SUPREME COURT OF QUEENSLAND

CITATION:	*Fox & Anor v Brisbane CC & Ors; Fox & Anor v Brisbane CC & Anor; Stop Master Butchers Industrial Estate in Hemmant & Tingalpa Action Group & Ors v Brisbane CC & Anor* [2003] QCA 330
PARTIES:	**DANIEL PATRICK FOX AND DENISE NOELLE FOX** (appellants/appellants) **v** **BRISBANE CITY COUNCIL** (respondent/first respondent) **MASTER BUTCHERS LIMITED** ACN 010 855 526 (co-respondent/second respondent) **STATE OF QUEENSLAND** (co-respondent by election) **DANIEL PATRICK FOX AND DENISE NOELLE FOX** (applicants/first respondents) **v** **BRISBANE CITY COUNCIL** (respondent/second respondent) **MASTER BUTCHERS LIMITED** ACN 010 855 526 (co-respondent/appellant) **STOP MASTER BUTCHERS INDUSTRIAL ESTATE IN HEMMANT AND TINGALPA ACTION GROUP, MARCUS ULRICH SCHERRER AND JANE PAULA SCHERRER** (applicants/first respondent) **v** **BRISBANE CITY COUNCIL** (respondent/second respondent) **MASTER BUTCHERS LIMITED** ACN 010 855 526 (co-respondent/appellant)
FILE NO/S:	Appeal No 5868 of 2002 Appeal No 8354 of 2002 Appeal No 8355 of 2002 P & E Appeal No 1386 of 2002 P & E Application No 3119 of 2002 P & E Application No 3105 of 2002
DIVISION:	Court of Appeal
PROCEEDINGS:	Planning and Environment Appeals
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	1 August 2003

DELIVERED AT: Brisbane

HEARING DATE: 28 March 2003

JUDGES: de Jersey CJ, Jerrard JA and White J
Separate reasons for judgment of each member of the Court, de Jersey CJ and White J concurring as to the orders made in Appeal No 5868 of 2002, Jerrard JA dissenting; Jerrard JA and White J concurring as to the orders made in Appeal No 8354 of 2002 and Appeal No 8355 of 2002, de Jersey CJ dissenting

ORDER: **1. Dismiss the appeal in Appeal No 5868 of 2002**
2. Dismiss the appeal in Appeal No 8354 of 2002
3. Dismiss the appeal in Appeal No 8355 of 2002
4. Costs to be reserved pending consideration of written submissions by the parties to be provided within seven days

CATCHWORDS: ENVIRONMENT AND PLANNING – DEVELOPMENT CONTROL – APPLICATIONS – FORM AND CONTENTS OF APPLICATIONS – SECOND APPLICATION FOR SAME DEVELOPMENT – where appellants argued a preliminary point that applications for development were piecemeal – meaning of "piecemeal" as derived from *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* (1980) 145 CLR 485 – where learned judge below refused to find applications were piecemeal – where considerations of convenience warranted separate applications – whether learned judge below erred in dismissing this point

ENVIRONMENT AND PLANNING – DEVELOPMENT CONTROL – CONSENTS, APPROVALS AND PERMITS – SUBDIVISION APPROVALS – where appellant gained council approval to develop land into 39 industrial lots – where extensive cut and fill earthworks required to reconfigure rural land – where appellant lodged two applications relating to the whole of the land – where applications divided into two stages of development – where earthworks identified in original application as "operational works" as defined by the *Integrated Planning Act* 1997 (Qld) – where council accepted development as code assessable only – whether learned judge erred in law in declaring council approval invalid

ENVIRONMENT AND PLANNING – DEVELOPMENT CONTROL – CONSENTS, APPROVALS AND PERMITS – SUBDIVISION APPROVALS – where appellant received council approval for code assessable development – where no public notification required for code assessable development – where learned judge below found that the earthworks amounted to a material change of use of the land – where appellant contends that although the excavation was preparatory to a future material change of use, it constituted

only operational works at this stage – where development amounting to a material change of use is considered impact assessable under the *Brisbane City Plan* 2000 – whether learned judge below erred in classifying earthworks as material change of use and not as operational works

Brisbane City Plan 2000
Integrated Planning Act 1997 (Qld), s 1.3.2, s 3.1.4, s 3.1.5, s 3.2.2, s 4.1.28, Sch 10

Boral Resources (Qld) Pty Ltd v Cairns City Council [1997] 2 Qd R 31, considered
BCC v Cunningham & Anor; Eastern Suburbs Leagues Club Ltd v Cunningham & Anor [2001] QCA 294; Appeal Nos 6745 and 6784 of 2000, 27 July 2001, discussed
Development Assessment Commission v Macag Holdings P/L (2001) 116 LGERA 1, distinguished
Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council & Ors (1980) 145 CLR 485, distinguished

COUNSEL: S J Fox (sol) for the appellants in Appeal No 5868 of 2002 and for the first respondents in Appeal No 8354 of 2002
D J S Jackson QC for the appellant in Appeal No 8354 of 2002 and Appeal No 8355 of 2002 and for the second respondent in Appeal No 5868 of 2002
S L Doyle SC, with M E Rackemann, for the first respondent in Appeal No 5868 of 2002 and for the second respondent in Appeal No 8354 of 2002 and Appeal No 8355 of 2002
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Brisbane City Legal Practice for the first respondent in Appeal No 5868 of 2002 and for the second respondent in Appeal No 8354 of 2002 and Appeal No 8355 of 2002

[1] **de JERSEY CJ:** These appeals are based on the contention that a learned Judge of the Planning and Environment Court erred in law (s 4.1.56 *Integrated Planning Act* 1997):

(a) in concluding that two applications in respect of the same overall development were not invalid because, being "piecemeal", they offended against the principle expounded in *Pioneer Concrete Pty Ltd v Brisbane City Council* (1980) 145 CLR 485 (appeal 5868 of 2002); and

(b) in declaring invalid the approval of the Brisbane City Council of one of those applications, on the basis the filling and excavation of rural land contemplated by the application constituted "impact assessable" development, contrary to the Council's view that it was merely "code assessable" (appeals 8354 and 8355 of 2002).

[2] Master Butchers Ltd proposed to develop 43.6 hectares at Tingalpa into 39 separate lots for industrial purposes. Separate applications for approvals were made, apparently because of a view that the *Integrated Planning Act* militated different treatment of the applications, essentially because the implementation of one, unlike the other, would involve "material change of use". The developments contemplated under the respective applications were designated "stage one" and "stage two", and related to separate though contiguous areas of land.

[3] The application in respect of stage one sought approval to reconfigure (subdivide) the stage one land into twenty lots, and preliminary approval to carry out operational work comprising filling and excavation. The Council granted those approvals on 28 February 2002.

[4] The application for stage two sought, in respect of the stage two land, preliminary approval for operational and building work, and in addition, preliminary approval for a material change of use from rural to industrial. The approvals were forthcoming, save, although without present significance, as to the building work.

[5] Common to both proposals was the need for extensive earthworks. All of the land was to be subject to a "cut and fill" operation, with the higher parts being cut in order to fill the lower lying area.

[6] It was common ground that the development was "code assessable" under Chapter 3 of the *Integrated Planning Act*. Depending on the further requirements of the Brisbane City Plan 2000, a code assessable development might be either code assessable – that is, to be assessed by an officer of the Council against the applicable prescribed codes; or impact assessable. In the latter case, an application is subject to public notification, with a right in objectors to make submissions to the Council. Impact assessment necessitates a more wide-ranging enquiry than code assessment, extending to consideration of desired environmental outcomes. The respondents are concerned they have been denied what they contend is their lawful right to make submissions in opposition to the stage one proposal, and that local authority consideration of its impact was otherwise wrongly curtailed.

[7] The Council took the view that although, because contemplating a material change of use, the stage two application was impact assessable (and the correctness of that is not challenged), the stage one application was merely code assessable. By an application for declaratory relief, the submitters challenged that approach, and contended that the stage one approvals were consequently invalid. The learned Judge upheld their contentions.

Appeal no 5868 of 2002: "piecemeal" applications?

[8] It is convenient to deal first with the issue of the lawfulness of Master Butchers having lodged two separate applications. *Pioneer Concrete Pty Ltd v Brisbane City Council*, supra, is authority for the proposition that an applicant for approval to use land for a particular purpose must apply at the outset for approval for the entire proposed use. The application in that case failed to identify all of the private land to which the proposed use related, rendering the application invalid.

[9] The learned Judge extracted as follows, from *Brisbane City Council v Cunningham* [2001] QCA 294, the Court of Appeal's exegesis of the *Pioneer* principle as applicable to a case of staged development:

> "There is one point of overlap (the carpark) and that is the circumstance upon which it must be decided whether the Pioneer case mandates a single application in respect of both matters…The essential requirement of the decision in Pioneer Concrete is that the proposed use "must be stated in appropriate detail in one application and all the land involved in the use must be the subject of the application".
>
> There is no rule prohibiting the making of more than one application in respect of the one piece of land or part of a parcel of land. The Pioneer principle required that each application for a use for a particular purpose be for the whole of the use (including incidental and necessary associated uses) and for the whole of the land devoted to that use. It did not require the two separate uses be combined in one application…even on the learned Judge's view that both applications proceeded from the one club.
>
> As part of an integrated overall plan, it is still necessary to examine the uses in question and the extent to which each application identifies the land over which such use is sought.
>
> Pioneer is concerned with the sufficiency of an application by reference to its subject matter (the use and the land on which that use and ancillary uses are intended). It does not forbid the inclusion in one application of multiple uses for multiple purposes. Whilst in certain circumstances it prohibits what are conveniently referred to as "piecemeal applications", it does not place an embargo upon staged developments except in the circumstances stated…It is only where land is proposed to be used for the one purpose at one time that consent for its use must be applied for in one application. A similar attempt to read too much into Pioneer failed in *Stubberfield v Redland Shire Council* (1995) 1 Qd R 332. The Court observed, "There were no significant parallels between this case and what was decided in Pioneer". Here the subdivisional application related to the entirety of Paradise Grove land. While it is correct that the application did not relate to the second phase of what Paradise Grove proposed, it dealt comprehensively with the first phase which was relatively comprehensive and self-contained. There was no need for the local authority to consider matters which were involved in the combined application. The outcome of the combined application was not determined or influenced by a favourable decision on the subdivisional application."

[10] For his conclusion that the applications were not relevantly piecemeal, the learned Judge relied on the aggregation of these circumstances: each application referred to the whole of the land and the entire development; they were separated because of the differential treatment required of them under the legislation; each was reasonably self-contained, although presented in context of the overall development; and the applications were lodged with the Council on the same day, then determined concurrently in the realisation that each had implications for the other.

[11] Counsel for the local authority submitted that the *Pioneer* principle does not apply to applications brought under the *Integrated Planning Act*. It is not necessary in this case to decide that point. That is because assuming its applicability, the learned Judge's approach is not attended by discernible legal error.

[12] The so-called *Pioneer* principle was developed in relation to proposed use of particular land for a single purpose. The goal is that the local authority should be made aware of all that is proposed, prior to its embarking upon a consideration and determination of the application. But where considerations of convenience otherwise warrant separate applications, there is no legislative prohibition, and the *Pioneer* principle should not be erected into an equivalent, where, as here, each application makes the overall scope of the project abundantly clear: no relevant intention was "held back".

[13] That is essentially the way the learned Judge approached the matter.

[14] The appellants, Mr & Mrs Fox, appear to contend however that the separation of the applications effectively skewed the Council's consideration away from a recognition that, as they would contend, the stage one proposal was impact assessable, that skewing being the consequence of its separation from the stage two application. As it was put, "the separation of the Applications was merely a strategy to avoid public notification and submitter appeal rights in relation to the first Application.". But that simply cannot sit with the circumstance that each application disclosed the scope of the entire development, with the applications in fact being determined concurrently.

[15] In my view the appellants have not demonstrated that the learned Judge erred in law in ruling against their contention on the preliminary application. Appeal number 5868 of 2002 should accordingly be dismissed.

Appeals 8354 & 8355 of 2002

[16] I turn to appeal numbers 8354 and 8355 of 2002, which concern His Honour's conclusion (and consequent declarations) that the development proposed in stage one was impact assessable, therefore invalidating the Council approvals, which had assumed a requirement for merely code assessment.

The learned Judge's reasoning

[17] The Brisbane City Plan 2000 provides, as relevant, that "operational work for filling or excavation" is code assessable. The term "operational work" is defined by the *Integrated Planning Act* to include "excavating or filling that materially affects premises or their use…but does not include building…work". The building work exception aside, the stage one work would appear to fall squarely within those definitions and thus be code assessable. The exception "building work", is defined to include, among its meanings, "building…a building" or "excavating or filling…for, or incidental" thereto. The learned Judge found that the excavation and filling work to be done in stage one, which would otherwise amount to "operational work", was properly characterised as "building work", because it involved excavating or filling "incidental to the types of buildings that were intended to be built.". He took that view notwithstanding nothing was disclosed of any proposed building or its purpose – an aspect to which I return. The Judge, further, considered

the case "entirely comparable" with that considered in *Development Assessment Commission v Macag Holdings Pty Ltd* (2001) 116 LGERA 1.

[18] For his conclusion that the stage one application was impact assessable, the learned Judge appears to have relied, not especially on its involving "building work", but on the circumstance that its proposal would involve a "material change of use", therefore by application of the City Plan necessitating impact assessment. The definition of "material change of use" in the *Integrated Planning Act* includes "the start of a new use of the premises" and "a material change in the intensity or scale of the use of the premises.". In determining whether the proposal, the subject of the applications covering stage one, involved a material change of use of the stage one land, the Judge had regard to the statutory definition of use, as including "any use incidental to and necessarily associated with the use of the premises.". The cut and fill operations on the stage two lands, vis a vis stage one, in his view attracted that description to stage one. Then bringing to account the scale of the operation, His Honour concluded it would amount to material change of use of the stage one lands.

[19] His ultimate factual conclusion was expressed in these terms:

> "The cut and fill operations on this rural land, even as part of the Stage 1 application, are incidental to and necessarily associated with the industrial use of the Stage 1 land.
>
> The fact that all the rural land is to be cut or filled, and the filled part compacted, shows that as a matter of fact and degree, it is to undergo a material change of use.
>
> The conclusion is really inescapable – the operational works on the rural land [stage two], even if seen as am incidental part of the Stage 1 application and approval, amount to a material change of use of that land."

[20] Before reaching his final conclusion that the stage one applications, involving a material change of use of the subject land, should have been subject to impact assessment, His Honour considered s 3.2.2 of the Act, which provides:

> "1. This section applies if, at the time an application is made –
>
> (a) a structure or works, the subject of an application, may not be used unless a development permit exists for the material change of use of premises for which the structure is, or works are, proposed; and
>
> (b) there is no development permit for the change of use; and
>
> (c) approval for the material change of use has not been applied for in the application or a separate application.
>
> 2. The application is taken also to be for the change of use."

[21] The Judge was proceeding on the basis the stage one application envisaged a material change of use of the stage one land. As to s 3.2.2, paragraph (a) applied, on His Honour's reasoning, and as to (b), no such permit had been issued. As to (c), an application for material change of use was sought in the stage two applications

(and that in fact had led to a preliminary approval). That arguably excluded the application of (c). The Judge appears to have considered the provision of no eventual significance anyway, because the application necessitated impact assessment, which was not carried out: the approval given was therefore invalid.

The parties' submissions

[22] While the respondents would support His Honour's reasoning leading to his finding of material change of use, the appellant and the Council submitted that the Judge erred in not finding that the applications in relation to stage one were merely code assessable. It was submitted for the Council that the excavating and filling of stage one land amounted to "operational work", "even though…preparatory to a hoped for material change of use [the ultimate establishment of an industrial estate].". Further, if it be correct to say that acting on the approval would effect a material change of use, then that should not seen as robbing the work of a concurrent "operational" character. As has been seen, "operational work" is code assessable under the City Plan. The learned Judge's more global approach failed to take account, it was submitted, of the scheme by which approvals may be sought progressively under the Act.

[23] On the other hand, it was submitted for the Stop Master Butchers Action Group, and others, that the appellant had manipulated the legislative mechanism to avoid, at this stage, impact assessment of what in truth amounted to material change of use. As it was put:

> "No problems would have eventuated by the developer in this instance making, in the first application, preliminary approval for operational works and a material change of use. The developer always intended to carry out the one entire development at the one time. The facts permit a conclusion to be drawn that the developer here deliberately lodged two applications in the form they were lodged in an attempt to prevent the Planning and Environment Court (should an appeal be lodged) from hearing issues of flooding, contamination and damage to the environment arising from the filling and excavation on the rural land."

[24] The appellant's submission ran:

> "The scheme of [the *Integrated Planning Act*: "*IPA*"] permits an application to be made for a preliminary approval of operational works separate from any necessary application for a development approval for the making of a material change of use. Indeed…*IPA* permits applicants a degree of flexibility to make applications for preliminary approvals or approvals of such kinds as they determine appropriate and does not dictate that applications must be made at any particular time or in any particular sequence."

[25] The appellant focuses attention on the statutory definition of "development" (s 1.3.2), as extending to any of five types of activity – carrying out building work, carrying out plumbing or drainage work, carrying out operational work, reconfiguring a lot or making a material change of use of premises. One sees that "operational work" includes, as relevant, "excavating or filling that materially affects premises or their use", which is plainly what was proposed in respect of this stage one land. The appellant queries why that should be conflated, as it were, with

material change of use, material change of use being included as a separate species of "development".

[26] As it was put in submissions,

> "The scheme of *IPA* is that the carrying out of a "development" may involve a number of different categories of development. Some of these may, depending on the circumstances, be assessable and others not. Those components which are assessable may, in some cases, be subject only to code assessment (with no public notification or appeal rights) while, in other cases, they may be subject to impact assessment. A number of components of an application may be applied for at the one time, or at different times…some may be the subject of preliminary approvals as well as subsequent development permits whereas others might be the subject of applications for development permits only. Moreover, *IPA* breaks down development into its constituent parts and provides the applicant with a deal of flexibility as to how and when it goes about obtaining the necessary authority for undertaking each of those components.
>
> The result is that *IPA* contemplates that for a development there may well be operational works which are such as may (by definition) materially affect the use of land, and that this is separate from and different to the development which is constituted by the actual making use of the land which is materially different from the current use."

Conclusions

"operational work", "material change of use"

[27] I agree with the above analysis. Including "excavating and filling that materially affects premises or their use," steps preparatory to a material change of use, as a species of "development" separate and distinct from material change of use, suggests that preparatory work of that ilk is to be recognised as such, acknowledging that further subsequent approvals may under the Act be necessary. In other words, this preparatory excavation work amounted to "operational work", and that is plainly code assessable. If its execution would lead to material change of use, impact assessment would be necessary further down the track. But at this preliminary approval stage, with the proposal falling squarely within the ambit of "operational work", there was no reason not to proceed as the legislation prescribes, that is, by code assessment.

[28] The statutory regime breaks "development" into its constituent parts, and contemplates different applications for different approvals, leading to particular assessments with respect to those various categories of development. Addressing an aspect raised by the learned Judge, even if (contrary to my own view) the stage one proposal amounted to both "operational work" and a "material change of use", that did not preclude the application made for preliminary approval in respect of the former.

[29] The learned Judge reached the view this was not "operational work" by application of the extended definition of "use" and the "building work" exception. I respectfully

consider his factual conclusions on those aspects were not reasonably open, and therefore amounted to errors of law.

"use"

[30] As to the definition of "use", the "use" relevant for the stage one applications, that is, the excavating and filling, which amounted to "operational work", does not attract, as "incidental and necessarily associated", the ultimate establishment of the industrial estate (carrying with it material change of use). That is because the development of an industrial estate was not necessarily associated with the bulk earthworks in stage two: they simply facilitated a subdivision, indeed one compatible with the rural context (see condition 60(c) set out in para 33 below). The fill for the stage one lands could, furthermore, presumably have been got from elsewhere, and not "necessarily" the stage two lands.

[31] The excavating and filling operation on the stage one lands, amounting to "operational work", was sufficiently reviewed under the code assessable applications lodged, recognising that subsequent approvals may be necessary further down the track. It should be appreciated only preliminary approval for filling and excavation had been sought. Such an approval could not itself authorise the carrying out of the work on any part of the land. Further application would be necessary, for a development permit.

"building work"

[32] As to the building work exception, the Judge's conclusion that the excavating and filling of the stage one lands amounted to "building work" rested on its being "for or incidental to" the construction of buildings on the stage two land. But any future position was simply not sufficiently known to permit such a conclusion. As at the time of the applications, the appellant was not proposing to erect any industrial buildings on the site. Its foreshadowed intention was to create an estate of industrial lots available for sale to individual purchasers.

[33] The bulk earthworks envisaged for the stage two lands would not produce lots for construction of any kind. What was proposed was in fact consistent with a rural use. Indeed, the stage one preliminary approval, referring to the stage two lands, provided, in condition 60(c):

> "The earthworks and/or remediation works to be carried out on proposed Lot 21 (balance lot) is to ensure that the final landform/levels are representative of, and compatible with the surrounding rural landform..."

[34] Consistently, in the stage two application, the appellant sought only preliminary approval for material change of use for a range of industrial activities. No specific details were known of buildings to be erected in the future, or indeed any particular industrial purpose. The reality is, as earlier mentioned, that the work proposed for the stage one land was simply bulk earthworks to facilitate a subdivision.

[35] To the extent the work may facilitate future subdivision and lots to provide sites for buildings, it would be merely preparatory. It would properly be termed excavation and filling materially affecting the land, not work for or incidental to the construction of buildings. That relationship had not yet been established.

[36] The learned Judge has, with respect, engaged in forecasting, at this merely preliminary approval stage, to the point of speculation. The categorisation should have been left at "operational work" with the "building work" exception inapplicable.

section 3.2.2

[37] I should say something of s 3.2.2. The learned Judge concluded the provision meant one should regard the stage one application as embracing an application for material change of use. The provision appears to be directed towards avoiding a situation where, for example, a person lawfully erects a building which must remain empty and unusable if no subsequent development permit is obtained for the associated change of use. I accept the submission that the section should be construed as applying to applications for a development permit for the relevant works, rather than, as here, for a preliminary approval. As has been mentioned, a preliminary approval does not authorise that the work be carried out. That will only lawfully occur if and when a development permit is granted. In other words, the section should be construed as operating only if the structure or works may not be used by reason of the absence of a development permit, which is not this case.

[38] In the result, the work, the subject of the stage one application and preliminary approval, was in my view rightly regarded by the Council as "operational work for filling or excavation" and therefore, by application of the City Plan, code assessable and not impact assessable.

Macag

[39] It remains to mention the learned Judge's substantial reliance on the decision of the South Australian Full Court in *Macag*. His Honour was particularly concerned that a substantial project could be well advanced but with no capacity of control by the local authority, and possibly irreversible impact on the land. It was that concern which influenced the outcome in *Macag*. While such concern was legitimate under the South Australian legislation on the construction urged, it was however unwarranted here. That is because, by contrast with the Queensland *Integrated Planning Act*, the relevant South Australian legislation made no provision for "operational work" and a process of code assessment for related proposals. The distinction between the respective pieces of legislation was highlighted in a cautionary way in the reasons expressed by this court in granting leave to appeal.

[40] Under the Queensland Act, concern that acts having a material effect could be carried out without assessment is obviated by the existence within the category of "development" of "operational work", taken with the provisions of the Act and the City Plan requiring a development permit and prescribing code assessability. A feeling that impact assessment might better meet the public interest is obviously not to the point where the legislature has addressed the point and deemed code assessment sufficient.

[41] In my view, the natural construction of the statutory provisions, in the context of the uncontested facts of this matter, warrants the conclusion that the learned Judge erred in law, in treating the stage one proposal as impact assessable.

[42] I would order, in appeal numbers 8354 and 8355 of 2002:

1. that the appeals be allowed with costs to be assessed;
2. that the declarations made by the Planning and Environment Court on 6 September 2002 be set aside;
3. that the subject application to that court filed on 19 July 2002 be dismissed with costs to be assessed.

[43] **JERRARD JA:** In this appeal I have had the considerable advantage of reading the reasons for judgment and proposed orders of de Jersey CJ. His Honour's concise statement of the relevant facts, issues, and arguments, makes it unnecessary for me to repeat those, and I respectfully agree with much of his judgment. The critical point on which we disagree is my view of the effect of the development application for "Stage 1" development approval. That was an application for preliminary approval for operational work and for a development permit for reconfiguring a lot (subdividing three lots into 19 lots ("the Stage 1 land") as originally applied for).[1]

[44] To explain my view it is necessary to make some further reference to the facts and to the Act. Considering the Stage 1 proposal as a discrete application, it was an application for development approval with respect to five parcels of land, contiguous to each other, and totalling 42.6435 hectares in area. The original application dated 30 April 2001 sought preliminary approval for operational work to be carried out on all five lots, and on all of the land, save the 16.44 hectares of the one lot which was to remain a park land.

[45] That operational work was excavation and filling. The judgment under appeal records in [17] that the purpose of the proposed earthworks was to produce flat land across all five lots (excluding the park land) at the Q100 flood level (a minimum of RL of 3.54 metres), as illustrated at AR 582. Excluding the park area, a significant portion of the south western aggregate block of five lots will be excavated, and likewise a good part of the north and eastern side of the aggregated area. The land so cut will be used to fill all the remainder of the aggregate area, excluding the park.

[46] The court was told at the hearing of the appeal that some 210,000 cubic metres of soil will be moved, and that in the area designated the balance land in the Stage 1 application and on the eastern part of that balance land currently designated rural, there will be a 14 metre drop down in height created by the excavation between that area of the balance land and a neighbouring property. These are significant works.

[47] As well as seeking approval for that operational work consisting of that filling and excavation affecting every part of all five lots (excepting the park land), the Stage 1 application also sought a development permit for reconfiguring the three lots of the five designated general industry, and lying in the north and west of the aggregate area, into 19 lots. Those subdivided lots will total 12.78 hectares in area, and the remaining area (consisting of two lots, one zoned light industry, and the other a mixture of future industry, rural, and park land) upon which the earth works would be performed (i.e. excluding the park land) will total 29.8635 hectares in area ("the balance land"). The Stage 1 application did not seek any reconfiguring of that balance land. The Stage 1 application explained (at AR 116) that it was proposed to cut and fill the Stage 1 land to provide relatively level industrial allotments, and that excavation and filling of the land "is part of the site contamination rehabilitation and land subdivision operational works".

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[1] The *Integrated Planning Act* used upper case for the first letter of all those terms. To avoid a judgment that appears like a 19th Century pamphlet, lower case is used.

[48] Documents accompanying the application for development approval in Stage 1 informed the Council that the site, in its wet land area, contained a number of existing water bodies that were "impacted by contaminants" and thus required remediation to reduce the risk of environmental harm (at AR 181). The application informs that:

> "Land remediation works will involve excavation of the contaminated soil and appropriate encapsulation within selected industrial lots.
>
> It is understood that this remedial strategy would result in the removal of contaminated wetlands that have established along the drainage lines which were used as part of the previous tannery effluent overflow ponds system. However, to achieve the remediation objectives this action is necessary."

[49] The application elsewhere informed the Council (at AR 179) that in order to achieve the upper limits of 400 mg/kg for Environmental Threshold Levels and associated phytotoxity limits, for Chromium III, set by the Contaminated Land Unit for this project, the only option is remediation by excavation and relocation. The application enlarged on this at (AR 564) to explain that:

> "There are no practicable alternatives to the proposed works from an environmental and financial perspective.
>
> The retention of the site in its current condition would maintain the risk of environmental harm associated with the presence of heavy metals contamination that exists in an unsecured state where there is a potential for release into the receiving environment.
>
> The removal of contaminated material from the site for off-site treatment/disposal is not an appropriate or acceptable management strategy.
>
> The subsequent re-development of part of the site for the purpose of establishing an industrial estate is the only manner by which it would be practicable to finance the on-site treatment and containment of contaminated material."

The "subsequent redevelopment" was the application described as Stage 2, made that same day, for reconfiguration of the balance land into 18 lots.

[50] The written submission in reply made by the first respondents in Appeal No 8354 asserts [in 106.2] that part of the contaminated land is situated in the rural zone of the balance land, and that this is demonstrated at AR 300 and AR 577. The latter is a plan which has unreadable notations; a better version at AR 573 is not much better. However, the description given was not challenged, and it implies that some of the Stage 1 land is also contaminated. In any event the documents accompanying the Stage 1 application record (at AR 578) that an area in the north and north west of the site will be the repository for the contaminated excavation soil, with a holding capacity of 116000 cubic metres. The north west area must be within the Stage 1 land. The application for Stage 1 approval makes clear that dealing with the contamination problem on the aggregate area is critical for Master Butchers Ltd. Its opponents seemed more concerned in their submissions to avoid any change.

[51] The approval given to the Stage 1 application, which had been slightly reworked by then, was for reconfiguration into 20 not 19 lots, but otherwise largely as applied for. A specific condition of the preliminary approval requires the applicant to undertake all of the earth works described herein, the condition being expressed as including that:

> "The earth works and/or remediation works to be carried out on proposed lot 21 (balance lot) is to ensure that the final land form/level area representative of, and compatible with the surrounding rural land form."

The "lot 21 (balance lot)" is the balance land.

The Act

[52] The *Integrated Planning Act* describes "development" as being any of:

(a) carrying out building works;
(b) carrying out plumbing or drainage work;
(c) carrying out operational work;
(d) reconfiguring a lot;
(e) making a material change of use of premises.

The Dictionary in Schedule 10 of the Act provides that "premises" means a building or other structure or land. The Act in Part 3, Division 2 provides definitions of each of building works, drainage work, material change of use, operational work, plumbing work, and reconfiguring a lot. Operational work is defined as not including building, drainage, or plumbing work; and does include within its meaning excavating or filling that materially affects premises or their use, or undertaking work "in, on, over or under" premises that materially affects premises or their use. It is clearly intended by those definitions that operational work that materially affects premises or their use is not ipso facto a material change of use of those premises.

[53] The provisions of the Act recognise a variety of development that is assessable development. Such development is to be assessed against one or more of a quite large number of applicable codes, which describe the performance criteria to be met, and the acceptable solutions prescribed for achieving those criteria. Where none is prescribed, then "information requirements" inform applicants what information must be supplied to the planning authority.

[54] Schedule 8 of the Act describes some development that is made assessable development by the Act. The definitions in Schedule 10 make clear that a planning scheme in force in the Local Authority area can also identify assessable development. Some such development requires "impact assessment" of the environmental effects of proposed development and the ways of dealing with the effects.

[55] Section 3.1.4(1) of the Act provides that a development permit is necessary for assessable development. If granted, a development permit authorises assessable development to occur (s 3.1.5(3)). Each of a development permit and a preliminary approval is a "development approval" as defined in Schedule 10. In comparison to a development permit, a preliminary approval whilst approving assessable development does not authorise it to occur; and there is no requirement to get a

preliminary approval for development (s 3.1.5). However, such approvals are obtained as a matter of practice since they inform developers of the realistic prospects of obtaining development approval for that development. Irrespective of whether preliminary approval or a development permit is sought, the application for either is one for development approval and it must be:

- made in the approved form;
- contain an accurate description of the land, the subject of the application, as specified in s 3.2.1 of the Act. Section 3.2.3(2) makes clear that the application must identify whether the development approval is for -
  - carrying out building work;
  - plumbing or drainage work;
  - carrying out operational work;
  - reconfiguring a lot;
  - making a material change of use of premises.

[56] The Brisbane City Plan 2000 is a planning scheme in terms of the Act and makes extensive provision for the various codes against which assessable development as described therein is to be assessed, when occurring on land zoned either rural, light industry, or future industry. For all three zonings, the City Plan requires that operational work for filling or excavation be assessed only against the Filling and Excavation code; and also relevantly requires that any material change of use for which development approval is sought be subject as well to impact assessment. Impact assessment necessitates public notification of the application (s 3.4.4), thus entitling interested members of the public to make submissions, and "submitters" are given rights of appeal by s 4.1.28.

[57] As is made clear in the judgment under appeal and that of the Chief Justice, the developer lodged applications for preliminary approval for each of Stage 1 and Stage 2 at the same time. The "Stage 2" application sought a development permit for reconfiguring the balance land area of Stage 1 (excluding the park) into 18 proposed lots, and preliminary approval for a material change of use (to general industry) and for carrying out operational work. The material change of use was simply the zoning change of the future industry, light industry, and rural areas respectively to general industry (excluding the park area) (AR 307).

[58] The effect of applying for preliminary approval for a material change of use in the Stage 2 application was that it required impact assessment, and the public notification provisions of the Act were followed for that application. The appellants in Appeal No 5868 of 2002 appealed to the Planning and Environment Court against the approval of that Stage 2 application, on the grounds that it was a piecemeal application. However, opposition to Stage 2 by submitters was necessarily limited to the applications for reconfiguring or subdividing that balance land and to the proposed rezoning, and **not** to the proposed cutting and filling, since that was applied for and approved in the Stage 1 application requiring on its face only assessment against that filling and excavation code. The first respondent in Appeal No 8354 and 8355 of 2002 succeeded in the Planning and Environment

Court in satisfying the learned judge that in truth the Stage 1 application itself was for a material change of use of the balance land area of Stage 1, and that accordingly it required impact assessment as well.

Conclusions

[59] I have descended into this extensive detail as to the nature of the Stage 1 application and the provisions of the Act and the Brisbane City Plan to explain my respectful disagreement with the views of the Chief Justice. I do so simply because the definition of "use" in Schedule 10 of the Act provides that in relation to premises "use" includes "any" use incidental to and necessarily associated with the use of the premises. In *Boral Resources (Qld) Pty Ltd v Cairns City Council* [1997] 2 Qd R 31 (at 33), this court considered that extended definition was not satisfied in circumstances where the further or other use was not unavoidably involved in the authorised use, and where the authorised use was economic without the other use. I consider that each of those requirements of "necessary" (and incidental) use are satisfied here.

[60] The documents forming part of the Stage 1 application, which are supporting information as described in s 3.2.1(3)(b) of the Act, plainly describe the entirety of the filling and excavation across both the Stage 1 land sought to be divided into 19 lots and the balance land as necessary for the decontamination of the aggregate area and for Stage 1 itself. Further, it is said there are no practicable financial alternatives. I consider that the application for approval for carrying out that filling and excavation work on the balance land of the Stage 1 application is an application for a necessary and incidental use of that balance land, as explained in *Boral Resources*, to the use of that Stage 1 area zoned general industry. There was therefore an application for a material change of use of that balance land from future industry and rural to general industry. It is no answer to say that the developer might have obtained fill from elsewhere. That was not what the applicant proposed, and the application specified that contaminated soil excavated would be dealt with by "appropriate encapsulation" within selected lots and not removed. The application did not propose either taking away any excavated soil or bringing in any soil from anywhere else.

[61] Recognition of the fact that the Stage 1 application described an intended use of the balance land as necessary and incidental to the use of the Stage 1 area for general industry does not damage the integrity of the *Integrated Planning Act,* as described in the submissions of the Brisbane City Council and repeated in the judgment of the Chief Justice. The submission that the Act allows a developer to apply for preliminary approval for operational work, obtain that approval, then obtain a development permit, and then carry out that work, followed eventually by an application for further development approval for the material change of use ultimately decided upon, is not a submission which described what was occurring with these applications. In truth one composite application was really being made, for reconfiguration of lands zoned general industry, future industry, light industry, and rural, into 39 separate lots zoned general industry and that composite application was made by two applications presented at the same time. Recognising that the very terms of the "Stage 1" of those two applications proposed necessary and incidental use of the balance land for that Stage 1 application does not jeopardise the scheme of the Act described in the submission quoted. Indeed, the "Stage 2" development (the reconfiguration for sale into 18 lots of the rezoned

balance land) is itself financially and otherwise necessary and incidental to the use applied for of the Stage 1 land.

[62] The argument that the *Integrated Planning Act,* in contrast to the legislation it replaced, carefully distinguishes preliminary work such as excavation, plumbing, drainage, building, and operational works from the developed result which is a material change of use, can be accepted as accurate. However, the argument that holding the Stage 1 application to be for a material change of use of the balance area land in that application will make it impossible for planning authorities, such as the Brisbane City Council and its officers, to know when what would otherwise be properly called operational works should be identified as a material change of use, lacks validity. A case such as this, where the Stage 1 application is itself accompanied by another application for a material change of use of that "balance" land, immediately identifies it as a significant matter to which close attention should be paid. Where an application like the Stage 1 application here is made for a preliminary approval for operational work involving such a huge degree of operational work on all of both the land directly the subject of the application and other land, it seems likely a conclusion could easily be reached that the application involves the use of that other land as incidental and necessarily associated with the development approval applied for.

[63] It follows that I agree with the learned judge below, to quote from [48] of his reasons, that:

> "The cut and fill operations on this rural land, even as part of the Stage 1 Application, are incidental to and necessarily associated with the industrial use of the Stage 1 land"

and that that was therefore a material change of use of that land. I would accordingly dismiss the appeals in Appeal No 8354 and 8355 of 2002.

Piecemeal Applications

[64] I am satisfied that to apply the passage cited in [9] of the reasons of the Chief Justice from the judgment in *Brisbane City Council v Cunningham,* that:

> "…it is only where land is proposed to be used for the one purpose at one time that consent for its use must be applied for in one application",

leads to the conclusion that there should have been just one application in this matter. It was proposed to level by cutting and filling all of the land to be reconfigured into 38 (or thereabouts) lots used for the purposes of general industry, and all cutting and filling was to occur in the one significant operation on land designated general industry. Which resulting lots were marketed first was entirely up to the developers; Stage 2 land might be. Accordingly, I would hold that the considerations of convenience described in [12] of the reasons of the Chief Justice, which could only be the absence of public notification and submitter appeal rights, do not justify the separate applications that were made. I would allow the appeal in Appeal No 5868 of 2002. I would reserve the costs of each appeal pending consideration of written submissions by the parties to be provided within seven days.

[65] **WHITE J:** I have had the advantage of reading the reasons for judgment of the Chief Justice and Jerrard JA where the relevant facts and arguments advanced on

these appeals are set out in detail. So far as appeals No 8354 and 8355 of 2003 are concerned I support the approach and proposed orders of Jerrard JA. I respectfully agree with the Chief Justice that the appeal in No 5868 of 2002 should be dismissed.

[66] The ultimate question seems to be whether what was sought was in reality a material change of use of the balance land area of stage 1 rather than simply operational works, being filling and excavation. The consequence of having two applications in respect of this land has meant that the stage 1 application was code assessable only, that is, assessable by an officer of the Brisbane City Council, while stage 2 was impact assessable giving submitter rights which the former did not. The appellants contend that in so doing the proper consideration of the proposed use of the land has been impeded.

Appeal No. 5868 of 2002

[67] The appellants took a preliminary point below that the applications for development were 'piecemeal' as that expression has come to be used deriving from the High Court decision in *Pioneer Concrete (Qld) P/L v Brisbane City Council & Ors* (1980) 145 CLR 485 per Stephen J at 500. There seems no reason to doubt that the proposition derived from that case applies to applications made under the *Integrated Planning Act 1997* ("the *IPA*") because in *Pioneer* the court was concerned with the identification in the application of "the land to which the application related or applied." Section 3.2.1 of the *IPA* refers to "the land, the subject of the application" and the "land to which the application applies." The learned judge below concluded that the applications were not piecemeal and dismissed the preliminary point.

[68] Stephen J in *Pioneer* observed at 504

> 'Such piecemeal applications are likely to place planning authorities or review tribunals in somewhat of a dilemma. The first application may well require assessment of the entire proposal if it is properly to be disposed of; yet the second application will still remain to be dealt with on its merits as an independent matter. When it comes to be heard there will be strongly felt pressures to avoid what might seem to be conflicting outcomes if, the first application having been granted, the second were to be refused.'

His Honour noted at 505

> 'All this, of course, places no obstacle in the way of applications where consent becomes necessary for the extension of an existing use to adjoining land or where an applicant for consent to a proposed use contemplates that there will later be an extension of that use. It is only where land is proposed to be used for the one purpose at the one time that consent for its use must be applied for in the one application.'

[69] It may be accepted that nothing was held back from the Council by submitting two proposals. They were submitted and considered together. The entire development was laid out for the consideration of the planning authorities. The concerns expressed in *Pioneer* are not present here. Reference was made to *Brisbane City Council v Cunningham* (2001) 115 LGERA 326. The application there under

consideration was, with respect, correctly characterised as a true staged development. Although I conclude that the appeals in 8354 and 8355 of 2002 ought to be dismissed that does not imply that this appeal should succeed. There is no error in the approach of the learned judge below.

Appeals No. 8354 and No. 8355 of 2002

[70] Having been unsuccessful on their preliminary point the respondents to these appeals challenged the planning authority's approval of the stage 1 application on the ground that it was invalid as including impact assessable development which should have been notified to the public and assessed accordingly. The learned judge below concluded in favour of the respondents and declared the approval to be invalid because, in effect, he characterised the earthworks in and on the rural land as required in stage 1 as both building work and material change of use rather than operational work as contended for by the appellant and as the Council had approved it.

[71] The appellant owns 42.6435 hectares of land on Fleming Road, Hemmant, described as Lot 51 on RP 136252, Lot 1 on RP 72122 and Lot 1 on RP 132766, Lot 3 on RP 72122 and Lot 4 on SP 118579. For the purposes of the Brisbane City Plan 2002 the first three lots comprising some 14.30 hectares are designated general industry. Lot 3 comprising 1.116 hectares is designated light industry. Lot 4 with a total area of 26.74 hectares is partly designated future industry (0.47 of a hectare), rural (10.58 hectares) and park land (5.69 hectares) ("the land"). The appellant wished to develop the land into industrial lots. The land is contaminated as a result of the operation of a tannery until approximately 1978 and is on the Contaminated Land Register.

[72] In order to advance the development the appellant needs to undertake extensive cut and fill earthworks over all the land to reconfigure it to create some 39 industrial lots. The appellant lodged two applications dated 30 April 2001 with the Brisbane City Council ("the Council") relating to the whole of the land supported by two town planning reports by Bennett & Francis Pty Ltd in essentially the same terms although divided into stage 1 and stage 2 developments and referring to earthworks for all the land. Stage 1 was proposed to be carried out on the industrial land reconfiguring it into 19 lots (19 were proposed and 20 approved). It does not contain any of the rural land. Stage 2 was proposed to be reconfigured to produce a further 18 lots and contains some land in the industrial area although most is in the rural area (18 lots were proposed and 20 approved). The first application described the current use as "vacant and storage/administration" although it is known to be used also for cattle grazing. The town planning report attached to the application described the proposal as having two main components,

> "1. Subdivision of the land into industrial lots and new road, comprising stage 1 of the project. A Development Permit is sought for reconfiguring a lot.
>
> Access to these industrial lots is proposed to be via Fleming Road in such a manner that prohibits trucks accessing the north to Hemmant, Lytton Road and the Port.

A total of 19 lots are proposed, ranging in size from 2000m^2 to 2.368 hectares.

2. It is proposed to cut and fill the land to provide relatively level industrial allotments, however, no filling is to occur within the Regulation Line.

   Excavation and Filling of the land is part of the site contamination rehabilitation and land subdivision operational works. A preliminary approval is sought for operational works."

The operational work was excavation and filling.

[73] The second application described as stage 2 is further described in the Bennett & Francis Report as a proposal which has two main components,

"1. A Material Change of Use of part of the land is requested from Future Industry, Light Industry and Rural Area to General Industry Area. These areas are clearly defined on the attached copy of Bennett & Francis' Plan 005685.25 attached at **Appendix "B"**. A balance proposed lot 38, remains in the Rural Area and a further balance area of Parkland is proposed below the regulation line. A preliminary approval is sought for the proposed Material Change of Use.

2. Subdivision of the land into 18 industrial lots, 1 rural lot, 1 parkland lot and new road comprises stage 2 of the project. A Development Permit is sought for reconfiguring a lot.

   Access to the industrial lots is proposed to be via Fleming Road in such a manner that prohibits trucks accessing to the north to Hemmant, Lytton Road and the Port.

   Of the 18 Industrial Lots proposed, sizes range from 2000 m^2 to 8900 m^2."

[74] On 26 February 2002 the Council approved the application for stage 1

" Development Application for Reconfiguring a Lot (20 Lots, a balance lot, new road and parkland) as well as Filling and Excavation on land at 252-288 Fleming Road, Hemmant Qld 4174 and described as Lot 1 on RP132766, Lot 51 on RP136252, Lots 1,3 on RP72122 and Lot 4 on SP118579, Parish of Tingalpa.

…

This approval is for;

Reconfiguring a Lot - Development Permit

Carrying out Operational Work - Preliminary Approval."

[75] The approval with respect to the stage 2 application was

"Development Application for Material Change of Use for Industry (other than Schedule 2) and Warehouse as well as Reconfiguring a Lot (20 lots, including 1 Rural lot, new road and parkland) on land at

> 252-288 Fleming Road, Hemmant Qld 4174 and described at Lot 1 on RP132766, Lot 51 on RP136252, Lots 1,3 on RP72122 and Lot 4 on SP118579, Parish of Tingalpa.
>
> …
>
> This approval is for;
>
> **Material Change of Use - Preliminary Approval**
>
> **Reconfiguring a Lot - Development Permit**
>
> **Carrying out Operational Work - Preliminary Approval**."

As can be seen, both of these approvals applied to the whole of the land.

[76] Each approval was subject to conditions. The magnitude of the earthworks proposed is such that some 210,000m^3 of soil would be excavated particularly from Lot 4 and used in the allotments proposed in the first application including part of proposed Lot 21 to the north (described as "balance land" being the stage 2 land) but not to the proposed park. The earthworks were identified as operational works associated with stage 1 and accepted by the Council as code assessable, that is requiring no notification to the public who could not make submissions which the Council would be required to consider before making a decision about the application.

[77] Conditions 2 and 53 imposed by the Council required all the operational works associated with the development approval to be carried out prior to use and endorsement by the Council of the Survey Plan of the proposed reconfiguration for *Land Title Act 1994* registration. Condition 3 of the stage 2 application required the Survey Plan of the reconfiguration proposed in the stage 1 application to be sealed by the Council prior to the endorsement of Survey Plan of the reconfiguration proposed in the stage 2 application. Condition 24 of the stage 2 application required the earthworks "on the site" in accordance with a new plan to be submitted. Condition 24 (c) dealt with the rural land.

> "The earthworks and/or remediation works to be carried out on proposed Lot 41 (rural lot) is to ensure that the final land form/levels are representative of and, compatible with the surrounding rural land forms. The final contours are to be to the satisfaction…"

[78] Condition 61 of the stage 1 approval required the appellant to undertake earthworks over the whole land as shown in the submitted plan. The stage 2 land was described in the stage 1 approval as "balance Lot 21." Condition 61(c) required

> "The earthworks and/or remediation works to be carried out on proposed Lot 21 (balance Lot) is to ensure that the final land form/levels are representative of, and compatible with the surrounding rural land forms. The final contours are to be to the satisfaction of…"

[79] As the learned judge below found, the purpose of the whole development is to provide industrial lots on which buildings or other structures can be erected. The references in the reports are to traffic impacts, noise emissions, making clear what is intended. The land is to be levelled and compacted. There are to be roads into the

development, and the usual services are to be provided to the lots as set out in the approvals.

[80] The *IPA* in s 1.3.2, defines 'development' as any of five categories

- carrying out building work
- carrying out plumbing or draining work
- carrying out operational work
- reconfiguring a lot
- making a material change of use of premises.

Each is separately defined. 'Building work' means

> '(a) building, repairing, altering, underpinning (whether by vertical or lateral support), moving or demolishing a building or other structure; or
>
> …
>
> (b) excavating or filling –
>
> (i) for, or incidental to, the activities mentioned in paragraph (a); or
>
> (ii) that may adversely affect the stability of a building or other structure, whether on the land on which the building or other structure is situated or on adjoining land; or
>
> (c) supporting (whether vertically or laterally) land for activities mentioned in paragraph (a).'

'Material change of use', of premises means

> '(a) the start of a new use of the premises; or
>
> (b) the re-establishment on the premises of a use that has been abandoned; or
>
> (c) a material change in the intensity or scale of the use of the premises.'

'Operational work' means

> '(a) extracting gravel, rock, sand or soil from the place where it occurs naturally; or
>
> …
>
> (c) excavating or filling that materially affects premises or their use; or
>
> …
>
> (e) undertaking work (other than destroying or removing vegetation not on freehold land) in, on, over or under premises that materially affects premises or their use;
>
> …
>
> but does not include building, drainage or plumbing work.'

As can be readily seen "building work" and "operational work" are mutually exclusive.

[81] Other definitions are located in schedule 10. 'Use' in relation to premises 'includes any use incidental to and necessarily associated with the use of the premises'. 'Premises' means

> '(a) a building or other structure; or
> (b) land (whether or not a building or other structure is situated on the land).'

[82] Characterising the earthworks in stage 1 as building works and/or material change of use in accordance with the City Plan has the consequence that it is impact assessable.

[83] The learned judge below concluded that read together the definitions of "development", meaning making a material change of use of premises (land), and "material change of use" meaning the start of a new use of premises, can include the process which leads to the actual use. That approach is consistent with the dynamic nature of the definition of development and the Explanatory Notes to the *IPA* and "use" includes any use incidental to and necessarily associated with the use of the premises.

[84] The appellant and the Council contend that what is proposed is operational works within the *IPA* definition, it is not building work and the stage 1 earthworks are not necessarily associated with a material change of use. His Honour's approach was to look at the purpose of the work, its scale and other questions of fact and degree to see if, objectively, it amounted to material change of use. He concluded that the stage 1 application necessarily included the rural land as an incidental use for the industrial subdivision.

[85] As the environmental report included in the application stated

> " Upon review of the site contamination reports provided by Baseline Consulting Pty Ltd it appears that the only commercially viable strategy available to remediate the identified land contamination at the Master Butchers site is under the proposed land development plan. A remediation action plan and a site management plan will need to be prepared for the Environmental Protection Agency and these plans will dictate the activities undertaken at the site. The preliminary studies concerning land contamination at the site have indicated that a number of existing waterbodies are impacted by contaminants and thus require remediation to reduce the risk of environmental harm. Land remediation works will involve excavation of the contaminated soil and appropriate encapsulation within selected industrial lots."

His Honour found that all the rural land was proposed to be cut or filled and the fill partly compacted so that as a matter of fact and degree it was to undergo material change of use. It is plain that the stage 1 earthworks on the balance land were incidental and necessary to the use of the stage 1 area zoned general industry. It follows that these appeals should be dismissed.

[86] The orders which I would make are:

1. In appeal No. 5868 of 2002, dismiss the appeal.
2. In appeal No. 8354 of 2002, dismiss the appeal.

3. In appeal No. 8355 of 2002, dismiss the appeal.