

SUPREME COURT OF QUEENSLAND

CITATION: *Iwasaki Sangyo Co (Aus) Pty Ltd v Chief Executive, Department of Environment and Resource Management* [2012] QCA 241

PARTIES: **IWASAKI SANGYO CO (AUS) PTY LTD**
ACN 009 858 191
(applicant)
v
CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND RESOURCE MANAGEMENT
(respondent)

FILE NO/S: Appeal No 2675 of 2012
QCAT No 256 of 2011

DIVISION: Court of Appeal

PROCEEDING: Application for Leave *Queensland Civil and Administrative Tribunal Act*

ORIGINATING COURT: Queensland Civil and Administrative Tribunal at Brisbane

DELIVERED ON: 7 September 2012

DELIVERED AT: Brisbane

HEARING DATE: 6 August 2012

JUDGES: Muir and Fraser JJA and Philippides J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Application for leave to appeal refused with costs.**

CATCHWORDS: PROCEDURE – INFERIOR COURTS – QUEENSLAND – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where respondent issued a property map of assessable vegetation (PMAV) to the applicant, containing category A areas – where inclusion of category A areas is permitted if the respondent reasonably believed that a vegetation clearing offence was being or had been committed in relation to the areas under s 20BA(a) of the *Vegetation Management Act 1999* (Qld) (VM Act) – where the respondent made a review decision pursuant to s 63A(1)(b) of the VM Act and issued a review notice to the applicant, including an amended PMAV which reduced the number and/or size of the category A areas – where the applicant filed an application to QCAT for review of the internal review decision – where a Tribunal member directed that the Tribunal would hear the proceeding with reference to the proposed new PMAV with the parties at liberty to adduce

evidence and address the Tribunal on the applicability of the proposed new PMAV – where the applicant applied for leave to the QCAT Appeals Tribunal – where leave was refused – where the applicant argued the direction impermissibly changed a review decision into an original decision, thus exceeding QCAT’s jurisdiction – where the respondent contended that the direction was of a procedural nature only – whether QCAT had power to make the direction

Acts Interpretation Act 1954 (Qld), s 4, s 24AA

Integrated Planning Act 1997 (Qld), s 4.3.1(1)

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 17, s 18, s 19, s 20, s 24, s 62(1), s 150(1), s 150(3)(b)

Vegetation Management Act 1999 (Qld), s 20AL, s 20B, s 20BA(a), s 20C, s 20D, s 62, s 63, s 63A, s 63B

COUNSEL: P Flanagan SC, with M Wilson, for the applicant
M Hinson SC, with J Brien, for the respondent

SOLICITORS: Clayton Utz for the applicant
Department of Environment and Resource Management for the respondent

- [1] **MUIR JA:** The applicant seeks leave to appeal pursuant to s 150(1) and s 150(3)(b) of the *Queensland Civil and Administrative Tribunal Act 2009* (the “QCAT Act”) against a decision of the Queensland Civil and Administrative Tribunal’s (“QCAT”) Appeals Tribunal made on 20 February 2012 in a proceeding commenced in QCAT by the applicant. The central questions for determination arise from a direction in the proceeding made by a member of QCAT on 24 June 2011 that:

“Pursuant to section 62(1) of the *Queensland Civil and Administrative Tribunal Act*, the Tribunal will hear the proceeding with reference to the proposed new PMAV and the parties are at liberty to adduce evidence and address the Tribunal on the applicability of the proposed new PMAV.”

- [2] The applicant argued that this direction impermissibly altered a review decision made by the respondent pursuant to s 63A(1)(b) of the *Vegetation Management Act 1999* (the “VM Act”) into an “original decision and thereby exceeded the Tribunal’s jurisdiction”. The respondent’s contention is that the direction was of a procedural nature and did not, and could not, change the review decision into a new original decision.

The factual background

- [3] On 20 April 2010, the respondent issued a Property Map of Assessable Vegetation (PMAV) to the applicant pursuant to s 20B(1)(g)(i) of the VM Act.
- [4] The PMAV contained category A areas¹. Their inclusion is permitted if the respondent reasonably believed that a vegetation clearing offence was being, or had

¹ See VM Act, s 20AL(e).

been, committed in relation to the areas.² The subject vegetation clearing offence was alleged to be the carrying out of an assessable development without a permit in contravention of s 4.3.1(1) of the *Integrated Planning Act 1997*.

- [5] On 20 May 2010, the applicant applied, pursuant to Part IV Division 1 of the VM Act for an internal review of the decision to issue the PMAV with respect to the category A areas it contained. The respondent made a review decision on 30 June 2010 pursuant to s 63A(1)(b) of the VM Act and issued a review notice to the applicant, including an amended PMAV which reduced the number and/or size of the category A areas (“the internal review decision”).
- [6] On 28 July 2010, pursuant s 17 and s 18 of the QCAT Act and s 63B of the VM Act, the applicant filed an application with QCAT for review of the internal review decision. A compulsory conference was held between the parties to the QCAT proceeding on 9 March 2011. On or after the conclusion of the conference, the Tribunal member directed by consent that the respondent provide “... a map of any additional potential [category A] areas together with submissions” in relation thereto and that the applicant provide submissions in reply to the respondent’s submissions. The respondent’s submissions sought “... the amendment of the PMAV based on new evidence which has been gained during the QCAT process ...”. The submissions included the following:

- “7. As a result of the new evidence, DERM³ has a reasonable belief that a vegetation clearing offence has been committed in a number of areas not reflected on the current PMAV (‘the additional areas’). Accordingly, DERM believes the additional areas should be mapped as category A on the PMAV.
8. DERM has produced a report (Attachment 1) documenting the reasons for forming the reasonable belief in relation to the additional areas.
9. The additional areas are outlined in blue on working diagrams (Attachment 2).
10. The current category A areas as depicted on the PMAV dated 24 March 2011 are outlined in red on the working diagrams (Attachment 2).
11. DERM is of the view that this submission is necessary to produce the correct and preferable decision which is the purpose of a review pursuant to section 20(1) of the QCAT Act.
- ...
16. DERM requests that the Tribunal consider DERM’s submission in relation to the additional areas. If the Tribunal considers that these areas should be included on the PMAV, DERM would ask the Tribunal to make an order for the amendment of the PMAV or an order directing DERM to amend the PMAV to include the additional areas as category A.”

² VM Act, s 20BA(a).

³ Department of Environment and Resource Management.

- [7] The applicant submitted that QCAT had no jurisdiction to accede to the request contained in the respondent's submissions.
- [8] On 24 June 2011, the Tribunal gave the direction quoted above.
- [9] The applicant applied for leave to appeal to the Appeals Tribunal. After a hearing on the papers, leave to appeal was refused on 15 February 2012.

The draft Notice of Appeal

- [10] The applicant's draft Notice of Appeal contains four proposed grounds of appeal which allege that the learned member erred in law:
1. *in failing to find that the direction made by QCAT on 24 June 2011 pursuant to s 62(1) of the QCAT Act, in effect impermissibly altered the "review decision" into an "original decision" for the purposes of s 63A of the VM Act;*
 2. *in failing to find that QCAT did not have jurisdiction to make the direction that altered the nature of the decision that was being reviewed from a "review decision" into an "original decision" for the purposes of s 63A of the VM Act;*
 3. *in failing to have regard to s 62 of the VM Act which mandated that every review of an original decision must be, in the first instance, by way of an application for an internal review of the decision; and*
 4. *in finding that QCAT had the jurisdiction either under the QCAT Act or the VM Act to make the direction.*

The applicant's arguments

- [11] Counsel for the applicant advanced the following arguments. The right to have a decision of a decision maker internally reviewed under s 63(1) of the VM Act is restricted to decisions requiring the issue of an information notice. Section 62 of the VM Act classifies any decision that may be internally reviewed as an original decision. An essential component of an original decision that is able to be internally reviewed is the prior issue of an information notice issued pursuant to s 20B(2) of the VM Act where a PMAV is involved.
- [12] There is no power under the VM Act to amend a PMAV. New areas may be added to an existing PMAV only by replacement of the original PMAV pursuant to s 20D of the VM Act. The operation of s 20D(4) extends the information notice requirement of s 20B to a replacement PMAV under s 20D. This explicit restriction on the addition of further areas to a PMAV, through the operation of s 4 of the *Acts Interpretation Act 1954*, displaces the otherwise general power of a decision maker to amend contained in s 24AA of the *Acts Interpretation Act*.
- [13] Even if the desired amendment only seeks to expand a previous PMAV area, s 20D(2)(b) provides that the previous PMAV must be replaced. Any attempt to expand or add to the previous PMAV either through the process of an internal review or, as here, through a QCAT external review, impermissibly turns the review decision into an original decision in respect of which an information notice and the right to internal review is mandatory.

- [14] Under s 63 of the VM Act, it is only persons who are given or entitled to be given an information notice about a decision under the Act who may apply for an internal review of the decision. Consequently, if QCAT had the power to amend or replace the PMAV, it would mean that a person in the position of the applicant has lost the right of an internal review by the respondent.

Relevant provisions of the VM Act

- [15] Provisions of the VM Act⁴ relevant to the issues under consideration are as follows:

20B When chief executive may make PMAV

- (1) The chief executive may make a PMAV for an area if—
- ...
- (d) the area has been unlawfully cleared; or
- ...
- (g) the chief executive reasonably believes—
- (i) a person has committed a vegetation clearing offence in relation to the area, whether before or after the commencement of this section, or a vegetation clearing offence is being committed in relation to the area; or
- (ii) the area was cleared of vegetation in contravention of a tree clearing provision under the *Land Act 1994* as in force before the commencement of the *Vegetation Management and Other Legislation Amendment Act 2004*, section 3; or
- ...
- (2) The chief executive must give each owner of land to be included in the PMAV an information notice about the decision to make the PMAV.

20BA Chief executive may make decision about category A area

The chief executive may make an area a category A area on a PMAV if the chief executive reasonably believes—

- (a) a vegetation clearing offence is being, or has been, committed in relation to the area; or
- (b) the area was cleared of vegetation in contravention of a tree clearing provision under the *Land Act 1994* as in force before the commencement of the *Vegetation Management and Other Legislation Amendment Act 2004*, section 3; or
- (c) prohibited development under the repealed Moratorium Act, part 5 was carried out in relation to the area.
- ...

⁴ *Vegetation Management Act 1999*, reprinted as in force on 26 March 2010, reprint 3D.

20D When PMAV may be replaced

- (1) The chief executive may replace a PMAV for an area (the *previous area*) with 1 or more PMAVs (each a *new PMAV*).
- (2) A new PMAV may apply to—
 - (a) part or all of the previous area; or
 - (b) part or all of the previous area and another area.
- (3) Subsection (1) applies only—
 - (a) if a matter mentioned in section 20B occurs in relation to an area mentioned in subsection (2); or
 - (b) to reflect a change to an endangered, of concern or a least concern regional ecosystem in an area mentioned in subsection (2); or

Editor's note

A change may only be made by amending the *Vegetation Management Regulation 2000*.

- (c) for a matter other than a matter mentioned in paragraph (a) or (b), if each of the affected owners agrees to the replacement.
- (4) A reference to a PMAV made under section 20B or 20C is taken to include its replacement under this section.
- (5) In this section—

affected owner means an owner of land proposed to be included in a new PMAV if any of the following apply—

- (a) the owner applied under section 20C for the making of the new PMAV;
- (b) there was not a PMAV for the land or part of the land;
- (c) the land, or part of the land, will be affected by a change to the boundary of a vegetation category area in the new PMAV.

...

62 Internal review process before external review

Every review of an original decision must be, in the first instance, by way of an application for an internal review of the decision.

63 How to apply for internal review

- (1) A person who is given, or is entitled to be given, an information notice about a decision made under this Act may apply for an internal review of the decision.

...

63A Review decision

- (1) The chief executive must, within 30 business days after receiving the application—
 - (a) review the decision (the *original decision*); and
 - (b) make a decision (the *review decision*) to—
 - (i) confirm the original decision; or
 - (ii) amend the original decision; or
 - (iii) substitute another decision for the original decision; and
 - (c) give the applicant notice (the *review notice*) of the review decision.
- (2) If the review decision is not the decision sought by the applicant, the review notice must comply with the QCAT Act, section 157(2).”

Consideration

- [16] The appeal is from an interlocutory decision which permits the respondent to adduce evidence and make submissions with a view to persuading QCAT to amend the PMAV or make a new one. QCAT may or may not accept the respondent’s submissions should the respondent pursue his presently foreshadowed course. It is open to the applicant to argue that such a course is impermissible.
- [17] There is much to be said for the view that interlocutory appeals of this nature should be discouraged as tending to cause delay and increase costs. It is pertinent also that the applicant, if dissatisfied with the QCAT decision, will have available to it the appeal procedures under the QCAT Act.
- [18] For these reasons, and because I am of the view that the applicant does not have a strong case on the merits and has suffered no injustice, I would refuse to grant leave to appeal. In view of the approach I have taken to the disposition of this application, I will confine the following remarks to an explanation of my conclusions as to the merits of the applicant’s case.
- [19] The applicant’s argument is based, in part, on the premise that the consequence of the 24 June direction was that QCAT became engaged in a review, not of the review decision, but of a fresh original decision. That contention is unsustainable. Rather than deciding to amend the PMAV, the respondent expressly refrained from doing so. Instead, the respondent invited the Tribunal to consider whether certain additional areas should be included in the, or an amended, PMAV as category A areas. Whether such areas should be included was a matter for the Tribunal. These conclusions are apparent from a consideration of the respondent’s submissions to the Tribunal dated 8 April 2011 and the Tribunal member’s reasons delivered 24 June 2011 (paragraphs 8 and 9 in particular).
- [20] A PMAV may be made on the chief executive’s initiative⁵ or on the application of a land owner.⁶ The applicant disputes the extent of the category A areas shown on the PMAV. Section 20AL of the VM Act defines “category A area” for present purposes as an area that “the chief executive decides under s 20BA is a category A

⁵ VM Act, s 20B.

⁶ VM Act, s 20C.

area”.⁷ The chief executive may make an area a category A area if the chief executive reasonably believes that “a vegetation clearing offence is being, or has been, committed in relation to the area...”.⁸

- [21] As counsel for the respondent submitted, the review application made to QCAT puts in issue the reasonableness of the respondent’s belief necessitating a consideration of the nature and extent of any clearing. The application to review implicitly accepts that the review decision may be set aside in favour of a decision not to make the PMAV. Counsel for the applicant accepted also that the Tribunal under s 63A of the VM Act could substitute another decision for the original decision, but argued that the express power of amendment in s 63A was confined by s 63B and s 20D(4).
- [22] Section 63B permits a person dissatisfied with a review decision to apply to QCAT for a review of the decision. By definition, according to the applicant’s argument, that meant that the respondent could not apply for a review of any decision to increase the category A area, if such a decision was made. It followed, it was submitted, that the review by QCAT only contemplated a result which would improve rather than worsen the applicant’s position. In present circumstances, that meant that QCAT would have power to reduce, but not increase, the category A areas.
- [23] The respondent’s counsel contended that even if the respondent has no general power to amend a PMAV, s 63A expressly confers such a power when the respondent is performing an internal review of an original decision. Counsel for the respondent submitted that as such a power is conferred for the purpose of correcting error it would be inconsistent with that purpose to read down the language of s 63A(1). QCAT has the functions of the respondent under s 63A and also the functions given to it by s 19 of the QCAT Act.
- [24] Counsel for the respondent also submitted that s 24AA of the *Acts Interpretation Act* 1954 conferred on the respondent power to amend a PMAV which “is exercisable in the same way, and subject to the same conditions, as the power to make” the PMAV. The competing contention was that the application of s 24AA was displaced by a contrary intention appearing from a combination of s 20D(2)(b), s 20D(4) and s 20B of the VM Act.
- [25] It is unnecessary, for present purposes, to consider these questions as the critical issue is QCAT’s relevant powers.
- [26] The argument that QCAT lacked power to amend the PMAV so as to increase the extent of the category A areas (but not, it would seem, decrease) is problematic. In exercising its review jurisdiction, QCAT may perform the functions conferred on it by both the QCAT Act and the VM Act and “has all the functions of the decision-maker for the reviewable decision being reviewed”.⁹ The purpose of such a review “is to produce the correct and preferable decision” and the hearing is to be “a fresh hearing on the merits”.¹⁰

⁷ VM Act, s 20AL.

⁸ VM Act, s 20BA.

⁹ QCAT Act, s 19.

¹⁰ QCAT Act, s 20.

[27] Section 24(1) of the QCAT Act is of particular significance for present purposes. It provides:¹¹

“(1) In a proceeding for a review of a reviewable decision, the tribunal may—

- (a) confirm or amend the decision; or
- (b) set aside the decision and substitute its own decision; or
- (c) set aside the decision and return the matter for reconsideration to the decision-maker for the decision, with the directions the tribunal considers appropriate.”

[28] Counsel for the applicant did not offer a satisfactory explanation of why the power conferred on QCAT should be treated as doing no more than conferring on QCAT the powers of the respondent under s 63A of the VM Act. Once a review decision is before QCAT for review, the process involved is quite different in nature to that in which the respondent makes a reviewable decision. The parties to the QCAT proceeding are engaged in a fresh hearing which QCAT must determine on the merits in order to “produce the correct and preferable decision”. QCAT must afford the parties natural justice and the respondent has an obligation “to use his or her best endeavours to help the Tribunal so that it can make its decision”.

[29] There would appear to be little or no need for the internal review procedure, or the provisions of a further “information notice”, where there is a fresh hearing in QCAT. The parties are able to ventilate their competing contentions before a tribunal and, at least as a general proposition, to rely on whatever relevant and admissible evidence they wish to make use of.

[30] Having regard to the considerations just discussed, the applicant’s construction appears to read down, unjustifiably, the express power conferred by s 24 of the QCAT Act to confirm, amend or set aside a decision or to substitute QCAT’s own decision for the decision under review.

[31] For the above reasons, I would refuse the application for leave to appeal with costs.

[32] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with those reasons and with the order proposed by his Honour.

[33] **PHILIPPIDES J:** I agree with the reasons of Muir JA and with the order proposed.

¹¹ Reprinted as in force 1 December 2009, reprint 2.