen. This compares with the Court of Appeal’s overruling of Oakden Investments Pty Ltd v Pine Rivers Shire Council in Barro.

Accordingly, it is submitted that Barro remains good law and has not been overruled by the decision in Stevenson. Whether Barro or Stevenson is to be preferred will have to await further clarification from the Court of Appeal. It is noted that the version of the Planning Act under consideration in Stevenson was reprint 5, and in Barro reprint 7D rv. Accordingly, the Act, if there is considered to be a significant difference between the two versions, that more closely aligns with the current Planning Act is the one in Barro not Stevenson.

Court review for unlawfulness and jurisdictional error

Jurisdictional error aside, if the construction of the Planning Act in Stevenson is correct, and all that occurred was a breach in a condition regulating the exercise of a statutory power, or possibly some other breach that did not lead to invalidity, the development approval would remain valid. However, as the High Court stated in Project Blue Sky, where there is a breach of a condition regulating the exercise of a statutory power and it does not lead to invalidity, that does not mean that the applicant had no rights. It had the ability to apply for a declaration and injunction restraining any further action based on the unlawful action. In Stevenson, if there was an unapproved material change of use, it is also likely to be a continuing development offence. This is something that could have been restrained under section 604 of the current Planning Act.

Where there is a jurisdictional error in an administrative decision, however, the issue is not whether it was a purpose of the legislation that an act done in breach of the provision should be invalid, but rather whether there is any statutory provision necessitating a conclusion that the decision is not invalid for all purposes. In Stevenson, the Court, relying on Calvin v Carr, said that even if there was jurisdictional error the approval was valid during the construction period because it would remain valid until the declaration, and as a result, it had statutory effect because of section 3.1.5(3) of the Planning Act. That section authorizes development to the extent stated in the approval.

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100 Nguyen v Nguyen (1990) 91 ALR 161, [21].
101 Stevenson Group Investments Pty Ltd v Nunn [2012] QCA 351, [40]. The Court of Appeal proceeded on the instant factual situation rather than the more elaborate line of principle in Barro. The building in question had been constructed and sold to third parties, including the applicant, and the application to the PEC was made about 5 years after the development approval issued and 4 years after the applicant purchased its units: [35].
102 Oakden Investments Pty Ltd v Pine Rivers Shire Council [2003] 2 Qd R 539.
103 Barro Group Pty Ltd v Redland Shire Council [2010] 2 Qd R 206, [85]-[86].
105 Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, 393 [100].
107 BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd [2013] QCA 394, [66].
109 Stevenson Group Investments Pty Ltd v Nunn [2012] QCA 351, [39].
The Court of Appeal did not refer to the High Court’s decision in *Bhardwaj* with respect to this issue.\(^{110}\) It is unnecessary to compare what was said in *Calvin v Carr* with *Bhardwaj* in light of the Court of Appeal’s review of jurisdictional error in *BM Alliance*. It is submitted that, following *BM Alliance*, the proposition that a decision involving jurisdictional error embodied in a development approval, is valid until a declaration is made cannot stand in the absence of a provision, or provisions, necessitating such a conclusion, because there is “no decision at all”.\(^{111}\)

In terms of the current Planning Act, this is also confirmed by sections 324, 327, 334 and 335, which indicate that the power to give an approval only arises after a decision has been made.\(^{112}\) Sections 334 and 335 require written notice of the decision and for the decision notice to include, amongst other things, the day of the decision and whether the development is approved, approved subject to conditions or refused. Section 339 of the current Planning Act provides that where the development application is approved or approved subject to conditions the decision notice or negotiated decision notice takes effect as a development approval as indicated in that section. By virtue of section 340 of the current Planning Act development cannot start until the development approval takes effect. Section 243 of the current Planning Act enacts the substance of section 3.1.5(3) of the Planning Act. Therefore, it can be seen that whatever protection section 243 may provide, it is illusory until there has been a decision, at least not involving a jurisdictional error, approving the development application, with or without conditions, and it has taken effect.

That this is the correct construction is further confirmed by section 578 of the current Planning Act which provides that it is an offence to carry out assessable development unless there is an “effective” development approval for the development. That is, it is not enough to have a development approval, it must also have taken effect.

It is difficult to identify a provision, or provisions, in the Planning Act or the current Planning Act that necessitates the conclusion identified in *BM Alliance*.\(^{113}\) Stevenson and Barro identify different reasons why different conclusions may be reached on this issue,\(^{114}\) and that there can be different conclusions may indicate that there are no provision(s) “necessitating” the required conclusion. In that case, it would seem there would be very little, if any, discretion to refuse a declaration that a decision infected by jurisdictional error is invalid. This is because the finding that it was affected by jurisdictional error means that it is already invalid without the declaration. As the

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\(^{110}\) *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.


\(^{112}\) See also *Barro Group Pty Ltd v Redland Shire Council* [2010] 2 Qd R 206, [26], [29]-[32], which requires that the development application also actually lawfully reach the decision stage.

\(^{113}\) Cf. section 101 of the *Environmental Planning and Assessment Act 1979* (NSW) which may provide an example of a provision that protects development approvals: 101 Validity of development consents and complying development certificates - If public notice of the granting of a consent or a complying development certificate is given in accordance with the regulations by a consent authority or an accredited certifier, the validity of the consent or certificate cannot be questioned in any legal proceedings except those commenced in the Court by any person at any time before the expiration of 3 months from the date on which public notice was so given.

\(^{114}\) See *Stevenson Group Investments Pty Ltd v Nunn* [2012] QCA 351, [36] cf *Barro Group Pty Ltd v Redland Shire Council* [2010] 2 Qd R 206, [54].
Supreme Court has recently said “in a case where a decision is affected by want or excess of jurisdiction, and the applicant for relief is a party aggrieved by the decision, relief will be granted ‘almost as of right’”.115

This may lead to a need to review the types of matters that are normally considered when exercising the declaratory power where jurisdictional error is involved.116 It also raises the real question of what is left for the court to do after there is a finding of jurisdictional error. It is submitted that under the current Planning Act neither the PEC nor the Supreme Court would have power to actually make a decision replacing that of the decision maker where jurisdictional error is involved.117 The denial of relief in circumstances where jurisdictional error is involved could amount to a merits conclusion by the court in what is only a legal review. This then raises the issue of whether the excusatory power under section 440 may be able to be used to preserve a development approval where jurisdictional error is found. The excusatory power is a broad and untrammelled one.118 Some examples are considered below.

In Holcim (Australia) Pty Ltd v Brisbane City Council (Holcim)119 the PEC held that there was jurisdictional error in relation to Council properly considering the issue of amenity in a code assessable development application; it failed to consider all aspects of amenity.120 The Court stated that “[i]t cannot be said the omission is insignificant so as not to have materially affected the decision”, and it was a factor of “prime importance” which was “at the core of the Council’s considerations”.121 One of the respondents submitted that relief should be refused, because even if the Council proceeded on an incorrect basis, the impacts would be appropriately managed and there was no utility in remitting the application.122

The PEC proceeded on the basis that it did have a discretion but made it clear that the proceeding was only dealing with a legal review, not the merits. That issue would have to await a merits review and was not a matter for the Court (and the Court also had its doubts on that issue), and it said that the Council had made a “fundamental error” in an “important decision making process”.123

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115 J Hutchinson Pty Ltd v Cada Formwork Pty Ltd [2014] QSC 63, [79], citing R v Ross-Jones; Ex parte Green (1984) 156 CLR 185, 194 per Gibbs CJ; discussed in Anderson Street Banksmeadow Pty Ltd v Helcon Contracting Australia Pty Ltd [2013] NSWSC 657 at [7].


117 Sections 456 cf. 496 of the current Planning Act. See also with respect the nature of declaratory proceedings Holcim (Australia) Pty Ltd v Brisbane City Council ([2012] QPEC 32, [3]; Westfield Management Ltd v Brisbane City Council & Anor [2003] QPEC 010, [57]. See Netstar Pty Ltd v Caloundra City Council [2005] 1 Qd R 287 regarding the jurisdiction of the Supreme Court.

118 Maryborough Investments Pty Ltd v Fraser Coast Regional Council [2010] QPEC 113 at [18], [30] and [33]-[34].

119 Holcim (Australia) Pty Ltd v Brisbane City Council [2012] QPEC 32.

120 Holcim (Australia) Pty Ltd v Brisbane City Council [2012] QPEC 32, [76], [79].

121 Holcim (Australia) Pty Ltd v Brisbane City Council [2012] QPEC 32, [71], [76].

122 Holcim (Australia) Pty Ltd v Brisbane City Council [2012] QPEC 32, [81].

123 Holcim (Australia) Pty Ltd v Brisbane City Council [2012] QPEC 32, [3], [76]-[77], [81]
For *Holcim* if the excusatory power was going to be exercised to excuse the jurisdictional error, the Court would need to embark on a hearing to satisfy itself that the development application should be approved. If so, it should consider whether the conditions imposed in the development approval were the appropriate conditions with respect to amenity, and if not, order that the development approval be amended to impose additional appropriate conditions. This would be a merits review, not a legal review.

Similarly in *Stevenson*, on the assumption that the issue not contemplated (potential jurisdictional error regarding material change of use, see above) had been a part of the proceeding and correct, it is difficult to see how section 440 could be used to excuse an assumption of jurisdiction by the building certifier to determine the material change of use, which was within the council’s power to decide, and also to excuse the notification stage altogether.124

Could the excusatory power be used, though, in the situation where there has been a failure to refer a development application to a concurrence agency, e.g. SARA, Department of Environment and Heritage Protection (Department) with respect to contaminated land, which was not identified in the development application? This example will be considered on the assumption that the development application was impact assessable and the council had proceeded to approve it despite not having the benefit of the Department’s response, and that there were submitters, but none had appealed. If a person then applied to have the development approval declared invalid on the basis of jurisdictional error, could the excusatory power be used to preserve the development approval? Assuming further that after the proceeding was commenced the developer asks the Department to consider the development application and provide a response for use in the proceeding. It does so and indicates that it would have approved the development and provides a set of conditions it would have imposed.

The excusatory power can be used where the development application has lapsed. Section 440 says that it can be used in that situation. Accordingly, the use of the excusatory power in that instance could revive the development application, retroactively. The excusatory power could also address the fact that the development application did not leave the information and referral stage.

Section 440 could not, it is submitted, cure the fact that the council committed jurisdictional error by failing to ask itself under section 324 whether it should approve the development application having regard to the contamination, and in failing to consider, amongst other things, the following relevant matters:125

1.2 an assessment of the development application against the relevant provisions of the planning scheme with respect to contaminated land;
1.3 an assessment of the development application against the Department’s response; and

124 *Maryborough Investments Pty Ltd v Fraser Coast Regional Council & Anor* [2010] QPEC 113 at [18], [30] and [33]-[34]; *Metrostar Pty Ltd v Gold Coast City Council* (2006) 154 LGERA 245 at [17] and [33].
125 *Holcim (Australia) Pty Ltd v Brisbane City Council* [2012] QPEC 32, [76]-[77].
1.4 any submission that might have addressed the contamination, if the matter had been addressed in the development application and Department’s response.

There would also be no conditions imposed by the council or the Department with respect to the contamination. The submitters have also lost the right to consider, submit and appeal in relation to the issue. The Department has indicated what it would have done, but its response, including the conditions, do not form part of the development approval.

It is submitted that the only way to excuse the failure would be to have a merits hearing with respect to whether the development should be approved, and if so, on what conditions. This is beyond the function of the Court in this type of situation. Despite these examples, the writer does not exclude the possibility that there may be some situations where there is jurisdictional error and the excusatory power may be available. It is submitted though that they are likely to be rare. Therefore, where a breach of the current Planning Act is involved, there are three possible outcomes where a decision has notionally been made. They are:126

4.1 if jurisdictional error is involved, the decision is invalid;
4.2 if there is unlawfulness and it is a purpose of the Act that the further processing or decision is invalid, the court will have a discretion to make the declaration and to also use the excusatory power; and
4.3 if there is unlawfulness but it is not a purpose of the Act that the further processing or decision is invalid, the decision is valid.

As a result, where an applicant seeks to challenge a development approval, how the proceeding is framed will be critical. If jurisdictional error can be identified this will provide the strongest basis for an application challenging a development approval. It is submitted that the excusatory power will have a more limited role where jurisdictional error is involved compared to where unlawfulness is found.

**Identifying Jurisdictional Error**

In *Kirk v Industrial Relations Commission*127 the High Court, referring to *Craig v South Australia*,128 said [emphasis added]:

… the Court amplified what was said about an inferior court acting beyond jurisdiction by entertaining a matter outside the limits of the inferior court's functions or powers by giving three examples:

(a) the absence of a jurisdictional fact;
(b) disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and
(c) misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case.

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126 [76] b. and c. are, of course, predicated on the basis that the unlawfulness has not resulted in a jurisdictional error.
128 *Craig v South Australia* (1995) 184 CLR 163.
The Court said of this last example that ‘the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern’ and gave as examples of such difficulties R v Dunphy; Ex parte Maynes, R v Gray; Ex parte Marsh and Public Service Association (SA) v Federated Clerks' Union.

In Minister for Immigration and Multicultural Affairs v Yusuf the High Court said the following with respect to jurisdictional error [emphasis added]:

It is necessary, however, to understand what is meant by ‘jurisdictional error’ under the general law and the consequences that follow from a decision-maker making such an error. As was said in Craig v South Australia, if an administrative tribunal (like the Tribunal) ‘falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.’

‘Jurisdictional error’ can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from Craig, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law.

It can be seen that the types of matters that can give rise to a jurisdictional error are many of those types of matters that are regularly raised in judicial review applications. Once one or more of those matters is identified, it is necessary to ask the question whether the matter affected the exercise or purported exercise of the power. This requires a consideration of the all of the evidence, including the decision itself and the applicable statute, to determine whether there has been a jurisdictional error. The decision is not to be reviewed “minutely and finely with an eye keenly attuned to the perception of error”.

129 Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323.
The difficulty is that there is no one single test, theory or logical process for determining whether an error is jurisdictional or non-jurisdictional.\textsuperscript{132} Despite this, inherent to the concept of jurisdictional error is the requirement that the power must be exercised for the purpose for which it was conferred, and in the manner in which it was intended to be exercised.\textsuperscript{133}

Sometimes, a conclusion that there is jurisdictional error will be relatively easy to reach. Examples may include a building certifier granting an approval that is not even theoretically within the limits of his functions and powers, or a council deciding an impact assessable development application before notification has been undertaken. Some, including whether a relevant consideration like amenity has been properly considered, as in \textit{Holcim}, are much more complicated and require a more nuanced approach.

**Conclusion**
The Court of Appeal’s decision in \textit{BM Alliance} reviewed the consequences of jurisdictional error and stated that in the absence of a provision(s) necessitating a contrary conclusion the decision has no legal consequences. It is difficult to identify a provision in the current Planning Act that meets the requirement identified in \textit{BM Alliance}. The statement of principle in \textit{BM Alliance} provides the clearest guidance as to the correct state of the law and is to be preferred to what the court said in its earlier judgment in \textit{Stevenson}, where it refused leave to appeal.

Due to the limited way that \textit{Barro} was dealt with in \textit{Stevenson}, it has not been overruled. Those two decisions now suggest competing approaches as to how the current Planning Act should be construed, particularly in the event of noncompliance. There may need to be a review of the factors usually considered relevant to a court’s discretion where jurisdictional error is involved. In addition, there also seems to be a limit on the ability of the excusatory power to provide relief in instances of jurisdictional error because of the nature of the review being undertaken. In some cases jurisdictional error will be easy to identify, however, in others it can be difficult to distinguish from non-jurisdictional error.

\textit{Robert A. Quirk}

3. The Adequacy of the Environmental Protection Act 1994 in Addressing Diffuse Water Pollution.

By Matthew Dunlop

Introduction
The Great Barrier Reef World Heritage area runs along 2,000 km of the north Queensland coastline. It is recognized for its variety of ocean life and spectacular coral reefs. However, over the last several decades, the reef’s health has been degrading, at least partly due to land-based pollutants. Pollution of the reef derives significantly from land-based diffuse pollution from a variety of industrial pursuits.

This article will discuss diffuse pollution from agricultural activities within the Great Barrier Reef catchment, and how well the Environmental Protection Act 1994 (Qld) (EPA) addresses the issue. The specific Great Barrier Reef protection measures, the environmental impact statement process, as well as the duties, offences and enforcement powers within the EPA will be discussed to determine how they are or are not equipped to manage this difficult issue properly. Recommendations will be made to address deficiencies.

The Blight of Diffuse Pollution
The variety of human development and industry in Queensland impacts the environment, and particularly Queensland waterways. From small to medium-scale urban and suburban activities involving construction and sewerage, to large-scale mining and agricultural projects, sediment, chemicals and refuse is released into the State’s waterways. The release of land-based sediment is a natural process, allowing for nutrients and material to enter and rejuvenate aquatic environments. However, with the clearing of vegetation and the act of over-fertilization, the levels of land-based material and nutrients can be significantly increased. This poses a significant threat to the health of the State’s marine environment, none more so important than that of the World Heritage listed Great Barrier Reef. The Great Barrier Reef stretches over 2,000km along the North-Queensland coastline, and is fed by the Great Barrier Reef catchment, which covers an area of 423,000km² and is composed of 30 major rivers and hundreds of small streams. Over the decades, the Great Barrier Reef catchment has quickly been deforested for agricultural and urban development. Agriculture in particular is the single largest polluter of Queensland waterways and the Great Barrier Reef. More than 70% of land in the higher-areas within the Great Barrier Reef catchment is used for grazing cattle, while sugar cane and other crops are grown in lower flood-prone areas of the catchment. Severe weather in northern


136 Ibid.
Queensland in recent years has increased the risk posed to the reef from diffuse pollution across the state. Increased erosion from devolution has resulted in the increased run-off of sediment nutrients, such as phosphates and nitrogen, and herbicides, which eventually flow into the Great Barrier Reef, damaging the delicate ecosystems for which it was recognizes as a World Heritage Area. 137

How the release of sediment and nutrients from agricultural practices into Queensland’s waterways and the Great Barrier Reef can occur can be divided into two categories. The first is point source pollution, or non-diffuse pollution. Point source pollution is that which can be identified as originating from a particular identifiable source or sources. Point source pollution can be easily managed, can be identified and have practices implemented to accurately records and reduce said contamination.

Point source pollution may be minor, but collectively the impact can be significant and often is not apparent until the pollutant has reached downstream and the source is indeterminate. This is described as diffuse or non-point source pollution. Sediment and nutrient run-off is a natural process which reshapes waterways and feeds the ecosystems contained therein. However, agricultural practices can not only increase sediment and nutrient run-off through land clearing and poor land and cattle-management practices, but they can also introduce foreign pesticides and nutrients which can severely damage the fragile aquatic ecosystems. 138 It is diffuse pollution which is the most significant contributor to pollutant discharges impacting water quality in the Great Barrier Reef. 139

The issue of diffuse pollution has been apparent for many years. Currently, there are a number of land management plans and policies implemented at both State and Federal levels of government to curb the release of pollutants into the Great Barrier Reef. It is noted that the protection of the Great Barrier Reef is regulated under the Great Barrier Reef Marine Park Act 1975 (Cth). However, the primary legislative instrument for assessing and minimizing environmental impacts upon the environment from development within the jurisdiction of Queensland is the EPA. As the difficulties from diffuse pollution posed to the reef derive from Queensland waterways, it is the scope of the EPA to address the issue that will now be discussed.

The Environmental Protection Act 1994 (Qld)
Agricultural practices within Queensland can be regulated by a number of interlocking State and Federal statutory instruments. 140 However, the EPA allows for

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140 Environmental Protection Act 1994 (Qld) (EPA), Strategic Cropping Land act 2011 (Qld), Vegetation Management Act 1999 (Qld), Forestry Act 1959 (Qld), Coastal Protection and Management Act 1995 (Qld), Integrated Planning Act 1997 (Qld), Sustainable Planning Act 2009
the implementation of an approval process of any environmentally relevant activity within Queensland, as well as a broad set of duties, offences and enforcement powers to achieve the object of the act. However, with diffuse pollution being the largest recorded contributor to the decline in aquatic ecosystems both in Queensland and the Great Barrier Reef, it is vital that the EPA has the scope to address this significant issue. Ecologically sustainable development (“ESD”) as a goal of the EPA would appear to have the capacity address the environmental impact from the cumulative components as diffuse pollution, but can ESD as a process, achieve the same result?

The EPA itself has one sole object: to protect Queensland’s environment while allowing development that improves the present and future quality of life in a way that maintains ecological processes on which life depends. This object has several factors which should be explored in order to determine whether diffuse pollution is encompassed within its scope. The three key elements to the object of the EPA are ‘environment’, ‘development’, and ‘maintain[ing] ecological processes’. These three elements are that of the concept of ESD which is recognized as the basis for all development and environmental protection and conservation legislation in Australia.

‘Environment’ is defined quite broadly in the EPA as including ecosystems and their constituent parts including people and communities; all natural and physical resources; qualities and characteristics of locations; places and areas, however large or small, that contribute to biological characteristics; and social, economic, aesthetic and cultural conditions that affect or are affected by the preceding characteristics. This definition of environment is broad enough to encompass the natural and man-made state of the environment, regardless of jurisdictional boundaries. Accordingly, the down-stream effects of diffuse pollution, and not only the immediate environmental harm imposed upon the local environment of a source, appear to be applicable within the scope of this definition. Further, in 2009 the Queensland parliament enacted amendments to the EPA which specifically addressed degradation to the Great Barrier Reef from diffuse pollution resulting from agricultural practices in the catchment area. It would appear from these amendments that the term ‘environment’ within the EPA is not restricted by arbitrary jurisdictional boundaries of the States or Commonwealth.

‘Development’ within the context of ESD is restricted to within the confines of protecting the environment and maintaining sustainable ecological processes. Accordingly, the last elements of the object will be discussed together. In regard to the interpretation of the object of the EPA, Fisher questions whether ESD is conditional upon environmental protection, vice versa, or whether both are required, and if so, if one is prioritized over another. However the object is interpreted, with

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142 EPA, s 3.
143 Hub Action Group Inc v Minister for Planning (2008) 161 LGERA 136 at 141.
144 EPA, s 8.
145 Great Barrier Reef Protection Amendment Act 2009 (Qld).
146 Fisher, above n 8, 184.
reference to the method by which the object to be achieved, there is an obligation on a person exercising the functions of the EPA to do so in the way that best achieves ESD. Sustainability not only refers to the state of the environment, it also refers to natural resources, the environment and the community. With the continued harm to the reef, damage to the coral reefs, ecosystems and the economy of $4-5 billion per year from tourism, commercial fishing and aquaculture, recreation and scientific research, is likely to be unavoidable.

The EPA purports to achieve ESD by way of a cyclical approach involving research and consultation; developing appropriate environmental policies, standards and practices; integrated environmental values in planning and resource management practices; the internalization on environmental costs; and monitoring evaluation and enforcement of environmental outcomes. Several processes and mechanisms within the EPA in particular are relevant to the prevention of diffuse pollution in Queensland waterways and the Great Barrier Reef. They are the Great Barrier Reef protection measures, the environmental impact statement and environmental authority processes, duties and offences and the enforcement procedures.

**Great Barrier Reef Protection Measures**

Since 2001, the CSIRO and the Federal government have been researching the human impacts upon the Great Barrier Reef and how best to reduce the detrimental footprint which Queensland agricultural activities cause to the reef. In 2009, Queensland parliament enacted measures to specifically address the significant threat to the Great Barrier Reef from agricultural activities in the Great Barrier Reef catchment. The *Great Barrier Reef Protection Amendment Act 2009 (Qld)* introduced Chapter 4A into the EPA, which provided for a set of Great Barrier Reef protection measures (the protection measures) to assist specifically in monitoring, controlling and minimizing the amount of sediment and nutrient run-off into the Great Barrier Reef, consistent with the water quality targets agreed to with the Commonwealth within the then Reef Water Quality Protection Plan 2009.

To achieve the purpose of the protection measures, a number of positive duties are now imposed upon agricultural operators, differing depending on the type of agricultural environmentally relevant activity (agricultural ERA) being undertaken. The protection measures apply specifically to agricultural ERAs, which include commercial sugar cane growing and cattle grazing carried out on more than 2,000 hectares and on one of either the Wet Tropics, Mackay-Whitsunday or Burdekin Dry

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147 Ibid; EPA, s 5.
150 EPA, s 4.
152 EPA, s 74(a)
Tropics catchments. If 75% or 20,000ha of the property is within the catchment zones listed, then they are also subject to the protection provisions. These activities and locations were specifically addressed in this regulation due to the high risks of water quality degradation associated with agricultural activities within both sets of criteria.

A positive duty is imposed upon a person who carries out an agricultural activity not to apply nitrogen or phosphates to soil on an agricultural property without an appropriate environmental risk management plan (ERMP) in place. From the content requirements contained in the EPA, the purpose of the ERMP appears to be to identify the environmental hazards involved in the operation of the agricultural ERA and the methods of management of those hazards. The optimum amount is the highest amount of nitrogen or phosphorus that can be applied to soil on an agricultural property without over-fertilization. The person who carries out the agricultural ERA also has a positive duty to calculate the optimum amount for that particular agricultural property.

The measures relating to the optimum amount calculation and the ERMP enables the operator a degree of autonomy over the management of their property. Provisions such as this, which do not over-regulate agricultural operators, are likely to illicit more welcoming and enthusiastic participation with regard to proper land care management. At the same time however, the protection measures require the operators to engage an independent and accredited expert to assist in the soil testing. This prevents any erroneous or advantageous readings from agricultural operators at the initial step of the ERMP development and assists in the reduction of nutrient run off into the Great Barrier Reef.

However, there are no other ‘base requirements’ imposed upon graziers for the appropriate land management in order to reduce soil erosion. The reason for this may lie in the activity itself. Grazing can be described as being limited to managing set numbers of cattle in fenced paddocks to graze and seek water from both natural sources and man-made stores. The application of fertilizers or nutrients to paddocks would not be expected. Nonetheless, despite parliament’s identification of soil-erosion as being an issue of significance, the protection measures do not require this matter addressed.

Without limiting the above, commercial sugar cane growing larger than 70 hectares within the Wet Tropics and cattle grazing larger than 2,000 hectares within the

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154 EPA, s 75(1).
155 EPA, s 75(2).
156 Great Barrier Reef Protection Amendment Bill 2009 (Qld), 10.
157 EPA, s 78.
158 EPA, s 94(a)-(g).
159 EPA, s 77.
160 EPA, s 80.
162 EPA, s 81(2).
163 Great Barrier Reef Protection Amendment Bill 2009 (Qld) Explanatory Notes, 6.
Burdekin Dry Tropic Catchment require ERMPs to be accredited by the Minister.\textsuperscript{164} There is a positive duty in place for grazing and sugar cane agricultural operators to prevent over-fertilization which can result in excess nutrients being carried into nearby watercourses. It was parliament’s intention to specifically address the environmental harm caused to the Great Barrier Reef from the larger-scale grazing and sugar cane operations as they have been identified as the largest contributor to run-off pollution within the Great Barrier Reef catchment.\textsuperscript{165} One would expect that larger agricultural operations would have more resources to implement land-management activities as opposed to the small- to medium-scale enterprises. Simultaneously, local agricultural operators, including those below the protection measures thresholds, may volunteer to participate in the Queensland and Commonwealth Reef Plan to alter the land-management strategies to decrease run-off.\textsuperscript{166} However, this is problematic. The protection measures as they are currently drafted allow a great number of agricultural operators in the Great Barrier Reef catchment to continue operations without any sustainable land management practice in place. With regard to the Reef Plan 2013 participation goal of engaging 50% of the grazing industry within the Great Barrier Reef catchment, only 17% of graziers have adopted improved practices.\textsuperscript{167} Similarly, the participation rate among sugar cane operators since 2009 is only 25% of the 80% target.\textsuperscript{168} These participation figures alone are a dismal indication of the progress being made under the Queensland Government’s Reef Plan, but pale in comparison to the nitrogen and sediment reduction targets of 50% and 20% respectively by 2020, which have been recorded at only 7% and 6% since 2009.\textsuperscript{169}

Despite the operational size thresholds for the ERMP duty, if it is considered necessary or desirable to improve the quality of water released from a relevant agricultural ERA or because it is causing or may cause unlawful environmental harm, the minister has a discretion to direct that an accredited ERMP to be completed for any other agricultural ERA.\textsuperscript{170} This power itself, although beneficial to ensure the development of sustainable land-management practices, would need to be based upon evidence such as an environmental evaluation. This would require further time and funding, and with the difficulty of identifying the sources of diffuse pollution, the process is unlikely to be of any assistance in any practical sense.

The thresholds requiring an accredited ERMP themselves were determined with reference to the average size of agricultural properties in the Great Barrier Reef catchment.\textsuperscript{171} Therefore, statistically it is probable that half of the sugar cane and cattle grazing operations in the Great Barrier Reef catchment are operating without the need for an accredited ERMP. This loophole could exist for properties that are as

\begin{enumerate}
\item[164] EPA, s 88.
\item[165] Great Barrier Reef Protection Amendment Bill 2009 (Qld) Explanatory Notes, 6.
\item[168] Ibid.
\item[169] Ibid, 3.
\item[170] EPA, s 89.
\item[171] Great Barrier Reef Protection Amendment Bill 2009 (Qld) Explanatory Notes, 17.
\end{enumerate}
little as 1 ha below the 70ha threshold. When the protection measures were first enacted it may have been appropriate to focus on the larger operators to encourage and lead a sustainable approach to land management in the catchment area. The cumulative effects in the catchment have been demonstrated as needing improvement according to the 2011 Reef Plan Report Card,172 but to address these properly, as a whole, a wider net now needs to be cast to prevent over-fertilization on all agricultural projects.

Small to medium sized agricultural operations can still have a significant impact upon the environment. Due to a combination of lack of financial resources to invest in land management initiatives, environmental awareness and expertise and receptivity to environmental issues,173 the cumulative environmental harm from small agricultural practices have the potential to be as significant as that from the larger scale agricultural ERAs covered by the protection measures.

Similar to the United States,174 United Kingdom,175 and Scottish approaches to diffuse pollution,176 the EPA attempts to address the issue within catchments as a whole by focusing on those agricultural operations within the specified catchments. However, as long as the protection measures exclude smaller-scale operations, no substantial improvement in the protection and conservation of the reef’s ecosystems and environmental values will be achieved. Further, there is no penalty provision within Chapter 4A for failing to obtain or comply with an accredited ERMP. Instead, the Minister may issue a directions notice requiring compliance with the EPA.177 If the person who receives the notice fails to comply they are then susceptible to a civil penalty.178

Pursuant to the EPA, annual reporting from each agricultural operator on the implementation of the ERMP in force is required each financial year.179 This annual reporting is vital to the monitoring and assessment of management techniques undertaken by agricultural operators,180 both individually and on a collective level. These methods enable authorities and agencies to continue to monitor and assess the environmental harm caused to the reef and adequately implement financial incentives and penalties based on the types of risks associated with the various activities.

Environmental Authorisation and Environmental Impact Statements
The protection measures were developed to apply specifically to agricultural ERAs within the Great Barrier Reef catchment. However, despite the significant potential

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172 Queensland Government, above n 34, 3.
177 EPA, s 363B.
178 EPA, s 363E.
179 EPA, s 105.
180 Great Barrier Reef Protection Amendment Bill 2009 (Qld) Explanatory Notes, 24.
for environmental impact upon these practices in general, they are not required to undergo the environmental impact statement (EIS) and environmental authority processes under the EPA. There are three environmental impact assessment processes in Queensland, under the State Development and Public Works Organization Act 1971 (Qld), the Sustainable Planning Act 2009 (Qld), and under the EPA, which is the primary EIS mechanism. Although new agricultural projects outside of the Great Barrier Reef catchment require assessment to determine whether they will be sustainable, agricultural ERAs are specifically excluded as a prescribed ERA and from requiring assessment pursuant to the EIS and environmental authority processes. However, are the environmental and EIS processes under the EPA drafted wide enough to encompass the down-stream and cumulative impacts of diffuse pollution from individual sources?

The purpose of the EIS process is to assess the positive and/or negative impacts a development may have if approved and the measures proposed to minimize any adverse impacts. There are three types of EIS applications which apply under the EPA: Standard, variation and site-specific. For either of the applications, the administering authority must have regard to the standard conditions for the relevant activity or authority prescribed by the Environment Protection Regulation 2008 (Qld) and the tool utilized by the EPA, the standard criteria. The standard criteria enables the internationally accepted concepts of ESD, namely the precautionary principle, intergenerational equity and the conservation of biological diversity and ecological integrity, to be a significant consideration of the decision making process. In fact, the standard criteria is utilized at all stages of the cyclical process outlined in the EPA.

In 1992, the governments of Australia entered into the Intergovernmental Agreement on the Environment. This document was an acknowledgement by all levels of government that action needed to be taken and processes implemented in order to protect and conserve the environment both for Australia and the international community. The Agreement stipulated that in order to promote environmental policy programs, four key principles needed to inform policy making and program implementation: the precautionary principle, intergenerational equity, conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms. These are now widely accepted as the guiding principles in development legislation across Australia. Due to difficulty in obtaining scientific
evidence relating to the sources of diffuse pollution from up-river, it is the precautionary principle that will be focused upon.

It is difficult to consider the potential for diffuse pollution in the context of ESD for a number of reasons. Firstly, sediment and nutrient run-off into watercourses is a natural process. It is the poor management of land clearing, cattle grazing, and excessive fertilization that can significantly increase and introduce foreign or excess materials into the Great Barrier Reef. Secondly, the amount of sediment or nutrient run-off that can be measured or expected from an agricultural activity can be minute or negligible. These amounts may only become harmful to the environment when they accumulate in waterways with minute or negligible amounts of run-off from other sources in the waterway. The Courts have considered it inappropriate to accept any direct or indirect alteration of the environment to constitute pollution, and so it becomes difficult to determine when sediment and nutrients, which on their own may be negligible and without significant alteration to the environment, are to be considered actual or potential environment harm under the EPA.

The precautionary principle is a process that is to be applied to achieve sustainable development. In order to implement the precautionary principle, two questions are asked: is there a threat of serious or irreversible environmental damage, and is there scientific uncertainty as to the environmental damage. However, in the context of diffuse pollution to the Great Barrier Reef and environmental authorisations, the difficulty determining what portion of the actual or expected sediment and nutrient run-off received in the Great Barrier Reef is sourced from the agricultural activity in question, and how much of that run-off is a result of the development and operations on that land and not the natural result of natural run-off. One must take a proper, genuine and realistic consideration to the merits of the case.

There are no judicial or merits reviews of decisions under the EPA in which diffuse pollution has been a factor under consideration with regard to the precautionary principle. However an example of the precautionary principle in practice can be observed in the matter of Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth [2012]. This case involved a merits review of a decision to approve a mining lease pursuant to the Mineral Resources Act 1989 (Qld). The mining operations in question were to be conducted on an area located above and nearby a number of aquifers, including the Great Artesian Basin, which were utilized by local residents and property owners to operate their agricultural operations. Pursuant to the EPA, an environmental impact statement was prepared for the site. There was contentious evidence as to whether the mining operations would have an adverse impact upon the aquifers. The Court accepted that although the majority of expert evidence supported that there would be no major hydraulic connection between the mining operations and the deeper aquifers, based on one expert testifying that there was a slight possibility that the aquifers could be contaminated, there was potential for there to be upward diffuse leakage of groundwater from another aquifer to the coal seam gas measures.

195 Telstra Corp Ltd v Hornsby Shire Council (2006) 146 LGERA 10, 38.
198 Ibid, para 251.
Although there was no reliable data to support whether there would or would not be an impact upon the aquifers, or let alone a connection, the Court held that the precautionary approach was justified in relation to investigating further the deep aquifers of the mining project.199

Similarly, where a sugar cane or grazing project, whether it be located in the Great Barrier Reef catchment or elsewhere in Queensland, is subject to the EIS and environmental authority processes, where there may be room for further consideration to be had for all of the elements of ESD described in the standard criteria.

Duties and Offences

The EPA imposes a variety of negative and positive duties upon the public in general, as well as specific individuals.200 In particular, a person must not carry out an activity that causes or is likely to cause environmental harm unless the person takes all reasonable and practicable measures to prevent or minimize the harm.201 This general duty is broad. The element that is of interest is that of ‘environmental harm’. Pursuant to the EPA, environmental harm occurs when there is actual or potential adverse effect upon any environmental value,202 caused either directly or indirectly from a single activity or a combination of activities.203 An environmental value is the quality or physical characteristic of the environment that is conductive to ecological health or public amenity or safety, or another quality identified and prescribed under regulation.204

Applying these concepts contained within the EPA, even the potentially trivial or negligible quantities of additional sediment and nutrients which enter waterways and the Great Barrier Reef from a single source can be categorized as environmental harm. However, it is unlikely that this was parliament’s intention, and a realistic view needs to be taken with regard to the impacts upon the environment.205 Even if the Courts were to accept that the minute quantities of sediment being discussed would constitute a breach of the general duty in s 319(1), it would open the floodgates for all agricultural operations to be susceptible as breaching the general duty, pending the development of scientific methods to gather evidence of where the pollutant source is located. Further, there are a number of duties relating to notifying the authority of serious and material environmental harm.206 However, these duties only relate to environmental harm that is not authorized under the EPA, such as harm pursuant to an ERMP.207

The only agricultural activities that are prescribed under the EPA are intensive feed-lotting, poultry farming and pig keeping.208 The only environmental accreditation requirements for sugar cane and cattle grazing activities are those relating to over-
fertilization and ERMPs. Accordingly, agricultural ERA operators are not susceptible to the offences for carrying out an ERA without an environmental authority.

Nonetheless, agricultural ERA operators can still be liable if they wilfully and unlawfully, or unlawfully cause serious environmental harm, or material environmental harm. Material environmental harm under the EPA is defined as harm that is not trivial or negligible in nature, extent or context; or causes actual or potential loss or damage to property of an amount totaling more than threshold amount but less than the maximum amount; or results in costs of more than threshold amount but less than maximum amount incurred to prevent or minimize harm and rehabilitate or restore the environment to its condition before the harm. The threshold amount is $5,000 or a greater amount prescribed by regulation. Due to the nature of diffuse pollution, it is difficult to accurately predict if a contributor to an identified pollutant from diffuse sources could be liable for causing material environmental harm. What is likely is that the operator will not be liable for material environmental harm should the release from their activity be minor or negligible. However, they may be liable should their release, on its own, satisfy the elements of this type of harm.

Serious environmental harm is that which is irreversible, of a high impact or widespread; caused to an area of high conservation value or special significance; causes actual or potential loss or damage to property of an amount or amounts equaling more than $50,000, or a greater amount prescribed by regulation, or that costs more than said amount to prevent or minimize harm and rehabilitate or restore the environment to its previous condition. As with material environmental harm, there is uncertainty as to whether an agricultural operator could be liable for contributing to diffuse pollution which causes serious environmental harm. Although the cumulative result of the releases could potentially satisfy all elements of the definition, liability for the release is limited to what evidence can establish both regarding the sources and the contribution of each.

The EPA also contains a specific offence for causing contamination of waters which can still make an agricultural ERA operator liable. Contamination defined under the EPA is the release of a gas, liquid, solid, any energy, including radioactivity, or a combination of the above, into the environment. Section 44AG creates an offence for a person to unlawfully deposit a prescribed water contaminant in waters. A person deposits a contaminant in waters or another place if they drop, place or throw contaminants in waters or another place, or release the contaminant, or otherwise causes it to move into the waters or onto the place. This offence in particular can

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209 EPA, ss 82 & 88.
210 EPA, s 426(2)(a)
211 EPA, s 437(1)
212 EPA, ss 438(1) and (2).
213 EPA, s 16(1)
214 EPA, s 16(2).
215 EPA, s 17(1).
216 EPA, s 17(2).
217 EPA, s 11.
218 EPA, s 440ZG.
219 EPA s 440ZE(1).
potentially address diffuse pollution because there is no threshold in regard to how much contaminant is required to be released before the offence provision is activated. However, if proceedings are brought against an agricultural ERA operator, evidence is still required to convince the court, on the balance of probabilities, that the contaminant alleged to have caused harm to the Great Barrier Reef was released from the particular site.

**Enforcement**

Throughout this article the contention between the negligible or trivial release of run-off from properties in consideration of environmental harm has been discussed. ERMPs are vital to ensure that nutrient run-off associated with agricultural ERAs is identified and addressed. Of benefit, the Minister has a number of resources under the EPA to ensure compliance by an agricultural operator with an accredited ERMP or the person’s general environmental duty. The minister may issue an environmental protection order to compel compliance with either an accredited ERMP, or if the Minister is otherwise satisfied that serious or material environmental harm will be caused pursuant to an environmental evaluation, and it is an offence for an agricultural operation not to comply with this order. If harm has already been identified as being caused by the release of contaminants from a property, clean-up notices requiring any contamination to be prevented or minimized may be issued, along with the costs of the response to be incurred by the operator of the contaminating agricultural ERA.

However, the Minister does not require environmental harm to have been incurred or even anticipated to enforce compliance with recognized management plans. Specifically, the Minister may, in relation to operators of agricultural ERAs, issue a direction notice to remedy the contravention, whether environmental harm will be caused or not.

**Recommendations**

**Collaborative environmental governance**

Queensland’s current management for diffuse pollution can be summarized into two categories: voluntary land plan participation, such as Reef Plan and the Public Lands Strategy; and the protection measures and other offence provisions pursuant to the EPA. These measures can be described as addressing diffuse pollution from the individual standpoint. As stated, sediment and nutrient run-off is a natural process within a river catchment, such as the Great Barrier Reef catchment. As diffuse pollution is the result of a collective of pollutant-sources, it is best achieved through a community approach. Therefore, it is proposed that a collaborative environmental governance (CEG) approach be introduced to the EPA to address diffuse pollution better from a community level.

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220 EPA, s 358(d)(xi).
221 EPA, ss 358(c) & (d).
222 EPA, s 361.
223 EPA, s 363H(1).
224 EPA, s 363N(1).
225 EPA, s 363A(1)(b).
Such CEG processes have been implemented in other jurisdictions with varied success. One local example is the *Environment Protection Act 1970* (Vic), which provides for communities and other protection agencies to develop neighbourhood environment improvement plans (‘NEIP’) to address environmental issues within a specified areas which they intend to address through community action.\(^{226}\) There has been contentious discussion as to whether processes such as these empower communities and facilitate change in social behavior and understanding of sustainability.\(^{227}\)

The New South Wales Department of Environment, Climate Change and Water in their State of the Environment Report considered that achieving ESD in the future will not only require enhanced efficiency in the use of natural resources, but also a change in social attitudes and actions.\(^{228}\) Although there is potential for State reports such as this one, namely delay in publication to current data and potentially incomplete data due to collection,\(^{229}\) it is nevertheless consistent with *Great Barrier Reef Protection Amendment Act 2009* (Qld) enacted in Queensland in the same year, which enabled individual operators to develop run-off management methods specifically for the land on which they operate.

The structure of the NEIP within the Victorian Environmental Protection Act has been criticized for enabling government authorities with too much leverage in the process by holding the final approval.\(^{230}\) Gunningham and Sinclair,\(^{231}\) commenting on CEG processes involving the Swan-Canning river system in Western Australia, have suggested that a mix of regulatory mechanisms is ideal to address diffuse pollution.\(^{232}\) Further, where the NEIP requires the administering authority to approve the proposal presented by the community, Gunningham and Sinclair have recommended developing regulations for a CEG approach in a way that exhausts lower regulatory strategies, namely that of negotiation amongst the community, prior to involving higher regulatory means, being that of the administering authority.\(^{233}\)

**A broadened scope of the protection measures**

The current protection measures of Chapter 4A were initially restricted to sugar cane and grazing operations over a certain size and within specific catchments as they had been identified as the activities of the highest risk to the reef.\(^{234}\) Since then, severely limited reductions in sediment, nitrogen and phosphates have been records since 2009 when the Reef Plan commenced.\(^{235}\) Despite there being a two year delay in these

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\(^{226}\) *Environment Protection Act 1970* (Vic), ss 19AD – 19AK.


\(^{230}\) Gunningham et al, above n 28, 132.


\(^{232}\) Ibid, 199.

\(^{233}\) Ibid, 186.

\(^{234}\) *Great Barrier Reef Protection Amendment Bill 2009* (Qld) Explanatory Notes, 6.

\(^{235}\) Queensland Government, above n 34, 3.
results since 2011, it is clear that there is little effect in the variety of approaches currently in place within Queensland.

It is recommended that after four years since the protection measures were implemented and those agricultural practices that were not encompassed within the definition of agricultural ERA still pose significant risk to the water quality of the Great Barrier Reef, that the definition of the agricultural ERA itself be broadened. The width of the definition can either be broadened either in respect to which catchments the sugar cane or grazing activities operate, the size of the activities, or both. It is expected that broadening the definition of agricultural ERAs will require more sugar cane and grazing activities to comply with obtaining accredited ERMPs, enabling the recording and reduction of run-off entering the Great Barrier Reef.

Incentive mechanisms for plan participation
As demonstrated by the reduction goals expressed in the Reef Plan 2009, and the more recent 2013 Reef Plan, it is unrealistic to attempt to obtain reduction in diffuse pollution by 100%. At the same time, it is important to make available proper incentives to encourage agricultural operators within the Great Barrier Reef catchments to participate in the State and Commonwealth plans to improve the quality of water resources entering the reef. Rather than an allocated sum of funding for each management practice undertaken in participation of a government management plan, Gordon suggests a grant system, auctioning off (tendering) the adoption of best management practices to reduce sediment and nutrient run-off into adjacent waterways. This, as Gordon posits, would enable agricultural operators to select to receive funding for the best management practices suitable to the agricultural operations undertaken, the land on which the operations are located, and its location within the greater catchment. In order to increase the number of participating operators within the more at-risk catchments in Queensland, it is recommended that an incentive system such as this proposed by Gordon be implemented if any significant reduction in emissions into the reef is to be achieved.

Broaden eligibility for the EIS and environmental authority processes
The Chapter 4A protection measures of the EPA require no reference to any elements of ESD. No approval is required, but for an accredited ERMP, which also does not require any formal consideration of ecological sustainability principles or public interest by the Minister. It is recommended that in light of the significant environmental harm that can be experienced from both sugar cane farming and grazing in the Great Barrier Reef catchment, the EPA be amended to include these practices as prescribed ERAs, or alternatively, enable the Minister to require an EIS to be obtained and/or environmental authority applied for in relation to these activities, just as any other ERA. It is expected that amendments such as these will require decision makers to apply the widely accepted range of principles to these potentially high-risk activities and reduce the impact upon the reef from sediment and nutrients from agricultural practices.

236 Queensland Government, above n 33.
238 Ibid, 62.
Conclusion
Although the EPA contains mechanisms and processes designed to address diffuse pollution, these can be significantly restricted. A significant restriction with the duties, offences and enforcement powers within the EPA are due to the insufficient scientific capacity to identify sources of pollutants from upstream. Accordingly, a proactive approach to address diffuse pollution would be expected to have a higher rate of success before the pollutants are released into the waterways. By engaging landowners directly and relying on them with their knowledge of the land in which they live and work, as well as properly recognizing and funding alternative land management practices, which they may not otherwise implement because of expense, the causes of diffuse pollution can be reduced, potentially to reach the targets set by State government.

Matthew Dunlop