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Does the Court's Power of Declaration make it better?

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Introduction

The power given to the Planning and Environment Court, the PEC, under sections 4.1.21 and 4.1.22 of the *Integrated Planning Act* 1997 (IPA), once amended in 2001, is wide, flexible, arguably exclusive to that Court, and significant. An application made under s.4.1.21 is a powerful weapon in the hands of participants in our industry, be they a proponent, an opponent, a community interest group, or an interested "any person".

Section 4.1.21 gives the Court the power to make a declaration, on the application of "any person", about any matter done, or that should have been done under IPA, about the construction of IPA itself, as well as planning schemes and instruments under IPA, and finally, about the lawfulness of land use or development in all its forms. This significant power encompasses all aspects and issues arising in the legal planning process.

The next section, 4.1.22, expands the jurisdiction of the Court further, allowing it to make an order about a declaration under the preceding section. This power was initially limited by the "fraud fetter", which limited orders amending or canceling development approval to circumstances where it was obtained by fraud. However, the *Integrated Planning and Other Legislation Amendment Act 2001* (*IPOLA*) removed the fraud fetter entirely, giving the PEC unlimited ability to amend or cancel development approvals.

Equally, the Court is not obliged to exercise this power.

The jurisdiction conferred by these two sections, raises important questions:

1. Will the exercise of this power give greater certainty to all participants under IPA? Is it an advantage for the proponent of a project to seek a declaration ruling on interpretation of IPA, a planning scheme provision, or a local planning policy, before lodgement of a development application and pre-approval negotiation with the local authority?
2. Will the public at large, and the community interest groups, empowered with the open standing of "any person" seek a declaration to bring a halt to particular developments, even after the appeal rights under IPA have been exhausted? And even after projects are committed and underway.
3. That is, submitters can have a "third bite at the cherry".
4. Equally, it may encourage developers to seek to knock out specific conditions thereby amending a development approval, even after the approvals have been negotiated and time for an appeal has been spent. These may have been conditions hard fought by a submitter.
5. Since the amendment to section 4.1.22 is the PEC less constrained to exercise its discretion to declare a development approval invalid?

I conclude that the enhanced declaratory powers of the PEC since the removal of the fraud fetter facilitates the full and meaningful implementation of IPA, and appropriately preserves the Court's intended oversight of IPA. However, at the same time, the breadth of the declaratory powers conferred may go beyond the intention of the drafters of IPOLA 2001. The result is a more dominant PEC in its specialist area.

Just how wide is the power of declaration?

The first important consideration in understanding the power of declaration, is that the jurisdiction of the PEC is exclusive, once a matter has commenced under section 4.1.21(5). There is no recourse to the Supreme Court under those circumstances, as was held in *Netstar Pty Ltd v Caloundra City Council*[1]. President McMurdo stated that the PEC is a specialist court, and that it was the intention of Parliament to allow applications to be kept in that jurisdiction if originated in that Court. Her Honour did, however, note that a matter commenced in the Supreme Court will remain in that court.

1 [2004] QCA 296 at [12] and [16]

When it makes a declaration the PEC is exercising original, rather than appellate, jurisdiction; as such the range of matters that may be taken into account, and of orders that might be given, are not restricted by proceedings below. For example, while appeals are restricted to the PEC from only proponents and submitters, against approvals to matters commenced as impact assessable applications; declarations and consequent orders may be made on applications by any person and against decisions which are code assessable only.

Declaration is traditionally an administrative law remedy, and the relief which it may bring is typically informed by a wide discretion. Such discretion was held by the Court of Appeal in *NRMCA v Andrew* [2]to be relevant to the PEC's declarative power. In *Mudie v Gainriver Pty Ltd*[3], the Court emphasized the public policy concerns which ought to influence a court in exercising the discretion, and the stewardship role of the courts in encouraging compliance with the law. In that case and others, the words of President Kirby (as his Honour then was) in *Sedevcic* [4]were highlighted, namely the need to balance the public interest in compliance with the law, with the private inconvenience and loss that may result from strictly enforcing it via a declaration.

Witness the number of applications for declarations and concomitant orders in the past three years. The PEC has embraced a "supreme" court type jurisdiction in granting declaratory relief.

It is good law that it is permissible to sue for a declaration in the absence of a cause of action, and where no consequential relief could be granted[5]. Modern jurisprudence places few limits on what can be the subject of a declaration. This rule "consists in part in a subjective conclusion in the exercise of a judicial discretion that in the

2 *NRMCA (Qld) v Andrew* (1993) 2Qdr 706 at 713 (C of A)
3 *Mudie v Gainriver* (2002) 2 Qdr 53
4 *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 340
5 *Dyson v Attorney General* [1911] 1 KB 410, *Tonkin v. Brand* [1962] WAR 2 at 15

case is one for granting a remedy by way of declaration"[6].

The power of declaration and concomitant order can be illustrated in three roles: a clarifying role; a judicial review role; and a civil enforcement role.

Clarification role

As a clarification an applicant could seek an order that an application was not "properly made", under s 3.2.1 despite the Assessment Manager's discretion under s 3.2.1(9), and have an approval overturned by order- s 4.1.22- well after the development permit had issued.

Re-enforcement for this role is in the restatement of the PEC's declaratory power in the decision of *Cornerstone Properties Ltd v Caloundra City Council* [7] where His Honour Judge Rackemann held:-

> *"a determination as to whether an application is "a properly made application" would seem to be a matter which falls within the jurisdiction of this court under s4.1.21(1)(a)".*

In *Cornerstone Properties*, well after the permit was issued and work had commenced removing trees and shrubs generally identified on a tree survey subject to conditions, the State Government had sought referral of the application for a development permit for operational works to the Department of Natural Resources and Mines, all work having been halted on the site. The Court held that it could make a declaration in favour of the Applicant against that referral and a consequential order.[8]

Declarations are flexible remedies, which give the PEC a broad ability to clarify the *Integrated Planning Act* other Acts, planning schemes and instruments.

The disjunction of declarations and orders gives the Court wide powers to determine the appropriate outcome.

As such, potential areas of confusion or conflict in the Act itself, or in particular schemes, may be addressed conclusively.

Recent cases have shown that the PEC is willing to use declarations to grant discretionary remedies that are equitable in nature. Four examples, show how wide the power to declare what "should be done" under the Act:

1. In *Knobel Consulting*[9], a declaration clarified that, under the circumstances, the Council could not refrain from exercising its discretion under section 3.2.1 of the Act.
2. In *Aqua Blue Noosa Pty Ltd*[10], the *contra proferentem* rule was adopted as a guideline for interpreting planning decisions, narrowly reading ambiguous terms to give the land owner the benefit of the doubt.
3. In *McDonald*[11], the issue was the currency of a town planning consent, and it was determined that the applicant's conduct, having ceased work for well over the stipulated period, meant that the rights conferred by the permit were now extinguished.
4. Finally, in *Copehurst Pty Ltd*[12], the conformity of land prohibited from development with the Regulatory Provisions was determined, and an application under section 3.2.1 was therefore properly made.

The PEC's greater preparedness to excuse matters going to non-compliance with IPA, flowing from s 4.1.5A – *how court may deal with matters involving substantial compliance*- are signposts to a broader discretion for applicants under s 4.1.21. In *Reithmuller v Brisbane City Council* [13] and *Grant v Pine Rivers Shire Council* [14] it was empowered to excuse the lateness of the lodgement of a submission which would have otherwise denied appeal rights to a submitter.

The "high point in the (PEC's) generally liberal approach"[15] may have been reached in *Jewry v Maroochy Shire Council*[16]. His Honour Judge Skoein SJDC acknowledged that Regulation s30 of the Standard Building Regulations had no power to extend a time limit. A demolition permit under that regulation to demolish an existing building prior to construction of a new unit development had lapsed. An adjoining owner sought a declaration to halt the development which was under construction. On the facts both parties had overlooked the statutory time period, and that a new demolition permit would have been granted had it been applied for. The application for a Demolition Permit is code assessable. His Honour exercised his discretion and applied s 4.1.5A to treat the demolition work carried out as having been lawfully carried out, as though the permit which had lapsed, had not lapsed.

In *Metrostar* [17], a recent judgement, Judge Skoien accepted that the completed development work constituting site works, the building of understoreys and additional filling was on its face a clear breach of a departure from conditions, without approval under s 4.15(1) and (2)-*modifications of certain applications and approvals*- and amounted to carrying out of assessable development. Notwithstanding that Judge Skoien allowed an appeal by *Metrostar* against the Council, which deemed refusal of an application to change conditions after substantial completion of twenty townhouses. Reinforcing the wide discretion under s 4.1.5A [18]His Honour ruled in favour of a draft order with the effect that those necessary changes to conditions were extant, in time, and approved in accordance with IPA.

It may be considered that the effect of these two decisions is tantamount to making an order that overrides a substantive statutory requirement. However, both decisions were taken to avert obstructive results, as each development was substantially completed. Judge Skoien on both found that the developers had not intentionally flouted the law, nor were unmeritorious, and "to send the matter back to Council, to retard the development substantially more, would serve no useful purpose.....(and) to apply the ultimate penalty to unapproved development, demolition, would ...be sheer vandalism."[19]

Judicial review role

The PEC with declaratory and enforcement powers exercises a broad and flexible injunctive power. Injunctions are equitable in nature requiring a person to do, or refrain from doing, a particular action.

As such, the Court engages in an activity akin to a merits review in administrative law, and the relief granted upon a declaration will depend on all the circumstances of the case, as emphasized in several recent decisions of Judge Wilson SC[20].

A very important difference is that the declaratory jurisdiction of the PEC, contrary to Newton DCJ's understanding when the fraud "fetter" was present[21], does not have the restraint that the hearing is reliant upon the previously presented evidence. By its nature it is a hearing anew (*de-novo).*

I quote from Aronson and Dyer:-

> *"the High Court seems to see the declaration either as an equitable remedy, or perhaps (if the Ainsworth dictum is correct) a common law incident of the inherent jurisdiction to engage in judicial review"*[22].

6 *Palfreyman v Southern Metropolitan Master Planning Authority* (1963) 15 LGRA 38 at 53
7 [2004] QPEC 044 at [35]
8 See note 7 at [31].
9 *Knobel Consulting Pty Ltd v Gold Coast Council* [2005] QPEC 082 at [19]
10 *Aqua Blue Noosa Pty Ltd v Noosa Shire Council* [2004] QPEC 74
11 *John Joseph Peter McDonald v Douglas Shire Council* [2003] QCA 203
12 *Copehurst Pty Ltd v Maroochy Shire Council* [2006] QPEC 023
13 [2004] QPEC 064
14 [2005] QPEC 036
15 Fynes-Clinton S, *Commentary on Integrated Planning Act*, The Local Government Association of Queensland's Commentary Service for the Integrated Planning Act,2006,at 180/1
16 [2005] QPEC 030
17 [2006] QPEC 022
18 See *Metrostar* note 17 at [21] to [30]
19 See *Metrostar* note 17 at [31]
20 In *Woolworths v Caboolture Shire Council* [2004] QPEC 15 and 26, Judge Wilson SC considered discretionary matters and referred, inter alia, to *Sedevcic*. Judge Wilson SC again expressed the width of the Court's discretion in *Advance Property Planners Pty Ltd v Brisbane City Council* [2005] QPELR 113 at [16] on a question of non-compliance under s 4.1.5A.
21 *Eschenko v Cummins* [2000] QPELR 386 at [20]
22 Aronson M and Dyer B, *Judicial Review of Administrative Action,* LBC Information Services, Second Ed, 2000, Sydney,at p.634-635.

If the Court believes there is an "equity" worth protecting[23] "declaratory relief should be directed to the determination of legal controversies concerning rights, liabilities and interests of a kind which are protected or enforced in the courts."[24]

Especially where *Wednesbury*[25] unreasonableness is claimed, the Court may go beyond the scope of the material that was actually before the decision-maker, and instead determine what a reasonable decision-maker ought to have done. Where a failure to make enquiries is alleged, "evidence is admissible as to what inquiries, reports or consultations would have revealed"[26].

Expert evidence accepted by the Court has included geotechnical evidence, town planning evidence, architectural evidence, and economic evidence. In particular, evidence of all the circumstances surrounding a Council's decision, not just the formal "paper-trail", is admissible.

A serious question arises with regard to challenging the lawfulness of conditions, as being beyond power, outside of the expiration of the appeal period. A declaration of unlawfulness may be used in this way as a de facto appeal, and it was held in *Rowlands Surveys*[27] and in *Keilar Fox & McGhie*[28], that the expiry of a statutory appeal period does not deprive the Court of full power to make a declaration on the lawfulness of a condition. The potential exists, then, for a subsequent order to declare an entire development approval invalid, and this may be sought by a party who has exhausted their appeal rights through the ordinary process.

The Supreme Court exercised its inherent "judicial review" power, referring to s 4.1.21, in Emerald Developments (Aust) P/L. v Minister for Environment, Local Government, Planning and Women [2006] QSC 073 by declaration that the Minister's decision of 8 October 2004 to refuse the application for code assessable development (s 3.5.13) , as assessment manager (s 3.5.4 (2)), for the grant of a development permit for a 77 storey highrise residential tower is unlawful and of no effect.

Civil enforcement role

The final role which declarations may play, is as a complementary power to section 4.3.22, which gives the Court the power to grant injunctions to restrain development offences, and thereby to safeguard the objects of the legislation. Short of actually penalizing the offences, the PEC may use declarations to highlight the breaches of the law, but at the same time refrain from issuing injunctions. This approach was taken in *Caloundra City Council v Taper Pty Ltd*[29], where a multi-storey building had breached height requirements, but by less than a metre.

In the two *Woolworths* cases[30] injunctions were issued to restrain unlawful development, pursuant to declarations, however, the operation of those injunctions was suspended in order to permit the party in breach to remedy the breaches, and contingent upon the attainment of the relevant permits.

"Rolling in" the declarations

More than simply permitting declarations to be made relating to the provisions of IPA, the PEC has power which extends to other legislation "rolled in" to IPA under Schedule 8. Further, the PEC is capable of making a declaration on the lawfulness of a particular development in terms of any legislation under which that development is assessable, self-assessable, or exempt.

The discretion exercised regarding "substantial compliance" under section 4.1.5A also applies to compliance with the requirements of an Act other than IPA, and the Court has a broad power to proceed as it thinks appropriate. For example, in *Co-You Australia Pty Ltd v Gold Coast City Council*[31], non-compliance with a provision of the *Coastal Protection and Management Act 1995* was excused by Judge Wilson SC.

Finally, section 4.1.21(1)(c) confers a general power to make declarations concerning land use and developments under any of the Acts in Schedule 8. As noted by Judge Rackemann in *Cornerstone Properties*, while a scheduled Act may be capable of giving rise to a declaration under the section, not all declarations under that other Act will fall within the purview of declaratory power under IPA. In that case, a general declaration of lawfulness under the *Water Act 2000* was too wide: "lawfulness" in paragraph (c) is to be read as lawfulness in the context of IPA.

Accessibility and standing

Having established, then, the breadth of the declaratory power, and its utility in complementing and realizing the aims of IPA and the broader legislative scheme, the question remains of how widely available the remedies actually are. Arguably, a submitter can have a "third bite of the cherry" to knock out a development approval. "Standing" is not a statutory requirement.

There are no limits to who is the "any person" who can sue for a declaration. Owing to the wide discretion of the Court, however, persons who have no direct interest in the outcome, nor represent the interests of the community, may be denied the relief sought. This was established by the Court of Appeal in *NRMCA v Andrew*[32], with regard to the old *Local Government (Planning and Environment) Act*, and ought to be equally applicable to IPA.

There is contrasting authority in the development of the common law doctrine of standing. The evolving position places emphasis on the rule of law, and ascribes to all citizens a legitimate interest in seeing it upheld.

In *Nth Qld Conservation Council Inc. v Executive Director Queensland Parks and Wildlife Service*[33] His Honour Justice Chesterman analysed the authorities and concluded at [17]:

"It would seem to follow from the express recognition of a public interest in ensuring that governmental decision making occurs lawfully that an application for the review of an administrative decision will not be an abuse of process unless it is officious or is the product of some collateral motive. The law may be moving towards a statement that the public interest in

23 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 257 per Gaudron, Gummow and Kirby JJ: "the position is expressed in traditional form by asking of the plaintiff whether there is an 'equity' which founds the indication of equitable jurisdiction".

24 *Egan v Willis* (1998) 195 CLR 424 at 439 per Gaudron, Gummow and Hayne JJ.

25 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 QB 223. Lord Greene:" (unreasonable) has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must…(1), direct himself properly in law …(2) call his attention to the matters which he is bound to consider. If he does not obey those rules, he may truly be said…to be acting "unreasonably."(4) Similarly there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority (5). In another sense it is taking into consideration extraneous matters" (Authors numeration).

26 *King v Great Lakes Shire Council* (1986) 58 LGRA 366 at 371

27 *Rowlands Surveys v Thuringowa City Council* [1993] QPLR 217

28 *Keilar Fox & McGhie v Beaudersert Shire Council* [1997] QPELR 2

29 *Caloundra City Council v Taper Pty Ltd* & Anor[2003] QPEC 19.

30 *Woolworths Limited v Townsville City Council & Ors*[2004] QPEC 92- the Court declared that the second respondent "has and is continuing to unlawfully use premises at the subject site"; ordered that they be directed "to stop its use of premises at the subject site for the purpose of other development until further order"; but adjourned the further hearing of the application and suspended the operations of the two prohibition orders.
Woolworths Limited v Caboolture Shire Council & the Warehouse Group (Australia) [2004] QPEC 26 here the Court declared that the second respondent had started assessable development (being a new use characterised under the Planning Scheme for the Shire of Caboolture as a "shop"), without a development permit for the development; has and is continuing to unlawfully use the premises at the subject site for a shop use; that the second respondent cease the use of the subject site as a shop unless and until a permit for such use is obtained; and suspended the operation of the prohibition orders for a period of three months to enable the respondents to remedy "serious breaches of planning laws".

31 [2006] QPEC 001

32 (1992) 75 LGRA 64

33 [2000] QSC 172

ensuring the lawful exercise of executive power is itself a special interest."

Justice Chesterman stated that another point of significance is that if NQCC did not have standing to test the validity of the permit no one else will have, and the decision which may be quite unlawful, will go uncorrected. Society has an interest in efficient government but it has an equal interest in lawful government.

Perhaps a more significant limitation to the accessibility of declarations is that of estoppel via *res judicata* and *Anshun* estoppel. The certainty and predictability of the law referred to earlier must be complemented by a degree of finality. As such, issue estoppel prevents the relitigation, or "collateral attack" of issues already decided and exhausted on appeal. Similarly, *Anshun* estoppel prevents parties making a new application agitating a fact or defence, where it should have reasonably been raised in an earlier application.

Anshun estoppel was held to apply in *T M Burke Estates Pty Ltd*[34], where the Court of Appeal dismissed the Noosa Shire Council's application to reopen a PEC decision. The application did not relate to obtaining a declaration, but rather agitating a further subsection of a particular section raised at trial. The Court held that, as submissions had been invited at trial, but not made, that *Anshun* estoppel applied. Similarly, if it were reasonable to have sought a declaration at the same time as a statutory appeal was being made, an applicant developer may be estopped from raising the claim subsequently.

Accessibility is markedly easier to the PEC than to other courts of record as pursuant to s4.1.23 (2) the Court has only limited jurisdiction to award costs.

The PEC is less reluctant to declare a DA invalid

There is another way that an application for a declaration may arise, however, which is not subject to these forms of estoppel. Because "any person" may apply under section 4.1.21, a person (which also means a corporation) who was not a submitter, and has not been involved in earlier litigation, may apply. On my hypothesis remedies will be available to developers, submitters, and community interest groups, who are attempting a "third bite at the cherry".

In my opinion the interpretation of the law has moved on from the judgement in *Queensland Investment Corporation v Gold Coast City Council*[35], where Judge Quirk noted that an applicant, "having missed (for reasons for which they can blame no other party) the opportunity to appeal, should not be able to launch an alternative attack on this development approval in the absence of clear and serious reasons for holding it to be an invalid approval."

Judge Quirk noted a submission that the "fraud fetter", which still applied in the 2000 case, indicated a possible legislative intent to exclude declarative relief where the appeal provisions under IPA apply. Rather than clarifying this, as his Honour suggested, Parliament removed the fraud fetter, which opens the door to the normal use of the very sort of "alternative attack" that was envisioned.

Since the removal of the "fraud fetter" the grounds for ruling a Development Approval invalid now rely on the judicial review and administrative law principles illustrated in the current judgements of the PEC. This is a significant change and the Court does exercise its power. In *Westfield Management Ltd v Brisbane City Council* [36] Judge Brabazon QC declared the approval invalid on administrative law grounds; the Council took into account significant but irrelevant considerations and the planner had asked the wrong questions.

It is significant to note also that, being a code assessment decision, there was no statutory right of appeal, and declaration was the only remedy available to *Westfield*.

The accepted propositions to support the reluctance of the PEC to declare that a development approval is invalid rest on three premises[37]:

1. First is the factor that Judge Quirk averred to in *QIC*, namely that an approval creates rights which ought not be lightly disturbed, especially, one would think, when stakeholders have acted in reliance on an apparently exhausted appeals period. In *Greatlife Pty Ltd v Brisbane City Council*[38], where more than a million dollars had already been spent, and construction was underway, the Court noted that there was little utility in making a declaration in those circumstances, despite the application having not been properly made.
2. Another factor, also apparent from the *QIC* case, is that there is a risk of disturbing public confidence in the IDAS system and undermining its purposes, in particular the aim of IPA to create "efficiency and certainty" in the planning process.
3. Finally, there is the cautionary statement of Judge Brabazon QC in *Greatlife*, that invalidity for the purposes of section 4.1.21, and an application merely having been improperly made, cannot be equated.

These propositions are being tested, as the fetter that restrained the court in *Eschenko v Cummins* [39] has now been lifted.

Nevertheless, the onus of establishing invalidity falls upon the applicant.[40]

Notwithstanding this broadening of jurisdiction, the Court has not previously been constrained by the prior s 4.1.22 (2) from setting aside an approval if it were, "one which should be set aside because of an error of law committed within the jurisdiction proposed in the body in question"[41].

Therefore if an approval is void because of want of jurisdiction, the court was not constrained by the provisions of s4.1.22 (2).

In *Clayton*[42] the Court took the view that s 4.1.21 recognises a distinction between approvals which are inherently void because purportedly made in contravention of the statutory requirement going to jurisdiction and, on the other hand, approvals which are voidable by a Court, but valid and effective until and unless a successful legal challenge is taken[43].

The PEC has discretion, to make a declaration that a development approval is of no legal effect on either the "void" or "voidable" legal basis.

Arguably, the reasons for deciding if an approval is "voidable" have been enlarged. In 2005 in *Family Assets Pty Ltd v Gold Coast City Council* the PEC heard an application pursuant to s 4 .1 .21 to declare void the rezoning of two parcels of land, and a subsequent Order in Council, approved in 1995, and gazetted in 1996 respectively. Unshackled by the "fraud fetter" the applicant, a competing developer, strenuously argued a case against the Gold Coast City Council and the current owners of the subject parcels to seek an order to reach back in history and void the use of that land for a shopping centre and transit supportive neighbourhood centre, respectively. [44]

The application of these principles since the lifting of the "fraud fetter" on *Eschenko v Cummins* being decided differently today.

In conclusion

Returning to the questions posed at the beginning of this paper, then, it is clear that the power of declaration is a wide one, which complements and enhances the Planning and Environment Court's capacity to achieve the aims of IPA. Each of the scenarios raised in this paper is within power, in my opinion.

Noting that pursuant to s4.1.23 (2) the Court has only limited jurisdiction to award costs, will this change to IPA lead to an increase in proceedings, as developers challenge local authorities, on the legitimacy of involving the

34 *TM Burke Estates Pty Ltd v Council of the Shire of Noosa* [2001] QCA 42

35 *Queensland Investment Corporation v Gold Coast City Council* [2001] QPELR

36 [2003] QPEC 010

37 Fogg A, Meurling R and Hodgetts I, *Local Government & Environmental Law/Planning and Development (Qld)/Integrated Planning Act 1997/Chapter 3-(IDAS),* at [3065]

38 [2001] QPELR 42 at 46

39 See *Eschenko* note 21

40 See *Eschenko* note 21 at 389

41 *Tropic Isle Retail Stores Pty Ltd v Whitsunday Shire Counci*l [2000] QPELR 442 at 447

42 *Clayton v Miriam Vale Shire Council* [2000] QPELR 320

43 Fynes-Clinton S, *A Commentary on the Integrated Planning Act 1997*, LGAQ (Inc), at p 159

44 *Family Assets Pty Ltd v Gold Coast City Council & Ors* [2005] QPEC 6

referral agencies, on specific conditions since settled or on the validity of otherwise properly made applications. Certainly community interest groups and submitters will be emboldened to have a "third bite".

Is it appropriate to make a value judgment that this enhanced power is for the better? If it gives greater certainty to the development industry that the PEC is more authoritative and more capable of giving direction to local authorities by declaration of the substance and meaning of IPA, and the relevant connection of IPA to its companion roll-in statutes, prior to a decision for a development approval, the answer is, in my opinion, in the affirmative.

If it lengthens the reach of a submitter to have a "third bite at the cherry" is this counterproductive? I am sure community groups will have a view on that question; that it is not counterproductive.

This enhanced power does introduce a "de-facto" appeal process to challenge the lawfulness of conditions, in part defeating the requirement of "standing" under ss 4.1.27 and 4.1.28 of IPA, where it is necessary to have an interest as either an applicant or a submitter to appeal to the PEC against an approval, a refusal, or any condition applying to the development, and the length of the period mentioned in s 3.5.21 (the "life" of the approval)[45]: that is before a person can agitate for or against an application for a development permit.

Moreover, "any person" can disregard the IDAS process, let a development reach the expense of final design, building approvals, the letting of construction contracts, and legal obligations and risks set in concrete by the project proponent, only then to "ambush" by means of an application for a declaratory order. This, in my opinion, would be a manifestly unfair consequence. The unlikelihood of an adverse cost order could embolden such behaviour. Having said this, decisions on standing, as well as issue and *Anshun* estoppel, may limit the efficacy of this approach.

It will be the wisdom applied in the exercise of the discretion of the PEC that will delimit the access to the Court by applicants pursuant to s 4.1.21, and in judgements on applications so as to avoid unnecessary obstruction to the development assessment process, and to development per se.

On balance then, the enhanced power of declaration does "make it better" for those involved in planning and environment litigation. The potential pitfalls in terms of the uncertainty and injustice that may result from certain applications for declarations may be avoided by the wise and judicious use of the power by the Court, relying always on the broad discretion that underscores the power.

45 Ss 46 and 47, *Integrated Planning and Other Legislation Amendment Act* 2006

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Before entering the law Lindsey had over 20 years experience in commerce as a company owner and director, principally as a property developer, development manager, construction manager, real estate agent and property consultant.

As a developer he was responsible for land subdivisions, small lot housing estates, townhouse projects, medium density units, high-rise units, and retail projects, in the ACT, Brisbane, Gladstone and Cairns. His "green street" community title housing estate –"Cedar Crossing", Kenmore in Brisbane won the prestigious Royal Institute of Planning Association State award in 1993 in the category of residential development."

QP