SUPREME COURT OF QUEENSLAND

CITATION:	*Gold Coast City Council v Sunland Group Limited & Anor* [2019] QCA 118
PARTIES:	**GOLD COAST CITY COUNCIL** (applicant) **v** **SUNLAND GROUP LIMITED** ACN 063 429 532 **SUNLAND DEVELOPMENTS NO 22 PTY LTD** ACN 164 903 011 (respondents)
FILE NO/S:	Appeal No of 5432 of 2018 P & E Appeal No 321 of 2016 P & E Appeal No 323 of 2016 P & E Appeal No 4 of 2017 P & E Appeal No 1497 of 2017 P & E Appeal No 2213 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane – [2018] QPEC 22 (Kefford DCJ)
DELIVERED ON:	14 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	12 November 2018
JUDGES:	Fraser and Morrison JJA and Crow J
ORDERS:	**1. Leave to appeal is granted.** **2. The appeal is allowed.** **3. The orders made by the Planning and Environment Court on 4 May 2018 are set aside and in lieu thereof the respondents' application for declarations is dismissed, with costs.** **4. The respondents are to pay the appellant's costs of the application for leave to appeal and the appeal.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENT JURISDICTION – QUEENSLAND – PLANNING AND ENVIRONMENT COURT AND ITS PREDECESSORS – OTHER MATTERS – where the applicant had issued infrastructure charge notices to the respondent – where the respondent appealed the applicant's decision to issue the infrastructure charge notices

to the Planning and Environment Court – where the Planning and Environment Court made declarations overturning the imposition of the infrastructure charge notices – whether the Planning and Environment Court erred in their decision

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – OTHER CASES – where the applicant issued notices to the respondent each under s 635 of the *Sustainable Planning Act* 2009 (Qld) in order to levy charges on the respondent for trunk infrastructure – where the respondent filed an appeal against the appellant's decision to issue the notices – where the learned primary judge held that the notices were not in accordance with s 637(2) of the *Sustainable Planning Act* 2009 (Qld) and were not infrastructure charge notices under the *Sustainable Planning Act* 2009 (Qld) – where the applicant has sought leave to appeal against the declarations of the learned primary judge – whether the learned primary judge erred in declaring that the notices did not comply with the *Sustainable Planning Act* 2009 (Qld) and were not infrastructure charge notices under the Act

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – INTERPRETATION ACTS AND PROVISIONS – where it is contended the questions raised on appeal are of specific importance to the applicant as the entity responsible for issuing infrastructure charge notices in its local government area – where it is contended that the questions raised on appeal are of importance to other local governments throughout Queensland – where the resolution of the issues are relevant to the applicant's budgeting and financial resources – where it is submitted that the appeal raises critical questions about proper statutory construction – where is its contended that the Planning and Environment Court erred in holding that a failure to comply with s 637(2) of the *Sustainable Planning Act* 2009 (Qld) rendered the notices invalid – where it is submitted that the Planning and Environment Court erred by not refusing the declarations sought by the respondent – whether s 637(2) of the *Sustainable Planning Act* 2009 (Qld) was correctly interpreted by the learned primary judge

STATUTES – ACTS OF PARLIAMENT – OPERATION AND EFFECT OF ACTS – RETROSPECTIVE OPERATION – where the Court granted the parties leave to make supplementary submissions as to the impact of s 344 of the *Planning Act* 2016 (Qld) on the appeal – where the applicant contends that s 344 of the *Planning Act* 2016 (Qld) has a retrospective effect, applying to infrastructure charge notices issued on or after 4 July 2014 – where the respondent contends that the appeal must be determined upon the law as it stood at the hearing below – where it is submitted that as s

344 of the *Planning Act* 2016 (Qld) was not in existence at the time of the notice and therefore cannot apply – whether s 344 of the *Planning Act* 2016 (Qld) operates in a retrospective sense or not

Acts Interpretation Act 1954 (Qld), s 27B
Planning Act 2016 (Qld), s 344
Sustainable Planning Act 2009 (Qld), s 478, s 635, s 637(1), s 637(2) (repealed)

ADCO Constructions Pty Ltd v Goudappel (2014) 254 CLR 1; [2014] HCA 18, cited
Australian Education Union v General Manager of Fair Work Australia (2012) 246 CLR 117; [2012] HCA 19, cited
Cypressvale Pty Ltd v Retail Shop Leases Tribunal [1996] 2 Qd R 462; [1995] QCA 187, cited
Duralla Pty Ltd v Plant (1984) 2 FCR 342; [1984] FCA 146, mentioned
Kelly v The Queen (2004) 218 CLR 216; [2004] HCA 12, followed
Pfeiffer v Stevens (2001) 209 CLR 57; [2001] HCA 71, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, followed
Sabag v Health Care Complaints Commission [2001] NSWCA 411, cited
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, cited
Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan (1931) 46 CLR 73; [1931] HCA 34, cited

COUNSEL: R G Bain QC, with M J Batty, for the applicant
S L Doyle QC, with S J Webster, for the respondent

SOLICITORS: HopgoodGanim for the applicant
Holding Redlich for the respondent

[1] **FRASER JA:** I have had the advantage of reading in draft the reasons for judgment of Morrison JA. His Honour concludes that the primary judge erred in holding that the Infrastructure Charges Notices issued by the appellant to the respondents under the *Sustainable Planning Act* 2009 (Qld) were invalidated by the absence of reasons required to be given for the decisions to issue those notices. I agree with his Honour's reasons for that conclusion and with the proposed orders.

[2] It is therefore not strictly necessary to decide whether, if the notices were invalid because of the absence of the required reasons for the decisions to give those notices, the Court should hold in this appeal that the judgment at first instance should be set aside upon the ground that the invalidity was retrospectively cured by s 344 of the *Planning Act* 2016 (Qld). It is nevertheless appropriate to address that question. The following reasons are expressed upon the assumption that, contrary to my own conclusion, the primary judge was correct in holding that the notices were invalidated by the absence of required reasons.

[3] Section 344 is set out in [167] of Morrison JA's reasons. That section was introduced into the *Planning Act* 2016 (Qld) by the *Economic Development and Other*

Legislation Amendment Act 2019 (Qld) (which I will call "the amending Act") with effect after the decision in the Planning and Environment Court but before judgment in this appeal. As Morrison JA concludes, s 344 is clearly intended to have a retrospective operation, but it does not necessarily follow that it has such a retrospective operation as would justify this Court in holding that the primary judge erred in not applying the law declared in s 344 even though that section was not enacted when the primary judge made the decision under appeal. In *Australian Education Union v General Manager of Fair Work Australia*,[1] the High Court endorsed not only the rule of construction that a statute does not operate retrospectively unless that intention is clearly expressed, but also the further rule that a statute is not to be construed as retrospective to any greater extent than the clearly expressed intention of the legislature indicates.

[4] It is one thing for an amending Act to provide that it amends legislation with effect at a time before the commencement of the amending Act. That kind of amendment has a retrospective operation in so far as it alters rights or liabilities previously conferred or accrued at that earlier time. Section 344 operates retrospectively to that extent because it makes explicit a legislative intention to impose liability under and at the time of the issue of a notice which previously did not attract any such liability because it was invalid. To enact such retrospective legislation is a serious step for the legislature to take, but it is another thing again to enact an amendment which alters rights or liabilities which have been ascertained in a final judicial decision. A "particularly stringent" approach is taken to the construction of statues which are said to retrospectively affect judicial decisions.[2] Even so, if s 344 formed part of the law required to be applied by the Court in determining this appeal, there would be a reasonably arguable basis for holding that the amending Act was sufficiently explicit to require the Court to find error in the declaration, despite the absence of an express legislative intention to authorise the alteration of rights and liabilities that had been judicially ascertained.

[5] It is not necessary to express any opinion about that hypothetical case. As Morrison JA's reasons explain, the appeal from the decision in the Planning and Environment Court to this Court is not one in which the Court decides whether the primary judge erred upon the basis of the law in force at the time of the hearing of the appeal. This is a "strict appeal" in which the Court's function is confined to deciding whether or not there was an error in the judgment under appeal upon the basis of the facts and the law at the time of that judgment and, if so, to give the judgment which should have been given upon that same basis.

[6] The parties' submissions did not refer to any case concerning the impact of the nature of an appeal upon the application of retrospective legislation. In *Attorney-General of New South Wales v World Best Holdings Ltd*[3] and *MacCarron v Coles Supermarkets Australia Pty Ltd*[4] reference was made to the circumstance that an appeal was by way of re-hearing in the course of decisions that retrospective legislation was applicable notwithstanding the adjudication under appeal. It has

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1 (2002) 246 CLR 117 at 135 [31] (French CJ, Crennan and Kiefel JJ, quoting from *RS Howard & Sons Ltd v Brunton* (1916) 21 CLR 366) and at 155 [93] (Gummow, Hayne and Bell JJ, approving statements in the *Federated Engine-Drivers' & Firemen's Association of Australiasia v Broken Hill Proprietary Co Ltd* (1913) 16 CLR 245).

2 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 136 [33] (French CJ, Crennan and Kiefel JJ); see also at 136 – 137 [34] – [37].

3 (2005) 63 NSWLR 557 at 586 [154] (Mason P).

4 (2001) 23 WAR 355 at 359 – 360 [8] – [10] (Kennedy J).

been suggested that the legislation considered in *MacCarron* was held to have a retrospective effect in part because the appeal was by way of a rehearing.[5]

[7] The only case I have found in which the significance in a similar context of an appeal being an appeal in a strict sense, rather than an appeal by rehearing, was discussed in any detail is *Duralla Pty Ltd v Plant*.[6] In that case the Full Court of the Federal Court held that the appeal to that court was a strict appeal. That aspect of the decision was overruled by the High Court in *Western Australia v Ward*[7] without any reference to the Full Court's discussion of the significance of the nature of the appeal for the application of retrospective legislation. The amendment in issue in *Duralla Pty Ltd v Plant* was a paragraph of s 49A of the *Building Units and Group Titles Act* 1980 (Qld). That section expressly provided for its application for the purposes of a judgment or decision "by any court". The amendment in issue in this case contains no similar reference and is otherwise in a very different form. For that reason it is not useful to embark upon a detailed analysis either of the Full Court's decision that the amendment did not have a retrospective application in the appeal or of the Privy Council's advice to contrary effect in *Boheto Pty Ltd v Sunbird Plaza Pty Ltd*.[8] It remains noteworthy though that the separate reasons of each member of the Full Court reveal the significant influence of the nature of the appeal upon the application of the retrospective legislation in issue.[9] In particular, Beaumont J stated:

> "It is clear enough that the amendment was intended to apply to proceedings at first instance, even if those proceedings had already been commenced. But it is a very different thing to suggest that such amending legislation was also intended to apply so as to, in effect, reverse a decision already properly arrived at by a judge at first instance from whom only an appeal [*stricto*] *sensu*, as distinct from an appeal by re-hearing, lies. In my opinion, in order to construe amending legislation of the type now under consideration as applicable also at the appellate level, in an appeal in the strict sense, the most explicit language would be required, given the draconian result which would follow if such a construction were adopted …".[10]

[8] For the appellant to succeed in this appeal upon the basis of the amending Act the Court apparently must reason that the judgment under appeal resulted from an error about the law in force at the time of that judgment, because the amendment now compels the conclusion that at the time when the notices were issued they were not invalidated by the absence of the required reasons. That reasoning depends upon the Court applying the amendment Act to find error even though that Act was not in force when the primary judge's decision was made and even though it does not convey a legislative intention to displace the legislative provisions confining this Court's power to allow an appeal from a decision in the Planning and Environment Court to a case in which the Court finds error in that court's application of the law in force at the time of its decision.

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5 See *Statutory Interpretation in Australia*, 8th Edition, Pearce and Geddes, at 411.
6 (1984) 2 FCR 342 (Smithers, Northrop and Beaumont JJ).
7 (2002) 213 CLR 1 at 87 [71] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
8 [1984] 2 Qd R 9.
9 See *Duralla Pty Ltd v Plant* (1984) 2 FCR 342 at 353 – 356 (Smithers J), 365 – 366 (Northrop J), 366 – 367 (Beaumont J).
10 (1984) 2 FCR 342 at 366 – 367 (Beaumont J).

[9] The language of the amending Act is certainly very broad and general, but in my opinion it does not clearly, much less explicitly, provide for the extraordinary retrospective operation required by the appellant's argument.

[10] The second reading speech does not assist the appellant's case. It does refer to the decision under appeal ("a recent court matter in which certain Infrastructure Charges Notices were considered to be invalid") but, like the amending Act itself, it does not advert to a legislative purpose to retrospectively legislate that the decision was, or might on appeal be held to be, in error when it was given because of the effect of the amending Act. That speech also refers to the displacement of the "need to defend court actions by developers". That is not an apt reference to the present appeal, in which litigation was commenced by the appellant rather than by the respondents. The speech as a whole is, I think, open to the construction that the target of the amending Act was not the validation of the particular notices already declared to be invalid but the consequential uncertainty, litigation, and serious financial effects that might arise if the judgment under appeal remained potentially applicable in relation to notices (presumably numerous and involving a very large total liability) issued to other developers. But however the speech should be construed, in my opinion it does not support the appellant's argument that s 344 should be applied in this appeal.

[11] For these reasons I would hold that s 344 of the *Planning Act* 2016 (Qld) is irrelevant to the disposition of this appeal.

[12] **MORRISON JA:** Between July and December 2016 the Gold Coast City Council issued five notices to Sunland Group Limited, each entitled "Infrastructure Charge Notice". The notices were issued under s 635 of the *Sustainable Planning Act* 2009 (Qld).[11]

[13] Each notice was issued contemporaneously with the grant of a development approval in respect of land owned by Sunland Developments No 22 Pty Ltd. Each of the documents sought to levy charges on Sunland Group Limited for trunk infrastructure. Each of the notices contained an "Information Notice" which (in entirety) stated:

> "INFORMATION NOTICE
>
> DECISION TO GIVE AN INFRASTRUCTURE CHARGES NOTICE
>
> Council of the City of Gold Coast has issued this Infrastructure Charges Notice as a result of the additional demand placed upon trunk infrastructure that will be generated by the development."

[14] Sunland Group Limited filed an appeal against the Council's decision to issue the notices. As well, Sunland Group Limited and Sunland Developments No 22 Pty Ltd brought proceedings seeking declarations in relation to the same notices. The appeals and the originating application seeking declarations were ordered to be heard and determined together.

[15] On 4 May 2018 the learned primary judge made declarations that each Infrastructure Charges Notice:[12]

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11 Which I shall refer to as SPA. That Act has since been repealed but is applicable to the issues in this case.

12 I shall refer to an Infrastructure Charges Notice as an ICN.

(a) did not comply with s 637(2) of SPA; and

(b) is not an infrastructure charges notice under SPA.

[16] The Council seeks leave to appeal against those declarations.

Leave to appeal

[17] The Council contends that leave ought to be granted because: (i) the questions raised on the appeal are of specific importance to the Council as the entity responsible for issuing ICN's in its local government area; (ii) the questions are of importance to other local governments throughout Queensland; and (iii) the resolution of the issues are relevant to the Council's budgeting and financial resources. It is said that the proposed appeal raises critical questions about the proper statutory construction of SPA and specifically:

(a) what is required to conform with s 637;

(b) what would constitute adequate reasons for the purpose of s 637(2); and

(c) the proper exercise of the Planning and Environment Court's declaratory power.

[18] The proposed grounds of appeal are that the Planning and Environment Court erred in law in declaring that each ICN did not comply with s 637(2), and was not an ICN under the Act. Further, the Council seeks to contend that the Planning and Environment Court erred in holding that a failure to comply with s 637(2) of SPA rendered the notices invalid. Finally, the Council seeks to contend that the Planning and Environment Court erred by not refusing, as a matter of discretion, to make the declarations sought by Sunland.

[19] The Respondents[13] accept that leave to appeal would be appropriate.

Approach of the learned primary judge

[20] The first area which the learned primary judge dealt with was whether s 27B of the *Acts Interpretation Act* 1954 (Qld) (**the AIA**) applied, or whether, in accordance with s 4 of that Act, the application of s 27B was displaced by a contrary intention appearing in SPA.

[21] The learned primary judge held that s 637 of SPA made it clear that the "reasons" required in the information notice were to go beyond a mere explanation of how the charge had been worked out, given that that information was already required to be provided by s 637(1) of SPA.[14]

[22] Her Honour held that the absence of detail in s 637 of SPA about the intended content of the "reasons", was a strong indication that the legislature intended that the general statutory requirement enacted in s 27B of the AIA would apply. The purpose of such provision is to "permit economy of language".[15]

[23] The learned primary judge held also that the evident limitations in s 636 of SPA, together with the available grounds of appeal in s 478 of SPA, indicated that further

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13 To whom I shall refer as "Sunland" unless some distinction is required.

14 *Sunland Group Limited & Sunland Developments No 22 Pty Ltd v Gold Coast City Council* [2018] QPEC 22 (**Reasons below**) at [43].

15 *Pfeiffer v Stevens* (2001) 209 CLR 57; [2001] HCA 71 at [25].

information would likely be required to allow a recipient of such a notice to understand the basis of the Council's decision, and decide whether to make submissions about the original notice, or appeal the charge.

[24] Accordingly, her Honour held that the term "reasons" in the definition of "information notice" invoked the application of s 27B of the AIA.

[25] The learned primary judge went on to find that the reasons given in the information notice were inadequate because:[16]

(a) the Council was obliged under s 637(1)(b) of SPA to state how the levied charge was worked out; that obligation was distinct from the obligation to provide an information notice which contained the decisions and the reasons for it;

(b) whether the infrastructure charges notice contained reasons meeting the statutory description was a matter to be judged objectively;

(c) the statement provided by the Council was little more than a bare recital of a limitation on levied charges that exist under s 636(1) of SPA, which provides that a levied charge "may only be for additional demand placed on trunk infrastructure that will be generated by the development".

[26] Her Honour held that the statement did not disclose the path of reasoning by which the Council reached its conclusion. Had the Council exposed its path of reasoning, it may have revealed an error relating to the working out of additional demand, in respect of which a specific appeal right was provided under s 478(2)(b)(ii) of SPA.[17]

[27] The learned primary judge then turned to whether the failure to give appropriate reasons resulted in invalidity. Her Honour concluded that the language of s 637 of SPA, together with other contextual matters in the legislation indicating its scope and object, revealed an intention that an infrastructure charges notice which did not comply with s 637(2) of SPA, was invalid.[18]

The statutory construction issue

[28] At the heart of the issues before the learned primary judge, and this Court, is the question of what s 637(2) of SPA requires when an ICN is issued. More specifically, whether s 27B of the AIA applies or whether there a contrary intention evident in SPA.

[29] Section 27B of the AIA provides:

> "If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression 'reasons', 'grounds' or another expression is used), the instrument giving the reasons must also –
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> (a) set out the findings on material questions of fact; and
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> (b) refer to the evidence or other material on which those findings were based."

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16 Reasons below at [59]-[60].
17 Reasons below at [62]-[63].
18 Reasons below at [87].

[30] The learned primary judge concluded that s 27B applied, and that the "reasons" were inadequate. The Council did not contend below, or in this Court, that if s 27B applied what was contained in the Information Notice was sufficient.

[31] It is therefore convenient to turn to the statutory construction issue first.

Legal principles

[32] As to the proper approach to construction of a statutory provision, the principles are made clear by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*:[19]

> "[69] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.
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> [70] A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
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> [71] Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was 'a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent.'
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> …

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19 (1998) 194 CLR 355; [1998] HCA 28, at [69]-[71]. Internal citations omitted.

> [78] However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. …".

[33] When considering the proper construction of the statutory provisions it is necessary to adopt the approach referred to by McHugh J in *Kelly v The Queen*.[20] That requires that the words of a definition section must first be read into the substantive enactment to which it applies and only then can the substantive enactment be construed, bearing in mind its purpose and the mischief that it was designed to overcome.

[34] In *Red Hill Iron Ltd v API Management Pty Ltd*[21] Beech J referred to the proposition that definition clauses do not have operative effect:

> "[127] As mentioned earlier in section 2, both the Farm-in Agreement and Joint Venture Agreement make extensive use of defined terms. Definitions do not have substantive effect. They are not to be construed in isolation from the operative provision(s) in which a defined term is used. Rather, the operative provision is to be read by inserting the definition into the provision: *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216 [84], [103]; *Epic Energy (Pilbara Pipeline) Pty Ltd v Commissioner of State Revenue* [2011] WASCA 228 [62], [150], [218]. Those cases dealt with statutory interpretation; the same principle applies in interpreting contracts: *Vincent Nominees Pty Ltd v Western Australian Planning Commission* [25]."

[35] In *Watson v Scott*[22] this Court referred to *Red Hill* and set out the established principles that apply when construing clauses affected by definition clauses:

> "[50] The important part of that passage is the rule of construction that "the operative provision is to be read by inserting the definition into the provision". That was referred to by McHugh J in *Kelly v The Queen*:
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> > "[84] However, a legislative definition is not or, at all events, should not be framed as a substantive enactment. In *Gibb v Federal Commissioner of Taxation*, Barwick CJ, McTiernan and Taylor JJ stated:
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> > The function of a definition clause in a statute is merely to indicate that when particular words or expressions the

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20 [2004] HCA 12, (2004) 218 CLR 216 at [84] and [103].

21 [2012] WASC 323 at [127].

22 [2015] QCA 267 at [50]-[51]; internal citations omitted; emphasis in original text. See also *Farnham v Pruden* [2016] QCA 18 at [23].

> subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense – or are to be taken to include certain things which, but for the definition, they would not include. ... *[Definition] clauses are ... no more than an aid to the construction of the statute and do not operate in any other way*.
>
> (emphasis added)."
>
> …
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> "[103] As I earlier pointed out, the function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment. There is, of course, always a question whether the definition is expressly or impliedly excluded. But once it is clear that the definition applies, the better – **I think the only proper – course is to read the words of the definition into the substantive enactment and then construe the substantive enactment – in its extended or confined sense – in its context and bearing in mind its purpose** and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment."

[36] This Court has adopted the principle in *Kelly v The Queen* that the proper course of statutory construction is to read the words of a definition into the substantive enactment and then construe the substantive enactment.[23] However, definitions are not substantive and therefore the definition itself is not expanded in the same way.

Submissions on the construction of SPA

[37] The following will suffice to summarise the competing contentions as to the statutory construction issue.

[38] The Council contends that s 27B of the AIA does not apply because there is a contrary intention revealed in SPA, that appearing from the general character of the legislation when seen in the context that SPA explicitly states the required contents of an ICN and an information notice, and because there is no discretion afforded to the Council about whether an ICN and information notice should be issued.

[39] The substance of that contention is as follows:[24]

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23 For example, *Farnham v Pruden* [2016] QCA 18 at [23]; *Bond v Chief Executive, Department of Environment and Heritage Protection* [2017] QCA 180 at [9]-[11]; *Multiplex Bluewater Marina Village Pty Ltd v Harbour Tropics Pty Ltd* [2017] QCA 202 at [36]-[37].

24 Taken from the Council's amended outline, paragraphs 12-14.

(a) pursuant to s.635(l) and (2), the Council "must" give an ICN where the pre-requisites in s.635(1) are met: (i) a development approval has been given; (ii) an adopted charge applies for providing the trunk infrastructure for the development; and (iii) s.205 of SPA does not apply to the development;

(b) s 637(1) provides a detailed list of the requisite content of an ICN, which includes that (amongst other things) it must state the amount levied, how the charge has been calculated, the land in respect of which it applies, when the ICN is payable under s.638, and whether an offset applies;

(c) ss 627 and 637 then state, in detail, the requirements as to what an ICN and an Information Notice should contain; and

(d) where SPA has explicitly stated the appropriate contents of an ICN and an Information Notice, a contrary legislative intention arises and displaces the operation of s.27B of the AIA.

[40] Sunland supports the correctness of the learned primary judge's decision. They contend that to the extent that each notice purported to set out the reasons for the decision to issue the notice, it did so in a single sentence which went no further than reciting part of a statutory provision.

[41] They contend that s 27B of the AIA applies, there being no contrary intention revealed in SPA. Specifically it is contended:[25]

(a) while the general character of legislation may displace the operation of a provision of the AIA, it will do so only when the application of the provisions of the AIA would "change the character of the legislation";[26] s.27B of the AIA would not do so;

(b) ss 627 and 637 of SPA require the provision of "reasons"; the term "reasons" is not defined in SPA; a key purpose of provisions such as s.27B of the AIA is to "permit economy of language" in drafting; the absence of any definition of "reasons" indicates that the requirement to give reasons was "enacted in light of" s.27B of the AIA and "should be understood accordingly";[27] and

(c) the contention that there is no discretion on the part of the Council when issuing an ICN, or that it is an automatic process which requires no findings, is misconceived; before a complying ICN can be given the Council must make a number of findings about the development, such as details of it including location and intensity, the existing and future demand on infrastructure, and whether the trunk infrastructure does or will service other premises; an error in those findings could ground an appeal under s 478(2)(b) of SPA.

[42] The proper construction of s 637(2) of SPA, when construed in light of s 27B of AIA, is that a notice given under s 635 must:

(a) contain an information notice which sets out both the decision itself and also the reasons for the decision to issue the notice; and

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25 Drawing from the Respondents' amended outline, paragraphs 12-14.

26 Relying on *Pfeiffer v Stevens* (2001) 209 CLR 57 at [59], and *Blue Metal Industries Ltd v Dilley* (1969) 117 CLR 651 at 658.

27 *Pfeiffer v Stevens* at [25].

(b) that those reasons must set out findings on material questions of fact, and refer to the evidence on which those findings are based.

SPA – statutory context

[43] As *Project Blue Sky* held, the meaning of the relevant provision must be determined by reference to the language of the instrument viewed as a whole, or, in other words, one looks at the text in context. Therefore one needs to undertake a review of the various provisions of SPA which bear upon the context in which the relevant provisions must be construed.[28]

[44] The long title of SPA reveals its intended cope of operation: "An Act for a framework to integrate planning and development assessment so that development and its effects are managed in a way that is ecologically sustainable, and for related purposes".

[45] Section 3(a) provides that the purpose of the Act is to "seek to achieve ecological sustainability by … managing the process by which development takes place, including ensuring the process is accountable, effective and efficient and delivers sustainable outcomes". Another purpose is "supplying infrastructure in a coordinated, efficient and orderly way…": s 3(e).

[46] Section 4(1)(a) provides that if a function or power is conferred upon an entity under the Act, "the entity must … perform the function or exercise the power in a way that advances this Act's purpose". Section 5(1)(a)(i) then provides that "advancing this Act's purpose" includes "ensuring decision making processes … are accountable, coordinated, effective and efficient".

[47] Given that SPA was intended to provide the framework to regulate planning and development assessment it is not surprising that it contains detailed provisions relating to various development applications, how they are to be made and how they are to be assessed. For that purpose s 7 set out a broad definition of "development" that included carrying out building work, plumbing or drainage work, operational work, reconfiguring a lot and making a material change of use of a lot.

[48] The breadth of the activities caught by SPA provisions is demonstrated by the wide supporting definitions in s 10, which include: (i) "material change of use" means the start of a new use, re-establishment of an abandoned use, or the material increase in intensity or scale of an existing use; and (ii) "reconfiguring a lot" means creating lots by subdividing, amalgamating 2 or more lots, or rearranging the boundaries of a lot by registering a subdivision.

[49] Part 3 Division 4 then ties particular words to the application being made. Thus s 13 provides, relevantly:

> "In a provision of this Act about a development application, a reference to –
>
> (a) …
>
> (b) development, or the development, is a reference to development the subject of the application; and
>
> …

---

28 The review is of SPA as it applied at the relevant time; it has, of course, since been repealed and replaced.

(j) the land is a reference to the land the subject of the application; …"

[50] SPA then has a series of Parts that deal with the mechanical steps for a development application. The principal parts are set out below. They reveal the intricate detail with which SPA regulated the planning and development assessment process.

[51] Chapter 2 deals with State planning instruments, and standard planning scheme provisions, and how they impact upon regional and local planning provisions and planning policies.

[52] Chapter 3 contains detailed provisions as to local planning instruments, planning schemes and planning policies, providing for matters such as: (i) what they are; (ii) how they are made; (iii) what they comprise; (iv) their relationship to other Acts and planning schemes; (v) how they can be reviewed; (vi) how they can be amended or repealed; (vii) the operation of superseded planning schemes; (viii) temporary local planning instruments; and (ix) the power of the State to give directions as to those matters.

[53] Chapter 5 contains provisions relating to the designation of land for community infrastructure.

[54] Chapter 6 then contains the detailed provisions setting up the integrated development assessment system (or IDAS). IDAS is defined as "the system … for integrating State and local government assessment and approval processes for development": s 230. The provisions cover a myriad of matters including: (i) the relationship between the regulations made under s 232 and planning schemes and instruments; (ii) the categories of developments, such as self-assessable or assessable; (iii) the sort of approvals and permits that can be granted, and how they impact upon planning instruments; (iv) the definition of assessment managers, concurrence agencies and referral agencies, and their role in the assessment process; (v) the particular stages of the IDAS procedure, including applications, assessment and decisions; (vi) the notification of decisions and what decision notices must contain; (vii) approvals and how they operate; and (viii) how changes in applications or approvals are to be dealt with, and by whom.

[55] Chapter 7 establishes the Planning and Environment Court, and sets out its powers. Divisions 8 and 9 also set out the provisions regulating the right to appeal by applicants, submitters or advice agencies, how appeals are regulated, and alternative dispute resolution procedures.

[56] Relevantly to this case, s 478 makes provision for appeals about ICN's, but on limited grounds:

(a) that the charge in the notice is so unreasonable that no reasonable relevant local government could have imposed it;

(b) the decision involved an error relating to (i) the application of the relevant adopted charge, (ii) the working out, for section 636, of additional demand, or (iii) an offset or refund;

(c) there was no decision about an offset or refund; and

(d) the timing for giving any refund.

[57] Section 478(3) expressly excludes grounds about (i) the adopted charge itself, and (ii) where the decision is about an offset or refund, the establishment cost of infrastructure identified in a local government infrastructure plan, or the cost of infrastructure decided using the method included in the local government's charges resolution.

[58] Chapter 7 also sets out provisions dealing with offences and enforcement of decisions.

[59] Chapter 8 then deals with the local government's power to regulate and charge for trunk infrastructure. Those provisions are the subject of this appeal and the relevant ones will be dealt with separately.

[60] Development approvals and the process by which they are reached are the subject of numerous provisions under SPA. There are numerous provisions that oblige or permit a Council (as assessment manager), a concurrence agency, or advice agency, to say things to applicants or others, but which do not, in terms, refer to giving "reasons", such as:

(a) a "development approval includes any conditions … imposed by the assessment manager": s 244(a);

(b) the Council must "give a notice stating" various factual matters: s 266(1)(a) and (c);

(c) a concurrence agency "must give written notice" of things: s 290(2);

(d) an advice agency may "make a recommendation" or "advise" or "tell" the Council things: s 292;

(e) the Council must "give an acknowledgment notice" which states various things: ss 267 and 268;

(f) the assessment manager must "advise" various entities of a change in the application: s 352; and

(g) the assessment manager must, in certain circumstances "give a new decision notice", which must "state the nature of the changes": s 363(1) and (4)(c).

[61] There are also provisions that permit or oblige a concurrence agency to give the Council (in its role as an assessment manager) a "response" which "tells the assessment manager" various things, or "offer advice": ss 285 and 287.

[62] Those provisions are in contrast to those which require the Council (in its role as assessment manager), the Minister, a concurrence agency or a responsible entity, to give or state "reasons". The provisions include these:

(a) if a Council decides not to review its planning scheme it must make a report to the Chief Executive "stating the reasons why": s 93(b);

(b) if the Minister decides to direct a local government to take action about its planning instruments, or decides to take action without such a direction, the Minister must give a written notice stating "the reasons for the proposed exercise of power" or the "reasons for taking the action": s 125(3)(a) and s 129(6);

(c) if a local government proposes to designate land it does not own it must give written notice which states "the reasons for the designation", and if the Minister repeals such a designation notice of the repeal must "state … the reasons for the decision": s 213(3)(c) and s 218(2)(d);

(d) the Council must give a notice "stating … the reasons" for its state of satisfaction that an application is not properly made: s 266(1)(b);

(e) a concurrence agency's response must "include reasons for the [refusal of an application or inclusion of conditions or requirement for action]": s 289;

(f) if Council refuses an application the decision notice must "state … the reasons for the refusal": s 335(1)(f)(ii);

(g) if Council is satisfied its decision conflicts with a relevant instrument, it must "state the reasons for the decision": s 335(1)(n);

(h) a responsible entity must "state … reasons for the decision [to refuse a request]: s 376(2)(a);

(i) if a development condition is changed or cancelled written notice must be given to the owner of the land, stating "the reasons for the change or cancellation": s 378(8)(a)(i);

(j) if a concurrence agency objects to an extension of the time by which a development approval will lapse, it must give the assessment manager written notice "stating … the reasons for the objection": s 385(b);

(k) if the question of a development's compliance is referred to the local government and it decides that aspects of a development do not achieve compliance, its response must include "the reasons [it] is satisfied the development does not achieve compliance": s 402(7);

(l) if a compliance assessor decides a development does not achieve compliance it must give a written notice "stating … the reasons the development … does not achieve compliance": s 405(5)(b);

(m) where a compliance assessor refuses to change a compliance permit or certificate, it must give a written notice "stating … the … reasons for the decision": s 413(2)(c);

(n) the Minister can, by notice, give a direction to the assessment manager, concurrence agency or applicant, directing certain things to be done, in which case the notice "must state … the reasons for deciding to give the direction": s 417(4)(b), 418(2)(a), 419(2)(a), 420(4), 421(2) and 422(2);

(o) if the Minister proposes to call in an application notice must be given which states "the reasons for the proposed call in": s 424A(3)(b);

(p) if the Minister calls in an application notice must be given which states "the reasons for calling in the application": s 425(3)(a);

(q) if the Minister calls in an application a report must be prepared which includes "the Minister's reasons for the decision": s 432(2)(f);

(r) if an appeal is about a deemed refusal or deemed approval, the assessment manager must give "a statement of the reasons the assessment manager had not decided the application during [the relevant period]: s 551(1)(b); and

(s) if there is an irregularity in lodging a document or in complying with the requirements for validly starting a proceeding, the registrar must give the chief executive, "the registrar's reasons for deciding there is a noncompliance: s 554A(2).

[63] The review above demonstrates that SPA is a statutory instrument that regulates all aspects of development applications, assessment, decision-making and appeals in a detailed and prescriptive fashion. An applicant's rights to develop land, and for that purpose to make and pursue a development application, are completely governed by SPA's provisions. So, too, are the rights and obligations on the assessment manager, to decide the application and notify the result to the applicant. Similarly, the applicant's rights to challenge the decision are fully governed by SPA.

[64] The object of that legislative approach can be seen from the purpose of SPA, namely to seek to achieve ecological sustainability by managing the process by which development takes place, including ensuring the process is accountable, effective and efficient. The assessment manager (the Council here) is obliged to perform its functions and exercise its powers in a way that advances that purpose, by ensuring the decision-making processes are accountable and effective.

[65] Further, SPA draws a distinction between the notification of a decision where all that is required is the mere fact of it having been made, and where an explanation for that decision is required. Into the former category falls decision notices, approvals, or notices stating factual matters. Into the latter are those decisions where the recipient is required to be told why the decision was reached, or explaining the basis for a state of satisfaction, such as a refusal of an application, a conclusion of non-compliance or conflict, a requirement to take action, or an explanation why there was inaction. In the latter category the requirement of explanation is signified by use of phrases such as "reasons **for** the decision" or "reason **why**" something was done.

SPA – relevant provisions to the ICN's

[66] Section 635 of SPA provides that a local government has power to levy and recover an infrastructure charge. The section provides:

> "**635 When charge may be levied and recovered**
>
> (1) This section applies if –
>
> (a) a development approval has been given; and
>
> (b) an adopted charge applies for providing the trunk infrastructure for the development; and
>
> (c) section 205 does not apply to the development.
>
> (2) The local government must give the applicant an infrastructure charges notice.
>
> *Note –*

Under section 364, a local government may give a new infrastructure charges notice for a negotiated decision notice.

(3) The local government must give the notice.

(a) generally –

(i) if it is an assessment manager – at the same time as or as soon as practical after, the development approval is given; …

(4) Subsection (3) is subject to any provision under which an infrastructure charges notice may be amended or replaced.

Note –

See sections 626(3), 643(1), 657(3) and 662(4)(b).

(5) The infrastructure charges notice lapses if the development approval stops having effect.

(6) If the infrastructure charges notice levies on the applicant an amount for a charge worked out by applying the adopted charge (a ***levied charge***), the following apply for the levied charge –

(a) its amount is subject to sections 636 and 649;

(b) it is payable by the applicant;

(c) it attaches to the land;

(d) it only becomes payable as provided for under subdivision 4;

(e) it is subject to any agreement under section 639(1)."

[67] Section 636 provides that the charge levied by the Council is limited to the additional demand generated by the particular development:

"**636 Limitation of levied charge**

(1) A levied charge may only be for additional demand placed on trunk infrastructure that will be generated by the development.

(2) In working out additional demand, the demand on trunk infrastructure generated by the following must not be included -

(a) an existing use on the premises if the use is lawful and already taking place on the premises;

(b) a previous use that is no longer taking place on the premises if the use was lawful at the time it was carried out;

(c) other development on the premises if the development may be lawfully carried out without the need for a further development permit."

[68] SPA stipulates the requirements applicable to an ICN, in s 637:

"**637 Requirements for infrastructure charges notice**

(1) An infrastructure charges notice must state all of the following for the levied charge –

(a) its current amount;

(b) how it has been worked out;

(c) the land;

(d) when it will be payable under section 638 (without considering any possible operation of section 639);

(e) if an automatic increase provision applies –

(i) that it is subject to automatic increases; and

(ii) how the increases are worked out under the provision;

(f) whether an offset or refund under this part applies and, if so, information about the offset or refund, including when the refund will be given.

(1A) …

(2) The infrastructure charges notice must also include, or be accompanied by, an information notice about the decision to give the notice."

[69] SPA also defines the term "information notice" as follows:

"***information notice***, about a decision, means a notice stating –

(a) the decision and the reasons for it; and

(b) that its recipient may appeal against the decision; and

(c) how the recipient may appeal.

Note –

For appeals relating to this chapter, see sections 478, 478A, 535 and 535A."

[70] Following the approach in *Kelly v The Queen* the text of s 637(2) reads:

"The infrastructure charges notice must also include, or be accompanied by, a notice stating:

(a) the decision to give the notice and the reasons for it;

(b) that its recipient may appeal against the decision; and

(c) how the recipient may appeal."

[71] As noted above, SPA provides for appeals about ICN's. Section 478 provides:

"**478 Appeals about infrastructure charges notice**

(1) The recipient of an infrastructure charges notice may appeal to the court about the decision to give the notice.

(2) However, the appeal may be made only on 1 or more of the following grounds –

(a) the charge in the notice is so unreasonable that no reasonable relevant local government could have imposed it;

(b) the decision involved an error relating to –

(i) the application of the relevant adopted charge; or

(ii) the working out, for section 636, of additional demand; or

(iii) an offset or refund;

(c) there was no decision about an offset or refund;

(d) if the infrastructure charges notice states a refund will be given – the timing for giving the refund.

(3) To remove any doubt, it is declared that the appeal must not be about –

(a) the adopted charge itself; or

(b) for a decision about an offset or refund –

(i) the establishment cost of infrastructure identified in an LGIP; or

(ii) the cost of infrastructure decided using the method including in the local government's charges resolution.

(4) The appeal must be started within 20 business days after the day the recipient is given the relevant infrastructure charges notice."

Applicability of the AIA

[72] Part of the construction task involves consideration of s 27B of the AIA which, as noted in paragraph [29] above relevantly provides:

> "If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression 'reasons', 'grounds' or another expression is used), the instrument giving the reasons must also –
>
> (a) set out the findings on material questions of fact; and
>
> (b) refer to the evidence or other material on which those findings were based."

[73] The applicability of s 27B is governed by s 4 which provides that the application of the AIA "may be displaced, wholly or partly, by a contrary intention appearing in

[the] Act". It is therefore necessary to examine whether SPA displays such a contrary intention.

[74] In *ADCO Constructions Pty Ltd v Goudappel*[29] Gageler J said:

> "A contrary intention sufficient to displace s 30 of the *Interpretation Act* must ordinarily appear with the same reasonable certainty as is needed to displace the general common law rule. A contrary intention need not be express and its implication, although sometimes referred to as "necessary implication", has not been confined to those extreme circumstances in which alternation of an existing right or liability "cannot be avoided without doing violence to the language of the enactment". The cases, rather, demonstrate that a contrary intention will appear with the requisite degree of certainty if it appears "clearly" or "plainly" from the text and the context of the provision in question that the provision is designed to operate in a manner which is inconsistent with the maintenance of an existing right or liability."

[75] In *Pfeiffer v Stevens*[30] McHugh observed that the contrary intention may appear not only from the expressed terms or necessary implication of a legislative provision, but also from the general character of the legislation itself.

[76] The Council contends that the contrary intention is demonstrated by the mandatory requirements of s 635 and s 637. Specifically it is said that s 635 gives no discretion to the Council in determining to issue an ICN, if the conditions in s 635 are met. The contention is that where SPA has explicitly stated the contents of an ICN and an Information Notice that is enough to display the contrary intention for the purpose of s 4 of the AIA.

[77] For a number of reasons I am unable to accept that contention.

[78] First, s 635 specifies only two conditions for the applicability that section. They are that a development approval has been given and that an adopted charge applies for trunk infrastructure for the development.[31] Neither of those factors says anything about the basis for the charge, or why it applies to the development in question.

[79] Secondly, it is true to say that s 637(1) specifies a number of things that the ICN "must state". However, the requirement to give an "information notice" is in addition to what is required under s 637(1). Section 637(2) says that the ICN "must **also**" include or be accompanied by the information notice. Therefore whatever is in an information notice is not the same as the items under s 637(1).

[80] Thirdly, the definition of "information notice" specifies that it must state "the decision **and** the reasons for it". The decision means the decision to give the ICN: s 637(2). In addition to that, the notice must state the "reasons for the decision to give the notice". The decision to give the ICN is not the same thing as the ICN itself. The Council's decision to issue an ICN is something that would require the formal decision-making processes of the local government to be followed. Then a separate act is the giving of the ICN, which would be an administrative task.

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29 [2014] HCA 18; (2014) 254 CLR 1, at 22 [52].

30 [2001] HCA 71; (2001) 209 CLR 57, at 73-74 [56].

31 The reference to "adopted charge" simply means that the Council has, pursuant to s 630, passed a resolution to adopt charges for trunk infrastructure.

[81] Fourthly, since the information notice is additional to whatever is required under ss (1) the "reasons" within the information notice are, by logical inference, something other than what is given in the ICN itself. That is, other than items such as the amount, how it has been worked out, the land, and when it is payable.

[82] Fifthly, the formulation used in the definition in s 627 is "the reasons **for**" the decision to give the notice. In context the word "for" means "to reach or arrive at",[32] or "such as results in".[33] It means that the "reasons" will explain how the decision to issue the ICN was arrived at.

[83] Sixthly, there is no definition of "reasons" in SPA. Whilst the content of that word when used in s 627 is derived from its context, the absence of a definition invites the application of s 27B of the AIA. The purpose of a provision such as s 27B is to "permit economy of language".[34]

[84] Seventhly, Division 1, Part 8, of SPA contains provisions which entitle an applicant for a development approval to make written representations to the Council about matters stated in the decision notice, and obliges the Council to consider those representations: s 361 and s 362. If the Council agrees with the representations the result could be a negotiated decision notice which, in turn, could result in a new infrastructure charges notice: s 363 and s 364. The significance which SPA recognises in those provisions is that an applicant may suspend its appeal period if it needs more time to make such representations: s 366. Those sections would be rendered less effective unless the reasons given in the information notice were the reasons contemplated by s 27B of the *Acts Interpretation Act*, rather than some truncated or sterile form of words.

[85] In my view, there is nothing in the review of SPA's provisions (see paragraphs [45] to [65] above) which would suggest a contrary intention so that s 27B was inapplicable. To the contrary the formulations used for the various requirements for giving reasons (see paragraphs [60] to [62] above) supports the conclusion that s 27B applies and the reasons in the information notice are to explain how it is that the Council decided to give the ICN.

[86] The application of s 27B does not alter the character of SPA at all. In almost all of the instances set out in paragraph [62] above the information conveyed by the reasons would be necessary to inform the response by the recipient, and in many cases inform the recipient as to the right of appeal. When ones considers the grounds of appeal permitted by s 478 the position becomes even clearer. Those grounds are, relevantly: (i) that the charge in the ICN is so unreasonable that no reasonable relevant local government could have imposed it, and (ii) errors in the application of the relevant adopted charge, the working out (for s 636) of additional demand, and the offset or refund. One only need refer to the ground concerning s 636 to understand that the reasons in the information notice would go beyond the ICN's stating the amount and how it was worked out.

Sufficiency of the particular ICN's

[87] The conclusion above is that s 27B of the AIA applies and the ICN's had to meet its requirements. The Council did not contest that the ICN's were deficient if that were the case.

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32 Australian Concise Oxford Dictionary, 1988.

33 Macquarie Dictionary.

34 *Pfeiffer v Stevens* [2001] HCA 71, (2001) 209 CLR 57, 65 [25].

[88] However, the way in which that deficiency manifested itself has a bearing on the grounds relating to the relief sought below. Therefore closer examination is required.

[89] Under s 635(2) the Council was obliged to give an ICN. That obligation is triggered where a development approval has been given and an adopted charge applies for providing the trunk infrastructure for the development; s 635(2).[35]

[90] Section 636 provides that the levied charge is limited to the additional demand generated by the development. On one construction the opening words of s 636, "A levied charge **may be only for**", should be understood as meaning that a levied charge might be for more than just the additional demand generated by the development but that s 636 deals with the case where it is so limited. That construction might be seen to gain support from the fact that s 636 does not say that "A levied charge may **only be for**" additional demand. However, the better view, in my opinion, is that it means that the charge can only be for additional demand, as the alternative case is not mentioned in SPA at all.

[91] Section 637(1) provides for the various things which a notice "must state … for the levied charge". There was no challenge to the fact that all of the matters referred to s 637(1) are contained in the Council's ICN's. That is to say, Sunland's case did not attack any deficiency in that part of the ICN's which set out the matters in s 637(1). Thus:[36]

(a) the first page of the notice identifies the land to which the levied charge attaches[37] as "Lot 100 SP 281432": s 637(1)(c);

(b) it next identifies the amount of the levied charge as $15,540.00 plus adjustments and/or reviews: s 637(1)(a);

(c) the due date for payment was then set out, being "prior to the local government … approving the plan of subdivision for the reconfiguration": s 637(1)(d);

(d) the notice then provided for automatic increases, by stating that the levied charge was subject to automatic increases, and how: s 637(1)(e);

(e) the notice then provided that an offset applied and gave information about the offset: s 637(1)(f); and

(f) then, on the second page under the heading "charge calculations" the notice identified how the levied charge had been worked out: s 637(1)(b); it was by reference to a "charges resolution" being the "adopted charge" referred to under s 635(1)(b), in turn a reference to the adopted charge under s 630(1); the method by which it was worked out was stated to be in respect of the reconfiguration of a lot to two lots, each at $28,000 giving a total of $56,000; there was a reduction to that charge for an "applied credit amount" of $40,460 which was identified as having two components, one a credit available from previous payments made on the water and sewer networks, and the other a credit from payment made on the existing lot, Lot 100 SP 281432.[38]

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35 Section 205 does not apply and therefore s 635(1)(c) need not be mentioned further.

36 The ICN to which I shall refer here is that at AB 278.

37 Importing the definition applicable under s 628(1)(c) for the phrase "the land".

38 The other ICN's followed the same pattern, the calculations appearing at AB 280, 293 and 356.

[92] One ICN differed from the others in terms of setting out the Charge Calculation.[39] That ICN related to land at 259 Rio Vista Boulevarde, and Application No. PN165100/12/DA12. The method by which it was worked out was stated to be in respect of "Attached Dwelling (3+ bedroom)", 67 dwellings in total, each at $28,000 giving a total of $1,876,000. There was a reduction to that charge for an "applied credit amount" of $834,820 which was identified as coming from a previous payment on the water and sewer networks. That left a net charge of $1,041,180.

[93] Each of the ICN's included the "information notice", rather than be accompanied by it. The information notice was designated as such under that general heading.

[94] The information notice is required under s 637(2) to be "about the decision to give the notice". In context the word "about" has the meaning of "concerning" or "relating to".

[95] The information notice here referred to its subject matter, namely the "DECISION TO GIVE AN INFRASTRUCTURE CHARGES NOTICE". In my view, by those words alone the information notice stated the decision, thus complying with the first part of the definition in s 627. In any event, the definition of information notice under s 627 relevantly means "a notice stating … the decision …". The "decision" is the decision "to give" an ICN. The information notice in this case stated that in the first line when it said that the Council "has issued this Infrastructure Charges Notice." Literally speaking, the decision was to issue the ICN.

[96] The information notice then identified the next matter, namely that the ICN had issued "**as a result of** the additional demand placed upon trunk infrastructure that will be generated by the development".[40] The words "as a result" connote a causal connection between the issuing of the notice and the subject matter identified after those words.

[97] In my view, the requirement that the information notice state "the reasons for it", refers to the reasons for the decision to issue or the notice. In this case that was done by the words which followed in that section of the ICN, stating that the decision had been made "as a result of the additional demand placed upon trunk infrastructure that will be generated by the development". In other words, the reason why the Council issued the notice was because of the additional demand that the development would place upon trunk infrastructure.

[98] That statement, seen in light of the fact that an ICN must be issued if the preconditions in s 635(1) are met, means that the information notice revealed several components to the stated reasons to give the ICN's:

(a) (implicitly) a development approval has been given: s 635(1)(a);

(b) (implicitly) an adopted charge applies for providing trunk infrastructure to the development: s 635(1)(b);

(c) (implicitly) s 205 does not apply; the application was not one where a public sector entity was proposing or starting development: s 635(1)(c) and s 205;

(d) there will be additional demand on trunk infrastructure;

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39 AB 287.

40 Emphasis added.

(e) that additional demand will be caused by this development; and

(f) that it is a notice under s 636.

[99] The provisions of s 637(2), when read with s 27B of the AIA, are similar to other statutory provisions that require reasons, findings of fact and evidence to be referred to.[41] When considering what such a section requires, in the context of s 165(2) of the *Medical Practice Act* 1992 (NSW) and a medical tribunal conducting a hearing into a complaint, it was said in *Sabag v Health Care Complaints Commission*:[42]

> "Section 165(2) of the Act contains provisions similar to those appearing in s 13(1) of the *Administrative Decisions (Judicial Review) Act, 1977* (Cth) and in s 28 of the *Administrative Appeals Tribunal Act, 1975* (Cth). The general nature of the obligation was discussed by Fisher J, Hall and Woodley in *Re Palmer and Minister for the Capital Territory* (1978) 1 ALD 183 at 192-194. At pp 193-194, it was said:-
>
> > *"Likewise in Iveagh v Minister of Housing and Local Government [1964] 1 QB 395 at 410 Lord Denning says of the same section: 'The whole purpose of the enactment is to enable the parties and the courts to see what matters he (the Minister) has taken into consideration and what view he has reached on the points of fact and law which arise. If he does not deal with the points that arise, he fails in his duty and the court can order him to make good the omission.'*
> >
> > *...*
> >
> > *By requiring the decision-maker to give not only the reasons for his decision but additionally a statement of 'the findings on material questions of fact referring to the evidence or other material on which those findings were based', Parliament certainly intended that the citizen should be fully informed. These further requirements will be satisfied by a statement setting out the findings of fact, together with a reference to 'the evidence or other material' on which the findings were based. It is important to note that neither s 28 nor s 37 requires that the relevant 'evidence or other material' be 'set out' in the statement, only that it be referred to. Moreover, the citizen's entitlement to be fully informed was not merely an incident arising in the course of and for the purpose of a review by this Tribunal. It is a right which arises consequent upon a decision being made which is capable of being so reviewed, and the reasons, when properly given, ensure that the citizen is sufficiently informed to determine whether he wishes to take the matter further, and if so whether to make representations to the Minister, proceed in the appropriate court of law or to seek a review by this Tribunal. It follows that to achieve this end the reasons must, in the words of Megaw J in Re Poyser &*

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41 Examples are s 13(1) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth); s 28 of the *Administrative Appeals Tribunal Act* 1975 (Cth); s 165(2) of the *Medical Practice Act* 1992 (NSW).

42 [2001] NSWCA 411 at [43].

> *Mills' Arbitration* [[1964] 2 QB 467] *at 478, 'be reasons which will not only be intelligible but which deal with the substantial points that have been raised'. We would also refer to Elliott v London Borough of Southwark [1976] 2 All ER 781 per James LJ at 791: 'the duty to give reasons pursuant to statute is a responsible one and cannot be discharged by the use of vague general words which are not sufficient to bring to the mind of the recipient a clear understanding of why his request ... is being refused'.*"

[100] It is that approach which the learned primary judge adopted when considering what is required of the Council here. But the Council was not conducting any sort of hearing, nor adjudicating on a dispute, nor carrying out anything similar to a judicial or quasi-judicial function. Its function was different from a decision made by body which conducts a review,[43] or a repatriation appeal,[44] considers an application for an approval,[45] considers a request for an indulgence,[46] or something similar such as a parole board or complaints hearing.[47] In such cases the approach adopted in *Sabag v Health Care Complaints Commission* is appropriate. Here the Council was obligated to issue the ICN if certain preconditions were met, without any request or application, or anything like a review, hearing or adjudication.

[101] A factor which might be thought to tell against the adoption of the expansive approach to what is required of the reasons in s 637, is the fact that the Council's decision to give an ICN is not susceptible to a request for a statement of reasons under Part 4 of the *Judicial Review Act* 1991. The decision is caught by s 12 of Schedule 2 to that Act and therefore excluded from the definition of a decision to which the Act applies: s 31.

[102] The learned primary judge relied upon what her Honour had set out in paragraphs [45]-[46] and [53]-[57] of the Reasons below, as part of the reasoning that an expansive view was warranted because "the provisions of reasons is important to the exercise of the right to make submissions to Council or to appeal in the 20 business days provided" in SPA.

[103] Paragraph [45] gave "examples of findings on material questions of fact that may be critical to a decision whether to exercise appeal rights". The first was a finding as to whether, and on what basis, the use the subject of the development was for two or three bedroom dwellings.[48] But that determination would be made as part of the assessment of the development application, and announced in the approval decision. Consequently that finding will already have been made by the time an ICN issues. Appeal rights to challenge such a finding arise out of the approval decision, not the decision to give an ICN.

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43 For example, *Re Palmer and Minister for the Capital Territory* [1978] 1 ALD 183; *Sabag v Health Care Complaints Commission* [2001] NSWCA 411; *Ansett Transport Industries (Operations) Pty Ltd v Wraith* [1983] FCA 187; *SZVBT v Minister for Immigration and Border Protection* [2017] FCA 355; *W157/00A v Minister for Immigration & Multicultural Affairs* [2001] FCA 1536.

44 *Repatriation Commission v Perrot* [1984] FCA 139.

45 *Alexander v Australian Community Pharmacy Authority* [2010] FCA 189.

46 *Re ARM Constructions Pty Ltd v Deputy Commissioner of Taxation* [1986] FCA 108; 65 ALR 343.

47 *Menon v Council of the Law Society of New South Wales* [2016] NSWSC 1322.

48 Reasons below paragraph [45](a).

[104] The second example was a finding about whether trunk infrastructure the subject of a "necessary infrastructure condition" services or is planned to service premises other than the subject premises, and the basis of the cost of that infrastructure.[49] A "necessary infrastructure condition" is defined in s 645(2). It means a condition imposed on the development approval under s 646 and s 647 as to trunk infrastructure. In either case the condition is imposed on the development approval. Thus the decision leading to that condition will have been made before the decision to give an ICN.

[105] The third example was a finding about whether there was an existing unlawful use or a previous lawful use.[50] For the reasons set out at paragraphs [114] to [117] below any such findings would have to appear in the ICN itself, not in the information notice.

[106] Paragraphs [53]-[57] of the Reasons below do not add materially to what has gone before. There her Honour gives reasons why an ICN or an information notice must make relevant findings of fact. That may be accepted. It is the sufficiency of what was said that is at issue.

[107] In my view, there is no basis to adopt the view that the sort of reasons required of a local government under s 637 are akin to those that might be expected of a judge, tribunal or arbitrator, where a path of reasoning should be exposed.[51] In *Soulemezis v Dudley (Holdings) Pty Ltd*[52] McHugh J identified three purposes for the giving of reasons in a judicial context: (i) that it enables the parties to see the extent to which their arguments have been understood and accepted; (ii) it is an aspect of judicial accountability; and (iii) it provides a precedent for the future. Discussing that, this Court said in *Cypressvale Pty Ltd v Retail Shop Leases Tribunal*:[53]

> "However, before turning to the particular matters decided by the Tribunal, it is necessary to add that virtually all of the decisions which have been referred to here involved appeals from courts exercising judicial power in the full sense, and not administrative or quasi-judicial bodies or tribunals. The second and third of the three purposes identified by McHugh J. in *Soulemezis*, which are to maintain judicial accountability and to furnish precedents for the future, obviously have little or much less force in the case of a tribunal whose members and functions are not strictly judicial. The calibre, legal training and experience of members of the judiciary raise expectations that reasons they give for their decisions will attain a high level of sophistication. The same would not always be true of decisions of persons whose primary qualification for decision-making consists of specialist knowledge or experience rather than ability to produce reasons conforming to accepted judicial tradition. Reasons that would not be considered adequate if given by a judge may nevertheless suffice for some other decision-makers not chosen for their task because of their resemblance to the judiciary. In the end, the question whether reasons are "adequate" falls to be

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49 Reasons below paragraph [45](b).
50 Reasons below paragraph [45](c).
51 For example, *Menon v Council of the Law Society of New South Wales* [2016] NSWSC 1322 at [45].
52 (1987) 10 NSWLR 247.
53 [1996] 2 Qd R 462 at 485.

> considered in the context afforded by the nature of the question which has to be decided and other factors, including the functions, talents and attributes of the tribunal members or the individual in whom the duty of deciding questions of that kind has been vested."

[108] Given the scope of what these reasons were for, i.e. about the decision to give the ICN and not about the matters that were to be stated otherwise in the ICN, the reasons could be short and terse, as long as they were "proper, adequate and intelligible".[54]

[109] In my view, both s 637 and s 27B were satisfied by the statement of the reasons identified in paragraph [98] above. True it is that to say that the decision was made because there will be additional demand says very little beyond that, but the requirement was to state the reasons for the decision to give the notice, and those words say that. For the reasons set out at paragraphs [114] to [117] below the findings and reasons concerning additional demand were required to be in the ICN itself, not the information notice.

[110] It is the extended obligation under s 27B that adds to the "reasons" by requiring that in addition to them, the information notice must state (i) the material findings on questions of fact, and (ii) refer to the evidence on which those findings were based.

[111] In my view, and contrary to the finding by the learned primary judge,[55] the information notice does identify findings on material questions of fact. They are:

(a) (implicitly) a development approval has been given;

(b) (implicitly) an adopted charge applies for providing trunk infrastructure to the development;[56]

(c) (implicitly) the application was not one where a public sector entity was proposing or starting development;

(d) there will be additional demand on trunk infrastructure; and

(e) that additional demand will be caused by this development.

[112] I do not see why such findings of fact cannot also be the reason for issuing an ICN. Logically speaking the findings leads to the reason. At the core it is the existence of extra demand from a development that leads to the need to give the ICN. That conforms to SPA's provisions which give power to a local government to adopt a charge only in respect of "providing trunk infrastructure for development": s 630(1). The term "trunk infrastructure" is defined to mean, inter alia, (i) development infrastructure identified in a [local government infrastructure plan] as trunk infrastructure", and (ii) "development infrastructure that is required to be provided under a condition imposed under section 647(2)". Section 647(2) gives the local government power to "impose a condition on a development approval that requires development infrastructure necessary to service the premises to be provided at a stated time". Thus, if a development creates an additional demand for on trunk infrastructure, that is both the fact which warrants an ICN and the reason for giving it.

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54 *Westminster City Council v Great Portland Estates plc* [1985] AC 661 at 673.

55 Reasons below [50].

56 It may be that this is a finding of mixed fact and law.

[113] In my respectful opinion, the learned primary judge fell into error in concluding, with respect to the information notice and in particular as to the statement that the ICN was issued because of the additional demand on the trunk infrastructure, that the information notice had to disclose a path of reasoning by which Council reached its conclusion. Her Honour said:[57]

> "[62] The statement does not, however, disclose a path of reasoning by which Council reached its conclusion. It does not, for example, reveal Council's findings about:
>
> (a) whether there is an existing lawful use on the land;
>
> (b) whether there was a previous lawful use that is no longer taking place on the land; and
>
> (c) whether there is other development that may be lawfully carried out without the need for a further development permit and, if so, the demand generated by such development."

[114] The ICN's in this case were only for additional demand on trunk infrastructure generated by Sunland's development. Thus they came under s 636 of SPA. Section 636(2) provides that in working out "additional demand" the three matters referred to by the learned primary judge were to be excluded. But the "additional demand" which s 636(1) deals with is the subject matter of the "levied charge" itself, not the decision to give an ICN. When s 637(2) imposes a requirement to give reasons it is as to the "decision **to give**" an ICN.[58] That decision, by those words, predates the ICN itself, and therefore the levied charge. Therefore the reasons to which s 637(2) refers do not relate to the levied charge.

[115] Further support for that conclusion is given by the fact that if the amount of a levied charge is "worked out" by applying the adopted charge, its **amount** is subject to s 636. Section 637(1)(b) requires the ICN itself, not the information notice, to state how the levied charge "has been worked out".

[116] True it is that to say that the issuing of the ICN was because of the "additional demand placed on trunk infrastructure that will be generated by the development", says nothing about the evidential basis upon which the Council determined that there would, in fact, be an additional demand. However, for the same reasons set out above in relation to s 637(2), s 27B of the AIA applies to s 637(1)(b). It requires that the ICN "must state … how [the levied charge] has been worked out". Because s 636(1) limits a levied charge to the additional demand, "how [the levied charge] has been worked out" is a reference to the requirement in s 636(2) as to what must be done "In working out additional demand". Read together, s 637(1)(b) and s 636 require that the ICN itself explain how the additional demand has been worked out. Section 27B of the AIA applies where an Act requires a body to "give written reasons for the decision (whether the expression 'reasons', 'grounds' **or another expression is used**)".[59] The requirement in s 637(1)(b) and s 636(2), that the ICN "state … how [the levied charge] has been worked out", is, in my view, "another

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57 Reasons below [62], referring to *Menon v Council of the Law Society of New South Wales* [2016] NSWSC 1322 at [45] and [46].

58 Emphasis added.

59 Emphasis added.

expression" for the purposes of s 27B, requiring that reasons be stated in the ICN as to how the additional demand was worked out. That corresponds directly with the ground of appeal available under s 478(2)(b)(i) of SPA.

[117] Thus, the basis for the finding of additional demand that underpins the ICN is something that must be set out in the ICN itself. That is, in my view, a powerful indicator that the "reasons" referred to in s 637(2) do not comprehend that matter.

[118] The final obligation imposed by s 27B of the AIA is that the information notice must "refer to the evidence" upon which the factual finding was based. In my view, it is only in that respect that the information notices were deficient.

Invalidity of the ICN's

[119] The learned primary judge held that the ICN's were invalid because they were non-compliant with s 637(2) of SPA.[60]

Submissions

[120] The Council contends that invalidity does not follow non-compliance for several reasons,[61] but centrally because there is no such legislative intent in SPA.

[121] First, SPA does not expressly state that invalidity is the result of non-compliance. Section 635(l) places an obligation on a local government to give an ICN when certain pre-conditions are satisfied, but does not link the exercise of that obligation with a mandatory pre-condition of a complying Information Notice. SPA explicitly states where a document or instrument is to be of "no effect" because of a non-compliance or for other reasons, for example in s 78A(2), s 881(3) and s 979(2). However, there is no statement in SPA that a non-complying Information Notice renders an ICN invalid.

[122] Secondly, SPA treats an information notice as a separate document and therefore something different from the ICN itself.

[123] Thirdly, s 637 of SPA does not require a compliant Information Notice as a pre-condition to exercising the power to issue an ICN. Section 637 uses mandatory words such as "requirement" and "must" but that is not determinative. Those terms relate to whether the Information Notice meets s 627 and s 637, not whether an Information Notice that does not meet those terms is void and of no effect.

[124] Fourthly, the fact that an Information Notice is to be provided contemporaneously with the ICN is not determinative of the issue. Sunland did not suffer any prejudice from the way in which the Information Notice in this matter was drawn, and it was aware of the Council's position at all times, i.e. that extra demand was placed on trunk infrastructure. Sunland was able to file a detailed appeal and subsequent points of claim. To the extent that the Information Notice was deficient, that could have been remedied in the appeal itself (through the provision of particulars) rather than a declaration that the ICN itself was invalid.

[125] Fifthly, an Information Notice in the terms or of the content required by the Court below was not an "essential element" of a decision to issue an ICN. That is particularly so in circumstances where each ICN set out the information required by s 637(1).

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60 Reasons below [69]-[95].

61 Council's amended outline paragraphs 22-31.

[126] Sixthly, s 478 does not afford an applicant a right of appeal for a non-complying Information Notice. If the legislature had intended a non-complying Information Notice to result in invalidity of an ICN, it would have made provision for an appeal on such an issue.

[127] Seventhly, s 440 of SPA has conferred a power on the Court below to deal with noncompliance in the way the Court considers appropriate. It is therefore not logical for a non-compliant Information Notice necessarily to result in an ICN being of no effect and invalid.

[128] Finally, *Project Blue Sky* held it unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be the result. On the finding below non-compliance with the requirements of an Information Notice would result in the invalidity of an ICN. The public inconvenience would be that a local government's positive statutory obligation to give an ICN under s 536(2) of SPA could be circumvented. That would hinder the ability of a local government to impose infrastructure charges when additional demand is placed upon trunk infrastructure generated by a development.

[129] Sunland contended that the learned primary judge was correct to hold that non-compliance resulted in invalidity. It responded to the Council's contentions but also characterised the Council's giving the ICN as being similar to a public authority imposing a financial burden on someone.[62] As to the exercise of such a power, reliance was placed on *Sheffield City Council v Graingers Wines Ltd*:[63]

> "… the donee of that power - in this case the rating authority - must act strictly in accordance with the requirements or conditions laid down by Parliament so that it may have the benefit of the exercise of that power."

[130] Responding to the Council's points, Sunland contends that the absence of a provision in SPA about the consequences and non-compliance is a neutral factor. SPA does not contain a saving provision in respect of s 637(2), whereas it does in respect of ss 78A, 881 and 979. However, all of those provisions simply deal with preserving a document from invalidity "to the extent" of any inconsistency.

[131] Sunland contends that the use of mandatory language in s 631 is not determinative, but remains important because the "first textual indicator which is always of significance is the mode of expression", and "[s]ubstantial … weight must be given to language which is in mandatory form".[64] Where a provision has a "rule-like quality" it is more likely that it was intended that non-compliance would result in invalidity.[65] The use of the word "requirements" in the heading to s 637 and the use of "must" in s 637(2) are indicators of a legislative intention that compliance was a pre-condition to validity.

[132] As to the Council's contention that the use of mandatory language in s 637 was not determinative because it appeared in a different section to that which created the obligation to give an ICN (s 635), Sunland contended that the obligation in s 635

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62 The ICN levied a charge on the applicant and attached it to the land: s 635(6) of SPA.

63 [1977] 1 WLR 1119 at 1125.

64 Relying on *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at [40].

65 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, (1998) 194 CLR 355 at [95].

was to give a specific thing, namely and ICN. Section 637 then identified the constituents of an ICN, namely the "requirements" for what an ICN "must state", and what it "must also include".

[133] Sunland contends that there is no significance to the fact that an information notice is a separate document or something different to the ICN itself. The combination of mandatory language in s 637, and the requirement that the information notice be provided contemporaneously with the ICN, revealed an intention that non-compliance would result in invalidity.

[134] As to the Council's contention dealing with the right of appeal in s 478, Sunland submits that the argument overlooks the distinction between the decision to give an ICN, which attracts the appeal rights in s 478, and the validity of the notice itself. The appeal rights are enlivened upon receipt of a valid ICN, and could not prevent a party seeking declaratory relief when it received the document that was not a valid notice. The Council did not challenge the learned primary judge's conclusion that s 478 does not deprive the court of jurisdiction to make a declaration of invalidity.[66]

[135] Responding to the Council's point concerning the power in s 440 of SPA, Sunland contends that the existence of a broad power to deal with non-compliance confirms, rather than contradicts, the conclusion that a failure to comply with s 637(2) results in invalidity.[67]

[136] Finally, the Council's contention as to public inconvenience, circumvention of the collection of infrastructure charges, and impact on the public purse, overlooked the fact that a local government could invoke s 440 of SPA to excuse non-compliance in an appropriate case. However, if the non-compliance is material, and the local government does not demonstrate that it is appropriate to excuse the non-compliance under s 440, that does not provide a reason why an applicant should pay an unlawfully levied charge.

Discussion

[137] An examination of this issue commences with what was said in *Project Blue Sky Inc v Australian Broadcasting Authority*:[68]

> "[91] An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends on whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no

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66 Reasons below at [31]-[32].

67 Reliance was placed upon *Barro Group Pty Ltd v Redland Shire Council* [2010] 2 Qd R 206 at [54].

68 [1998] HCA 28, (1998) 194 CLR 355, at 388-389 [91] and [93]; internal footnotes omitted.

> decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.
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> …
>
> [93] ... A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute"."

[138] In attempting to discern whether there is an evident legislative purpose to invalidate an ICN because of non-compliance, one must examine the provisions of Chapter 8 of SPA. That commences with the acknowledgement under s 625(2) that the authority of the Council to adopt, by resolution, a charge for development infrastructure and then to levy that charge exists only in Chapter 8, Part 2. Section 630 then provides a local government with the power to adopt a charge for providing trunk infrastructure for development, and to do so by a resolution. However, the passing of the resolution or the adoption of the charge does not, of itself, levy an infrastructure charge: s 630(2)(a).

[139] Subdivision 2 of Part 2 sets out provisions governing the charges resolution. These provide for the things that the charges resolution "must state" or "must include": s 631(4), s 633(1) and s 633A(1). Other mandatory obligations are imposed upon the local government when it makes a charges resolution, including to upload and keep it on its website and attach a copy to its planning scheme: s 634(1).

[140] Section 635 then provides when a charge may be levied and recovered. The three pre-conditions to giving an ICN are that: (i) a development approval has been given; (ii) an adopted charge applies for providing a trunk infrastructure for that development; and (iii) s 205 of SPA does not apply.

[141] If those preconditions are satisfied then there is an obligation on the Council, signified by the use of the word "must", to give an ICN. Section 635(3) then provides when the ICN must be given and s 635(5) provides when it lapses.

[142] Section 635(6) provides that if the ICN "levies on the applicant an amount for a charge worked out by applying the adopted charge", then the levied charge is payable by the applicant and "attaches to the land".

[143] Section 637 then sets out the "Requirements for infrastructure charges notice". There are matters which the notice "must state" in s 637(1), and all of those matters must be stated. All of those matters relate only to "the levied charge". That is a term defined in s 635(6) as being "an amount for a charge worked out by applying the adopted charge".

[144] Some relaxation is indicated in s 637(1) in relation to the requirement that the ICN state whether an offset or refund applies, and information about that subject. No relaxation is permitted in respect of any other item under s 637(1). That is not surprising given that one of the items is a statement of "the land to which … the levy charge

under the notice, attaches": s 637(1)(c), reading in the definition of "the land" in s 628(1)(c)(ii).[69]

[145] Section 637(2) then uses mandatory language again in its requirement that the ICN "must also include, or be accompanied by" an information notice. The reason why the legislature makes it mandatory to include an information notice is revealed by what is required to be stated in such a notice. There are three components: (i) the decision and the reasons for it; (ii) that the recipient may appeal against the decision to give the ICN; and (iii) how the recipient may appeal.

[146] As is set out in the reasons above, the importance which attaches to the statement of the reasons for the decision to give the ICN is that it informs the right of appeal given by s 478. Under that section the recipient of an ICN "may appeal … about the decision to give the notice". However, the grounds are limited (as to which, see paragraphs [56] to [57] above) and on its face do not include any ground that would confront the non-compliance in this case.

[147] I do not accept the submission that if the legislature had objectively intended that non-compliance would lead to invalidity it would have made provision for an avenue of appeal. The right to appeal under s 478(1) is "about the decision to give the notice". In my view, there is a distinction between the decision to give an ICN, which is governed by s 635, and the question of what the ICN must contain, under s 637. Put simply, s 637 does not contain a power to issue an ICN, nor does it relate to the conditions upon which an ICN might be triggered. What it does is lay down the requirements for what an ICN must state. If an error is made in the content of an ICN, as in having a deficient information notice, there is no obvious ground of appeal in respect of that under s 478. The absence of a right of appeal does not say anything about whether the ICN complies with s 637.

[148] The examples given by the Council in respect of SPA's formula whereby it uses the phrase that a document or instrument is of "no effect", are as follows:

(a) s 78A(2), which provides that a local planning instrument which does not comply with s 78A(1) "has no effect";

(b) s 554A(4), which is concerned with non-compliance in relation to a document purporting to start a proceeding of the building and development committee; it provides that if the chief executive decides that non-compliance would cause substantial injustice, a written notice must be given stating that the document "is of no effect because of the non-compliance";

(c) s 881(3), which provides that a resolution of the local government in relation to an infrastructure charge "is taken to be of no effect to the extent a charge adopted under the resolution for a particular development … is more than the maximum adopted charge for the development …"; and

(d) s 979(2), which provides that "an existing resolution or an existing charge is of no effect to the extent it is consistent with the SPRP (adopted charges)".

[149] Of those provisions s 78A(1), s 881(3) and s 979(2) do not assist the Council's contentions. All of them seek to confine the extent to which non-compliance results in an ineffective document. Each of them provides that the document is of no effect only "to the extent" of the non-compliance or inconsistency.

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69 Adopting the approach set out in *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216 at [84] and [103].

[150] However, there are a number of provisions in SPA that stipulate something is of "no effect" without confining it to the extent of the relevant non-compliance or inconsistency. They include:

(a) s 349(2) which provides that a covenant entered into in connection with a development application "is of no effect unless" it is entered into in certain ways;

(b) s 427(3) which provides that if the Minister calls in an application after the assessment manager has made a decision, the decision "is taken to be of no effect";

(c) s 554A(4) which provides that where a document is lodged purporting to start a committee proceeding is lodged and it does not comply with the requirements under SPA for starting such a proceeding, the chief executive must give a notice stating that the document "is of no effect because of the noncompliance";

(d) s 898(5) which provides that certain provisions of a structure plan "are of no effect"; and

(e) s 902(2), which provides that a provision of a master plan that requires later master plans for the master planning unit "is of no effect".

[151] Thus SPA seems to make careful provision not only for things that are of no effect on a limited basis (i.e. to the extent of non-compliance), but also of no effect at all. That SPA does so in those cases highlights the absence of a similar provision in respect of a non-complying information notice in an ICN. When the legislature has taken the step of declaring certain matters to be of no effect whatever, yet has not done so in respect of a non-complying ICN is, in my view, a textual indication that invalidity was not intended. It might have been neutral, as Sunland contends,[70] but for the fact that the legislature took the particular step of declaring other matters "of no effect".

[152] The potential application of s 440 of SPA is, in my respectful view, a matter that weighs against a determination that the legislative intention was to make a non-complying ICN invalid in all cases. Specifically, where the non-compliance is, as set out above, limited to a failure to refer to the evidentiary basis for finding of fact, s 440 may well be seen to supply appropriate relief short of a determination of invalidity.

[153] Section 440 provides the court with power to excuse non-compliance. It is engaged where "the court finds a provision of this Act … has not been complied with, or has not been fully complied with". In that case "the court may deal with the matter in the way the court considers appropriate": s 440(2). The power given is a general power which is not dependent upon whether the non-compliance has resulted in a valid or invalid document. All it does it provide the court with a wide discretion as to the way in which it deals with non-compliance, whether complete or partial. The circumstances of each case will dictate what the appropriate response is. That response could extend from, at one end of the spectrum, excusing the non-compliance, to the other end and (conceivably) a declaration of invalidity or, in the right case, declining to grant a declaration of invalidity.

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70 Amended outline paragraph 25a.

[154] That conclusion is supported by what was said in *Barro Group Pty Limited v Redland Shire Council*:[71]

> "… 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."

[155] Whilst those observations were made with respect to the precursor of s 440, they remain applicable. The consequence is that s 440 merely gives the court a full range of powers, not tied to the question of validity or invalidity. In an appropriate case non-compliance can be overlooked or excused. In other cases the court has power to issue a declaration of invalidity.

[156] As the heading of s 637 is part of the statute[72] the contents of s 637 are "requirements" of an ICN. The use of that term suggests that the contents are preconditions to the giving of a valid ICN. Simply put, a valid ICN is one which contains all the matters listed. That is reinforced by the fact that s 637 uses the phrase "must state all of the following". In the words of *Project Blue Sky*[73] s 637 has a "rule-like quality which [could] be easily identified and applied". Further, that s 637(1) and (2) lays down matters which are to be strictly observed is supported by the fact that there is only a limited carve out in s 637(1A).

[157] However, the information notice has to be given contemporaneously with the ICN, either in the ICN or accompanying the ICN. As noted above, the contents of the information notice are directly relevant to the ability of the recipient of an ICN to make an informed decision about whether to appeal. That supports the view that s 637 should be construed as providing that if the requirements are not met the ICN is invalid.[74] But that also begs the question in this case, what are the requirements which, if not met, would lead to invalidity as opposed to correction under s 440.

[158] One must again take note of precisely what is required under s 637. First, the various matters under s 637(1), all of which must be stated in the ICN. As set out above that includes reasons for the finding that there is additional demand on trunk infrastructure: see paragraphs [114] to [117] above. Secondly, an information notice is required to be given, either in or with the ICN. Construed in light of s 27B of the AIA, the information notice must do a number of things: (i) state the decision to give the ICN; (ii) state the reasons for giving the ICN; (iii) set out the material findings of fact; and (iv) refer to the evidence on which the findings were based.

[159] It is noteworthy that the last obligation is in different language to the others. As to the first three, the notice must "state" or "set out" them, whereas all the last requires is that the notice "refer to" the evidence. Section 27B does not say that the evidence must be "set out". On its face the obligation to refer to evidence is a lesser burden than the others.

[160] Further, under s 636 the critical feature of how the amount is worked out in light of the additional demand is something for the body of the ICN under s 637(1), and not

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71 [2009] QCA 310; [2010] 2 Qd R 206 at 225 [54].

72 See s 14(2) of the AIA.

73 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, (1998) 194 CLR 355 at [95].

74 *Scurr v Brisbane City Council* [1973] HCA 39; (1973) 133 CLR 242, 251-2, 255; *Sandvik Australia Pty Ltd v Commonwealth* (1989) 89 ALR 213, 227.

the information notice. Because s 27B applies to that requirement, the ICN itself must set out the basis for the finding of extra demand.

[161] In my view, the legislation does not reveal an intention that invalidity would follow a failure to comply with the requirement to refer to the evidence, when the other requirements had been met.

[162] I pause to note that the Council's contention, that invalidity should not be inferred because of the public inconvenience and inconvenience to local governments which would follow, cannot be accepted. The submission is based upon a passage in *Project Blue Sky*:[75]

> "Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act."

[163] However, the concern about the public inconvenience falls away when one considers the fact that s 440 of SPA contains a provision permitting the court, in appropriate circumstances, to either excuse non-compliance or to punish it. If non-compliance was trivial or minimal, it would be a case where the non-compliance might be excused. The converse is hardly to be contemplated. That postulates that an ICN might be issued in circumstances where there was no meaningful information notice at all. In such a case, how could it seriously be suggested that questions of public inconvenience should mean that the applicant is not only liable to pay the levied charge, but the levied charge attaches to the applicant's land.

[164] The matters set out above lead me to conclude that in the present case the failure of the information notices to refer to the evidence upon which the material finding of fact, that there would be additional demand from the development, does not have the consequence that the ICNs were invalid. The learned primary judge fell into error in so finding.

Error in the exercise of the discretion

[165] In light of the conclusions reached above there is no necessity to deal with this ground of appeal.

Effect of s 344 of the *Planning Act* 2016 (Qld)

[166] Subsequently to writing the reasons above the Court was notified that s 182 of the *Economic Development and Other Legislation Amendment Act* 2019 (Qld) had been enacted. It introduced s 344 of the *Planning Act* 2016 (Qld), in these terms:

> "**344 Validation provision for particular infrastructure charges notices under old Act**
>
> (1) This section applies to an infrastructure charges notice given under the old Act on or after 4 July 2014 but before the commencement if—
>
> (a) under the old Act, section 637(2), the infrastructure charges notice must include, or be accompanied by, an information

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75 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, (1998) 194 CLR 355 at [97].

notice about the decision to give the infrastructure charges notice that states the reasons for the decision; and

(b) the infrastructure charges notice does not comply with the requirement.

(2) It is declared that the infrastructure charges notice is taken to be, and to always have been, as valid as it would have been if it had included, or been accompanied by, an information notice about the decision to give the infrastructure charges notice that states the reasons for the decision.

(3) It is also declared that anything done, or to be done, in relation to the recovery of the levied charge under the infrastructure charges notice by the local government that gave the notice is as valid as it would have been or would be if the notice had included, or been accompanied by, an information notice about the decision to give the infrastructure charges notice that states the reasons for the decision.

(4) Subsection (5) applies if the levied charge under the infrastructure charges notice has, before the commencement, been paid to the local government that gave the notice.

(5) It is declared that the payment is taken to be, and to always have been, as validly made as it would have been if the infrastructure charges notice had included, or been accompanied by, an information notice about the decision to give the infrastructure charges notice that states the reasons for the decision."

[167] The reference to the "old Act" is to the *Sustainable Planning Act* 2009: s 285(1) of the *Planning Act* 2016.

[168] The parties were given leave to make supplementary submissions as to the impact of s 344 on the appeal.

[169] The Council contends that s 344 has retrospective effect, applying to all ICN's issued on or after 4 July 2014. Therefore, it contends that if the ICN's in this case were invalid because the Information Notices did not include reasons (as is Sunland's main contention), then that point has become irrelevant and the appeal must fail.

[170] Sunland contends that the appeal is an appeal in a strict sense, and therefore it must be determined upon the law as it stood at the hearing below.[76] It contends that s 344 "was not then in existence" and cannot apply. Further, it contends that s 344 is not retrospective in a way that affects the decision below.[77]

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[76] Referring to *Allesch v Maunz* (2000) 203 CLR 172 at [22]; *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, at 107-108, and *Ponnamma v Arumogan* [1905] AC 383 at 390.

[77] Referring to *MacCarron v Coles Supermarkets Australia Pty Ltd* (2001) 23 WAR 355 at [12], *Zanai bin Hashim v Government of Malaysia* [1980] AC 734 at 742, *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at [32], and *Mabo v Queensland* (1988) 166 CLR 186 at 211-212.

Discussion

[171] It may be accepted that an appeal from the Planning and Environment Court is an appeal in a strict sense. Such an appeal is brought under s 63 of the *Planning and Environment Court Act* 2016 (Qld), which confines the grounds of appeal to "error or mistake in law or jurisdictional error": s 63(1). Section 65 of that Act provides the powers of the Court on such an appeal to one or more of the following: (i) return the matter to the P&E Court to decide in accordance with the appeal decision, (ii) affirm, amend, or revoke the decision appealed against and substitute another order or decision for the decision, and (iii) make an order if it considers appropriate. Whilst that may seem to grant powers similar to a court conducting an appeal by way of rehearing, they are not determinative of the issue as to the nature of the appeal.[78] Further, rule 745 of the *Uniform Civil Procedure Rules* 1999 (Qld) excludes rule 765 from operating in respect of an appeal from the P&E Court. Rule 765(1) is the rule that gives powers to the Court applicable to a rehearing.

[172] The oft-quoted authority on the difference between appeals by rehearing and strict appeals is *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan*.[79] There Dixon J said:[80]

> "The appeal to this Court is given by sec. 73 of the *Constitution*, which provides that "the High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences ... (ii) Of any ... Court exercising Federal jurisdiction." It is governed by the provisions of sec. 39(2)(b) of the *Judiciary Act* 1903-1927 and Section IV. of the *Appeal Rules*. The procedure which determines the mode of appeal does not affect the nature of the appeal itself. It is established that upon such an appeal, it is for the Court to form its own judgment of the facts so far as it is able to do so (*Bell v Stewart*). For this reason an appeal to this Court is often said to be by way of rehearing. "**On an appeal strictly so called, such a judgment can only be given as ought to have been given at the original hearing;** but on a rehearing such a judgment may be given as ought to be given if the case came at that time before the Court of first instance" (per *Jessel* M.R., *Quilter v Mapleson*). In the English Court of Appeal "all appeals are by way of rehearing, that is by trial over again, on the evidence used in the Court below; but there is special power to receive further evidence" (per *Jessel* M.R., *In re Chennell; Jones v Chennell*). Accordingly, that Court must decide an appeal by applying to the circumstances as they exist, when the appeal is dealt with, the law which then operates to determine the rights and liabilities of the parties (*Attorney-General v Birmingham, Tame, and Rea District Drainage Board*; *Ex parte Thomas*; and compare *Borthwick v Elderslie Steamship Co [No. 2]*; *Robinson & Co v The King*). If, by a retrospective change in the law, the rights and obligations of the parties come to depend upon facts which have not been ascertained, the Court of Appeal takes the necessary steps to have the dispute between the parties decided

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78 *DAR v Director of Public Prosecutions (Queensland)* [2008] QCA 309 at [8]-[14] and [28].

79 (1931) 46 CLR 73.

80 *Victorian Stevedoring* at 107-108; internal citations omitted; emphasis added.

> according to the law presently in force, and it may set aside the order appealed against, and remit the cause to be reheard so that the rights of the parties may be determined as at the date of rehearing (*Stovin v. Fairbrass*)."

[173] More recently the High Court has referred to the approach on a strict appeal as being that the appellate court is called upon to decide whether the decision under appeal was or was not erroneous on the evidence and the law as it stood when the original decision was made.[81]

[174] The law as it stood at the time of the hearing below includes s 344 if it is retrospective. It does not matter that the particular statute that enacted a provision came later than the decision below if that provision applies at the earlier time.

[175] In *Australian Education Union v General Manager of Fair Work Australia*[82] the plurality of the High Court[83] discussed the approach that must be taken when construing retrospective legislation and determining the extent of the retrospectivity:[84]

> "30. The preceding observations should not be taken as minimising the importance of the rationale underlying the common law principles of construction. In a representative democracy governed by the rule of law, it can be assumed that clear language will be used by the Parliament in enacting a statute which falsifies, retroactively, existing legal rules upon which people have ordered their affairs, exercised their rights and incurred liabilities and obligations. That assumption can be viewed as an aspect of the principle of legality, which also applies the constructional assumption that Parliament will use clear language if it intends to overthrow fundamental principles, infringe rights, or depart from the general system of law. The existence of those assumptions is, in the words of Gleeson CJ in *Electrolux Home Products Pty Ltd v Australian Workers' Union*:
>
> > "a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law."
>
> 31. Consistently with its underlying rationale, the resistance of the common law to construing statutes as taking effect before the dates of their enactment is graduated according to the extent of their propounded effects. In *RS Howard & Sons Ltd v Brunton*, Griffith CJ said:

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81 *Allesch v Maunz* (2000) 203 CLR 172; [2000] HCA 40, at 180 [22]; *Mickelberg v The Queen* (1989) 167 CLR 259 [1989] HCA 35, at 267; *Eastment v The Queen* (2000) 203 CLR 1; [2000] HCA 29, at 13 [18]; *Coal & Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194; [2000] HCA 47 at [12]; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573; [2011] HCA 10, at 596 [57]; *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 at [31] per Gageler J.

82 (2012) 246 CLR 117.

83 French CJ, Crennan and Kiefel JJ.

84 *Australian Education Union v General Manager of Fair Work Australia* at [30]-[32]; internal citations omitted.

> "[I]t is a settled rule of construction of Statutes that a law is not to be construed as retrospective in its operation unless the Legislature has clearly expressed that intention, and a further rule that it is not to be construed as retrospective to any greater extent than the clearly expressed intention of the Legislature indicates."

That graduated response was also reflected in the quotation by Lord Mustill in *L'Office Cherifien* from the judgment of Staughton LJ in *Secretary of State for Social Security v Tunnicliffe*:

> "It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

32. In *Attorney-General (NSW) v World Best Holdings Ltd* Spigelman CJ referred to the judgments of Staughton LJ and Lord Mustill and said:

> "This approach requires the court to determine the scope and degree of the unfairness or injustice that is applicable in the particular case. The greater the unfairness or injustice, the less likely it is that Parliament intended the Act to apply. Where Parliament has used general words the courts will apply the well established technique of reading them down."

While "fairness" and "justice" denote values underlying the relevant common law principles, it is neither necessary nor desirable, as a general rule, that the task of construction be mediated by broad evaluative judgments invoking that terminology. They carry the risk that the courts may then exceed their proper constitutional function. It is sufficient to focus upon the constructional choices which are open on the statute according to established rules of interpretation and to identify those which will mitigate or minimise the effects of the statute, from a date prior to its enactment, upon pre-existing rights and obligations."

[176] In my view, there are several features of s 344 that demonstrate it was intended to have retrospective effect, and that the retrospectivity extend to the ICN's in this case.

[177] First, s 344(1) states that it "applies to an infrastructure charges notice given under the old Act on or after 4 July 2014 but before the commencement [of the amending Act]", if that ICN does not comply with the requirement of s 637(2) that it have an Information Notice that states the reasons for the decision to give the ICN. Thus s 344 expressly applies to any ICN which was non-compliant with s 637(2) in the way prescribed. Section 344(1) does not discriminate between such non-compliant ICN's or carve out any exception. Thus it applies to all such ICN's.

[178] Secondly, s 344(2) declares that the ICN "is taken to be, and to always have been, as valid as it would have been if it had included, or been accompanied by, an information notice about the decision to give the infrastructure charges notice that states the reasons for the decision". The declaration is of validity is framed temporally as: (i) at the present ("is taken to be"), and (ii) at all times since the ICN was issued ("to always have been").

[179] Thirdly, the section declares that such an ICN notice "is taken to be" and "is taken to always have been" valid. The use of the phrase "is taken" in the two formulations has only one meaning, namely whatever the status of the non-compliant ICN before, it is now and always was valid.

[180] Fourthly, the temporal aspect is made clear, if it had not already been, by that part of the declaration dealing with the validity. The relevant ICN is to be taken "as valid as it would have been if it had included, or been accompanied by" a compliant Information Notice. As has been noted above, the ICN must include or be accompanied by the compliant Information Notice. Therefore s 344 declares validity from the moment the ICN issued.

[181] Fifthly, the ICN is declared to be as valid "as it would have been" if it had a compliant Information Notice. Within the confines of the issues raised that is the equivalent of a declaration of validity for all purposes.

[182] Finally, if there was any doubt as to the intention that s 344 apply retrospectively the Second Reading Speech,[85] made well after the appeal was heard on 14 November 2018, dispels it:

> "**The background of these amendments largely arises from a recent court matter in which certain infrastructure charges notices were considered to be invalid because they did not adequately meet the requirements to give the reasons for a decision under the SPA**. This has created uncertainty about the validity of infrastructure charges notices issued by councils across the state and opens the door for developers to retrospectively recoup charges already paid to councils under the SPA regime since 2014.
>
> The financial risk and uncertainty for local governments, industry and community are too great not to progress the proposed amendments. The bill restores certainty in the operation of the infrastructure charging framework for councils, the community and industry **by validating certain infrastructure charges notices issued under the repealed Sustainable Planning Act to the extent that they did not adequately include reasons**. To be clear, the bill will not make a charge valid where it may be flawed for any other reason.
>
> The amendments also confirm that actions that have occurred or will occur in relation to the recovery or payment of the levied charge under those particular infrastructure charges notices are valid. … **The validation of these particular infrastructure charges notices clarifies that the technical omission of reasons means that ratepayers would not be forced to subsidise the cost of providing**

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[85] Record of Proceeding (Hansard), 28 March 2019, page 893; emphasis added.

> **infrastructure and councils will not need to defend court actions by developers on the basis of a technicality**."

[183] The constructional choices here are all one way. The Legislature, knowing that there was an existing but yet to be determined appeal against a decision declaring certain ICN's to be invalid because of a particular aspect of non-compliance, used words that declared all ICN's in that category to be valid, now and at all times since they were issued.

[184] It is a different question whether s 344 should be applied in this appeal. Upon that question I agree with Fraser JA's reasons.

Conclusion

[185] As leave to appeal is not opposed and the questions are of importance, not only to the parties in this case but to the proper construction of a statute that continues to have impact, leave to appeal should be granted. The appeal should be allowed with costs.

[186] I propose the following orders:

1. Leave to appeal is granted.
2. The appeal is allowed.
3. The orders made by the Planning and Environment Court on 4 May 2018 are set aside and in lieu thereof the respondents' application for declarations is dismissed, with costs.
4. The respondents are to pay the appellant's costs of the application for leave to appeal and the appeal.

[187] **CROW J:** I have had the benefit of reading the draft reasons for judgment of Fraser and Morrison JJA and agree with the reasons and orders proposed.