SUPREME COURT OF QUEENSLAND

CITATION:	*Sevmere P/L v Cairns Regional Council & Anor* [2009] QCA 232
PARTIES:	**SEVMERE PTY LTD** ACN 087 075 018 (appellant/appellant) **v** **CAIRNS REGIONAL COUNCIL** (respondent/first respondent) **CHIEF EXECUTIVE, DEPARTMENT OF NATURAL RESOURCES AND WATER** (first co-respondent by election/second respondent)
FILE NO/S:	Appeal No 12465 of 2008 DC No 144 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Planning and Environment Appeal
ORIGINATING COURT:	Planning and Environment Court at Cairns
DELIVERED ON:	14 August 2009
DELIVERED AT:	Brisbane
HEARING DATE:	8 May 2009
JUDGES:	McMurdo P, Holmes JA and Dutney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed;** **2. Appellant and first respondent pay second respondent's costs.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – OTHER MATTERS – where appellant made a development application (superseded planning scheme) ("DA(SPS)") – where respondent Council elected to assess appellant's application under superseded planning scheme – where, pursuant to s 3.3.15(1)(b) of the *Integrated Planning Act* 1997 (Qld), respondent Department assessed appellant's application with regard to existing planning scheme – where, on the basis of the latter scheme, Department directed Council to refuse appellant's application in part – whether Department required to have regard to superseded scheme, not the existing scheme STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – RULES OF CONSTRUCTION –

SUPPLYING, OMITTING AND SUBSTITUTING WORDS – where under s 3.2.5 of the *Integrated Planning Act* an assessment manager may elect to assess a DA(SPS) under a superseded planning scheme – where s 3.3.15(1)(b) requires a referral agency to assess an application having regard to "any planning scheme in force, when the application was made…" – where assessment manager is bound to follow referral agency's directions – where, under s 4.1.52, Environment and Planning Court must, in an appeal against a decision about a DA(SPS) assessed under superseded scheme, disregard existing scheme – where, under s 5.4.2, a developer may be entitled to compensation if a DA(SPS) is assessed under existing scheme – whether these provisions can be construed harmoniously – whether internal conflict exists in *Integrated Planning Act* – whether literal meaning of s 3.3.15(1)(b) produces an absurdity or anomaly – whether words of s 3.3.15(1)(b) bear a meaning other than their literal meaning – whether Court can imply additional words into s 3.3.15(1)(b)

Integrated Planning Act 1997 (Qld), s 3.2.5, s 3.3.15, s 3.5.4, s 4.1.27, s 4.1.52, s 5.4.2

Chang v Laidley Shire Council (2007) 234 CLR 1; [2007] HCA 37, distinguished
Inco Europe v First Choice Distribution [2000] 1 WLR 586; [2000] UKHL 15, applied
Kingston v Keprose Pty Ltd (1987) 11 NSWLR 404, cited
R v PLV (2001) 51 NSWLR 736; [2001] NSWCCA 282, applied
R v Young (1999) 46 NSWLR 681; [1999] NSWCCA 166, applied
Ravenscroft v Nominal Defendant [2008] 2 Qd R 32; [2007] QCA 435, applied
Saraswati v The Queen (1991) 172 CLR 1; [1991] HCA 21, cited
Tokyo Mart Pty Ltd v Campbell (1988) 15 NSWLR 275, applied
Wentworth Securities Ltd v Jones [1980] AC 74, applied

COUNSEL: D R Gore QC, with D Morzone, for the appellant
C L Hughes SC, with T Fantin, for the first respondent
M D Hinson SC, with J S Brien, for the second respondent

SOLICITORS: Miller Bou-Samra Lawyers for the appellant
MacDonnells Law for the first respondent
Crown Solicitor for the second respondent

[1] **McMURDO P:** This is another case where this Court is required to make sense of the inter-relationship between various provisions of the *Integrated Planning Act* 1997, or "*IPA*", as it is called by those who practise in this jurisdiction. I agree with Holmes JA that the appeal should be dismissed with costs, although I reach that conclusion by a slightly different journey through the hazy *IPA* maze of smoke and

mirrors. My reasons can be relatively briefly stated because Holmes JA has set out the relevant facts, issues and statutory provisions. I will only repeat these where it is necessary to explain my reasoning.

[2] The appellant, Sevmere Pty Ltd, which I shall call the developer, applied to the first respondent, the Cairns Regional Council, to develop land by constructing 29 multiple dwelling units. The developer asked the Council to assess the development application under the Council's superseded planning scheme.[1] The Council issued an acknowledgement notice to the developer stating that the development application would be assessed under the superseded planning scheme.[2] The Council identified the Department of Natural Resources and Water (whose Chief Executive is the second respondent) as a referral agency for the application under *IPA*. For convenience, I shall call the second respondent "the Department". Under s 3.3.15(1) *IPA*, the Department as a referral agency:

> "must, within the limits of its jurisdiction, assess the [development] application –
> …
> (b) having regard to –
> (i) any planning scheme in force,[3] when the application was made, for the planning scheme area;
> … ."

[3] At the time the developer made its application to the Council, a new planning scheme placed a significant proportion of the developer's land in an area zoned for conservation, whereas under the superseded planning scheme all of the developer's land was in the Residential 3 Zone. The Department directed the Council to refuse that part of the development application that related to building in the area zoned for conservation. The Council was therefore obliged to refuse that part of the development application.[4] The Council advised the developer that it was refusing that part of the application explaining that, but for the Department's directions, it would have approved the development application.

[4] The developer appealed to the Planning and Environment Court, relevantly, against the Council's part refusal of its development application[5] flowing from the Department's direction to the Council. Under s 4.1.52(3)(b) that court "in an appeal against a decision about a development application (superseded planning scheme) … must … disregard the planning scheme applying when the application was made".

[5] The primary judge declared that under s 3.3.15(1)(b)(i) *IPA*, the Department, in assessing the development application (superseded planning scheme), was required to have regard to the current planning scheme, noting in his reasons that the developer may be entitled to compensation under s 5.4.2 *IPA*.

[6] In these circumstances, harmoniously construing the relevant provisions (s 3.2.5(3)(a), s 3.3.15(1), s 4.1.52 and s 5.4.2 *IPA*) is a challenge worthy of consideration for the intellectual Olympics.

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1 *IPA*, s 3.2.5(1).
2 *IPA*, s 3.2.5(3)(a).
3 The Macquarie Dictionary definition of "in force" is "in operation: a law now in force".
4 *IPA*, s 3.5.1(3).
5 *IPA*, s 4.1.27(1)(a).

[7] The developer applied to this Court for leave to appeal under s 4.1.56 *IPA*. As the application raised a significant point of law relating to the construction of *IPA*, this Court granted the developer leave to appeal at the commencement of the hearing of this appeal. The developer asked this Court to allow the appeal, set aside the declaration and instead declare that the Department should assess the development application under the superseded planning scheme without regard to the current planning scheme.

[8] As I have explained, this appeal turns on the tension between the following provisions of *IPA*. The Council must assess the development application (superseded planning scheme) under the superseded planning scheme (s 3.2.5(3)(a) *IPA*).[6] The Department as referral agency is obliged, on the other hand, to "assess the application … having regard to – (i) any planning scheme in force when the application was made" (s 3.3.15(1) *IPA*). The Planning and Environment Court is to determine an appeal from the Council's partial refusal of the development application "as if it were an application made under a superseded planning scheme" (s 4.1.52(3)(b)(i) *IPA*) and "disregard the planning scheme applying when the application was made" (s 4.1.52(3)(b)(ii) *IPA*). The developer's potential entitlement to compensation requires that the application "is assessed having regard to the planning scheme … in effect when the application was made" (s 5.4.2(c) *IPA*).

[9] One possible view of the construction of these provisions and their application to the circumstances of this case, and that contended for by the developer and the Council, is as follows. The Council elected to assess the development application under the superseded planning scheme[7] so as to avoid any liability to pay compensation under s 5.4.1 and s 5.4.2 *IPA*.[8] The Council was required to assess the application under the superseded planning scheme,[9] but the Department as referral agency under s 3.3.15(1) was required to assess the application having regard to the existing planning scheme, making partial refusal of the development application by the Council inevitable.[10] If the developer suffered a resulting reduction in the value of its interest in the land to which the application related, it would not be entitled to compensation under s 5.4.2 *IPA* because the Council assessed the application under the superseded planning scheme. In the current matter, the Council assessed the development application under the superseded planning scheme.[11] The Department assessed it having regard to the planning scheme applying when the application was made.[12] The Council was required to refuse part of the application because of the Department's assessment. But, the Planning and Environment Court was required to consider the developer's appeal to that court from that partial refusal as if the development application were made under the superseded planning scheme and to disregard the planning scheme applying when the application was made.[13] The developer and Council argue that it

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6 The Council is then bound to assess and decide the application as if it were an application to which the superseded planning scheme applied and the existing planning scheme was not in force: *IPA*, s 3.5.5(4)(a) and (b).

7 *IPA*, s 3.2.5(3); s 3.5.5(4)(a) and (b).

8 See *Chang v Laidley Shire Council* (2007) 234 CLR 1, Kirby J at 11-12 [26]-[27]; (2006) 146 LGERA 283, Keane JA at 294 [37].

9 *IPA*, s 3.2.5(3)(a) and s 3.5.5(4)(a) and (b).

10 *IPA*, s 3.5.11(4).

11 *IPA*, s 3.2.5(3)(a) and s 3.5.5(4)(a) and (b).

12 *IPA*, s 3.3.15(1).

13 *IPA*, s 4.1.52(3)(b).

follows that it cannot have been the intent of the legislature in these circumstances to have the Department assess the development application pursuant to s 3.3.15 under the present planning scheme.

[10] This is not an attractive construction. It is inconsistent with the clear terms of s 3.3.15. It hardly seems likely that parliament would have intended such a circular result in respect of the assessment and appeal provisions. Nor am I persuaded that the combined effect of those provisions is to deprive a party otherwise entitled to compensation under *IPA* in such a devious way. As Kirby J explained in *Chang v Laidley Shire Council*,[14] Queensland has a long history of providing compensation for owners of an interest in land where the interest is injuriously affected by the coming into force of a provision in a planning scheme. In the absence of a clear statement, it seems unlikely that, in circumstances like the present, the legislature intended the combined effect of these provisions to be to deprive an owner of an interest in land from just compensation arising out of a change to a planning scheme. In attempting to find a way through the *IPA* maze so as to harmoniously construe these provisions and apply them to the present circumstances, it is helpful to examine the objects and purposes of *IPA* and its scheme, insofar as they are relevant to the present case.

[11] The purpose of *IPA* is to seek to achieve ecological sustainability[15] by coordinating and integrating planning at the local, regional and state levels;[16] managing the process by which development occurs;[17] and managing the effects of development on the environment (including managing the use of land[18]). Assessment managers[19] and referral agencies are required to advance *IPA*'s purpose.[20] This relevantly includes ensuring decision-making processes are accountable, coordinated and efficient;[21] taking account of short and long term environmental effects of development at local, regional, state and wider levels;[22] avoiding, if practicable, or otherwise lessening, adverse environmental effects of development;[23] and applying

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14 (2007) 234 CLR 1 at 10-12 [21]-[27].

15 The terms that are contained in the definition of "ecological sustainability" are:
"(a) ecological processes and natural systems are protected
if—
(i) the life supporting capacities of air, ecosystems, soil and water are conserved, enhanced or restored for present and future generations; and
(ii) biological diversity is protected; and
(b) economic development occurs if there are diverse, efficient, resilient and strong economies (including local, regional and State economies) enabling communities to meet their present needs while not compromising the ability of future generations to meet their needs; and
(c) the cultural, economic, physical and social wellbeing of people and communities is maintained if—
(i) well-serviced communities with affordable, efficient, safe and sustainable development are created and maintained; and
(ii) areas and places of special aesthetic, architectural, cultural, historic, scientific, social or spiritual significance are conserved or enhanced; and
(iii) integrated networks of pleasant and safe public areas for aesthetic enjoyment and cultural, recreational or social interaction are provided."

16 *IPA*, s 1.2.1(a).

17 *IPA*, s 1.2.1(b).

18 *IPA*, s 1.2.1(c). The term "premises" includes land (*IPA*, sch 10).

19 For a definition of 'assessment manager' see *IPA*, s 3.1.7.

20 *IPA*, s 1.2.2.

21 *IPA*, s 1.2.3(1)(a)(i).

22 *IPA*, s 1.2.3(1)(a)(ii).

23 *IPA*, s 1.2.3(1)(c).

standards of amenity, conservation, energy, health and safety in the built environment that are cost effective and for the public benefit.[24]

[12] Chapter 3 *IPA* contains most of the provisions with which this appeal is primarily concerned. It is headed Integrated development assessment system (IDAS). IDAS "is the system detailed in [ch 3] for integrating State and local government assessment and approval processes for development".[25] Part 2 of ch 3 deals with the application stage. The application process is dealt with in Div 1 of pt 2 of ch 3 and contains s 3.2.5.[26] Part 3 of ch 3 deals with the information and referral stage. Division 4 of pt 3 contains the provision at the heart of this appeal, s 3.3.15,[27] and relates to referral agency assessments. Part 4 of ch 3 deals with the notification stage. Part 5 of ch 3 deals with the decision stage. Division 1 of pt 5, Preliminary, includes s 3.5.2 which requires pt 5 to be applied even where a concurrence agency (which includes a referral agency like the Department[28]) requires the application to be refused. Division 2 of pt 5 relates to the assessment process (of the decision stage) and contains s 3.5.5. Division 3 of pt 5 is headed "Decision" and contains s 3.5.11 (subs (2) of which requires the Council's decision to be based on the assessment made under div 2, and subs (4) of which requires the Council as assessment manager to refuse the development application in whole or in part if the Department as referral agency has stated it must be refused). The remainder of Ch 3 has no direct relevance to this appeal. Chapter 4 *IPA* deals with appeals, offences and enforcement. Part 1 of ch 4 deals with the Planning and Environment Court. Division 8 concerns appeals to the Planning and Environment Court relating to development applications. Division 12 deals with court process for appeals and contains s 4.1.52. Chapter 5 *IPA* is headed "Miscellaneous"; pt 4 of which deals with compensation and contains s 5.4.1 and s 5.4.2.

[13] In my view, it is possible to construe s 3.2.5(3), s 3.3.15(1), s 3.5.11, s 4.1.52(3) and s 5.4.1 and s 5.4.2, without significantly straining the ordinary meaning of the language used in those provisions, consistently with the purpose and scheme, of *IPA*[29] so as to apply them sensibly to the facts here.

[14] It is common ground that s 3.2.5(3) is intended to apply as follows. Where a developer has within two years of a change of planning scheme relied on a superseded planning scheme in making a development application, a local government can deny the applicant that opportunity only where the Council elects to accept exposure to compensation under s 5.4.2 *IPA*: *Chang*.[30] Those observations in *Chang* about the *IPA* compensation scheme upon which the developer and Council place such reliance in this appeal were general statements applying the *IPA* provisions relevant in *Chang* to the facts of *Chang*. Their Honours did not consider the impact of s 3.3.15(1) in circumstances like the present case. As in *Chang*, the Council in this case elected to treat the development application under the superseded planning scheme as one which would be assessed under the superseded planning scheme, ordinarily avoiding the requirement to pay compensation under

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24 *IPA*, s 1.2.3(1)(e).

25 *IPA*, s 3.1.1.

26 This requires the Council to assess the development application (superseded planning scheme) under the superseded planning scheme.

27 This requires the Department to assess the development application "having regard to … [the] planning scheme in force, when the application was made".

28 See definition of "referral agency" in *IPA*, sch 10.

29 Set out in [11] and [12] of these reasons.

30 (2006) 234 CLR 1, Kirby J at 11 [26]-[27]; (2006) 146 LGERA 283, Keane JA at 294 [37].

s 5.4.2. But, unlike *Chang*, this application was one which also required the Department to "assess the application … having regard to – (i) any planning scheme in force, when the application was made" under s 3.3.15(1). The Department made this assessment and responded to the Council, requiring the Council to refuse in part the development application insofar as it was inconsistent with the current planning scheme. It followed under s 3.5.11(4) that the Council was then obliged to refuse the development application and it did so.

[15] The developer appealed from that decision to the Planning and Environment Court. Under s 4.1.52(3), that court was obliged to hear the appeal by way of hearing anew.[31] As the appeal was against a decision about a development application (superseded planning scheme) that was assessed by the Council as if it were an application made under a superseded planning scheme, the Planning and Environment Court, like the Council, was required to disregard the planning scheme that applied when the application was made. But this development application (superseded planning scheme), unlike that in *Chang*, was not wholly assessed as if it were an application made under a superseded planning scheme, despite the Council's election under s 3.2.5(3)(a). Whilst the appeal was from the Council's decision, that decision was "assessed" within the meaning of that word in s 4.1.52(3)(b) under the IDAS process set out in ch 3 *IPA*. The Department's assessment of the application having regard to the planning scheme in force at the time the application was made was part of this integrated assessment process. In my view, it follows, under s 4.1.52, that in deciding the appeal insofar as it relates to the Department's part of the assessment of the application under s 3.3.15(1), the Planning and Environment Court must decide the appeal based on the laws and policies applying when the application was made.[32] This construction sits comfortably with the terms of s 4.1.52(3) which specifically note that the Planning and Environment Court is not prevented from considering an appeal merely because *IPA* required the Council to refuse the application.[33]

[16] All parties contend that the compensation provisions under pt 4 of ch 5 cannot assist the developer and that the primary judge was wrong to suggest otherwise.[34] They argue that the Council's election to treat the application as a development application (superseded planning scheme) under s 3.2.5(3)(a) and the terms of s 5.4.2(c) exclude the application of s 5.4.2. They contend this conclusion follows from the observations as to the effect of the compensation scheme under *IPA* made by Kirby J[35] and Keane JA[36] in *Chang*.

[17] As I earlier noted,[37] those judicial observations were not made in the context of considering the effect of s 3.3.15(1) on a development application (superseded planning scheme). In my view, which differs from that of Holmes JA, it does not necessarily follow from the application of the combined relevant provisions of *IPA* to the facts of this case, that the developer's right to compensation under s 5.4.1 and s 5.4.2 is lost.[38] If the developer is able to show it was the owner of an interest in

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31 *IPA*, s 4.1.52(1).
32 *IPA*, s 4.1.52(2)(a).
33 See *IPA* s 3.5.11(4).
34 *Sevmere Pty Ltd v Cairns Regional Council & Ors* [2008] QPEC 77 at [22].
35 (2007) 234 CLR 1.
36 (2006) 146 LGERA 283.
37 See these reasons at [14].
38 *Sevmere Pty Ltd v Cairns Regional Council & Ors* [2008] QPEC 77 at [22].

land at the time the planning scheme was changed;[39] and there was a change to the planning scheme affecting the land,[40] reducing the value of the developer's interest in the land;[41] and the developer made a development application (superseded planning scheme);[42] and the application was assessed having regard to the planning scheme and planning scheme policies in effect when the application was made;[43] and the Council or (on appeal the Planning and Environment Court) refused the application; then the developer would make out a right to compensation for reduced value of interest in the land against the Council.

[18] In this case, the development application was assessed by the Council having regard to the superseded planning scheme. But it was also assessed under the IDAS process in ch 3 by the Department having regard to the current planning scheme. As Holmes JA points out, the Department, in assessing the development application under s 3.3.15(1), did not assess it "having regard to the … planning scheme policies in effect when the application was made",[44] but the Department, under s 3.3.15(1), did assess the development application "having regard to the planning scheme … in effect when the application was made".[45] I do not consider it necessary that, to come within s 5.4.2(c), the development application must be assessed having regard to both the planning scheme in effect when the application was made, and planning scheme policies in effect when the application was made. It is sufficient to come within s 5.4.2(c) if the development application was assessed having regard to the planning scheme current at the time the application was made.

[19] Gaudron J in *Marshall v Director-General Department of Transport* observed:[46]

> "The right to compensation for injurious affection following upon the resumption of land is an important right of that kind and statutory provisions conferring such a right should be construed with all the generality that their words permit."

See also *Sorrento Medical Service Pty Ltd v Chief Executive, the Department of Main Roads*.[47] Taking a purposive approach to the construction of s 5.4.2(c), a compensation provision, "and" should be read disjunctively: cf *Re Peat Resources of Australia Pty Ltd, Ex parte Pollock*;[48] *Statutory Interpretation in Australia*, (6th ed, 2006), Pearce and Geddes.[49] In my view, insofar as the Department's part of the IDAS assessment process based on the current planning scheme resulted in a reduction in the developer's value of its interest in the land, the developer will have an entitlement to compensation, providing it satisfies the other requirements under *IPA* as to compensation. This construction is consistent with the purpose and scheme of *IPA*.[50] It avoids the undesirable outcome, unlikely to have been intended by the legislature in the absence of a clear statement, of depriving landowners of fair compensation when a change to a planning scheme has resulted in a reduction in the

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39 *IPA*, s 5.4.1, definition of "owner".
40 *IPA*, s 5.4.1, definition of "change".
41 *IPA*, s 5.4.2(a).
42 *IPA*, s 5.4.2(b).
43 *IPA*, s 5.4.2(c).
44 *IPA*, s 5.4.2(c).
45 *IPA*, s 5.4.2(c).
46 (2001) 205 CLR 603, 623.
47 2 Qd R 373, 397 [11]-[12], 386-387 [46]-[48].
48 (2004) 181 FLR 454, 460 [23], 474-475 [98]-[99], 475 [101] and 478 [112]-[115].
49 Para 2.25 and para 2.26.
50 Set out at [11] - [12] of these reasons.

value of an owner's interest in land: see Callinan J's observations in *Chang*.[51] The unfortunate aspect of this construction is that it may result in local governments being made liable for compensation in circumstances where they have done all they can to avoid the liability, because of a referral agency's assessment. That is not a result which is starkly inconsistent with the purposes and scheme of *IPA*.[52] It seems probable that parliament intended the view of its referral agencies having regard to current planning schemes to take precedence over a local government's desire to avoid liability for compensation by electing to assess development applications under superseded planning schemes. Any resulting unfairness to local governments is capable of resolution through funding arrangements between the elected State and local governments.

[20] It follows from my construction of s 3.2.5, s 3.3.15(1)(b), s 4.1.52 and s 5.4.2 that the primary judge was right in declaring that for the purposes of s 3.3.15(1)(b)(i) the Department, in assessing the development application (superseded planning scheme), was required to have regard to the current planning scheme. The appeal should be dismissed with costs.

[21] **HOLMES JA:** The appellant, Sevmere, has been granted leave to appeal a decision of the Planning and Environment Court concerning the proper construction of s 3.3.15(1) of the *Integrated Planning Act* 1997,[53] which on its face requires a referral agency to assess a development application with regard to the planning scheme in force at the time it was made. That may present difficulties, thrown into sharp relief by the facts of this case, when the application is a development application (superseded planning scheme) and the assessment manager has elected, under s 3.2.5(3) of the Act, to assess it under the superseded planning scheme. There are implications, too, for the aspiring developer's entitlement to compensation for any reduction in his or her land's value caused by the planning scheme change.

The development application

[22] Sevmere owns land in Cairns which it wishes to develop. In 2007, it made a development application (superseded planning scheme). That form of application is defined in sch 10 to the *Integrated Planning Act*; relevantly for present purposes, it is one:

> "(i) in which the applicant asks the assessment manager to assess the application under a superseded planning scheme; and
>
> (ii) made only to a local government as assessment manager; and
>
> (iii) made within 2 years after the day the planning scheme or planning scheme policy creating the superseded planning scheme took effect …"

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51 (2007) 234 CLR 1 at 36-37 [123]-[125].

52 Set out at [11] - [12] of these reasons.

53 References are to reprint 8A of the Act, which the parties agreed was the relevant reprint; it was in force between 31 March 2007 and 22 April 2007.

In its application, Sevmere asked the respondent, Cairns Regional Council, as assessment manager, to assess the application under the Council's superseded 1996 planning scheme.[54]

[23] By virtue of s 3.2.5(3) of the Act, the Council was required to respond to the application in one of two ways:

> "**3.2.5 Acknowledgement notices for applications under superseded planning schemes**
>
> ...
>
> (3) If an application is a development application (superseded planning scheme) in which the applicant asks the assessment manager to assess the application under the superseded planning scheme, the acknowledgement notice must state—
>
> (a) that the application will be assessed under the superseded planning scheme; or
>
> (b) that the application will be assessed under the existing planning scheme.
>
> …"

[24] The Council resolved to assess the development application under the superseded planning scheme. It gave an acknowledgment notice which stated that code assessment was required, the superseded planning scheme being the applicable code. The notice identified the Department of Natural Resources and Water as one of the two referral agencies for the application. (For brevity's sake, I shall refer collectively to the Department and its Chief Executive, the second respondent here, as "DNRW".)

The assessment process

[25] Once the acknowledgement notice had been given under s 3.2.5(3)(a) of the *Integrated Planning Act*, the assessment manager was required, by virtue of s 3.5.4(4), to assess and decide the application (as one requiring code assessment):

> "as if—
>
> (a) the application were an application to which the superseded planning scheme applied; and
>
> (b) the existing planning scheme was not in force; and
>
> (c) for chapter 5, part 1, the infrastructure provisions of the existing planning scheme applied; and
>
> (d) for section 6.1.31, the existing planning scheme policy or planning scheme provision applied."[55]

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[54] The dictionary in sch 10 to the Act defines "superseded planning scheme" as "for a planning scheme area, … the planning scheme, or any related planning scheme policies, in force immediately before –
(a) the planning scheme or policies, under which a development application is made, were adopted; or
(b) the amendment, creating the superseded planning scheme, was adopted."

[55] Chapter 5, part 1 is concerned with infrastructure planning and funding; s 6.1.31 with the imposition on a development approval of conditions requiring land, works or a contribution to the cost of supplying infrastructure.

Section 3.5.5 provides similarly in respect to any part of an application requiring impact assessment.

[26] DNRW's assessment, however, was governed by a different provision of the Act. Section 3.3.15 deals with assessment by a referral agency:

> "(1) Each referral agency must, within the limits of its jurisdiction, assess the application—
>
> (a) against the laws that are administered by, and the policies that are reasonably identifiable as policies applied by, the referral agency; and
>
> (b) *having regard to*—
>
> *(i) any planning scheme in force, when the application was made, for the planning scheme area*; and
>
> (ii) each of the following, if they are not identified in the planning scheme as being appropriately reflected in the planning scheme—
>
> (A) State planning policies, or parts of State planning policies;
>
> (B) for the planning scheme of a local government in the SEQ region—the SEQ regional plan;
>
> (iii) if the land to which the application relates is designated land—its designation; and
>
> (c) for a concurrence agency—against any applicable concurrence agency code."
>
> (Italics added.)

[27] Under the superseded planning scheme, all of the land to be developed had been contained in the Residential 3 zone. Under the existing planning scheme, however, a portion of it was designated as "Area Zoned for Conservation". In its referral agency response, DNRW directed the Council to refuse that part of the development application which related to the conservation-zoned portion of the land, but indicated that for the balance of the site, which remained in the Residential 3 zone, it had no requirements. The Council was, by virtue of s 3.5.11(3),[56] required to take the action stated in DNRW's response. Accordingly, it approved the proposed development with the exception of that part of it intended to take place on the land in the area zoned for conservation. It advised Sevmere, however, that had it not been for DNRW's direction, it would have approved the whole of the development, subject to some conditions.

The compensation regime under the Integrated Planning Act

[28] Section 5.4.2 provides for compensation to land-owners where there has been a change in the planning scheme reducing the value of land to be developed:

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56 "… if a concurrence agency's response has, under section 3.3.18(1)(b) or (c), stated an action that must be taken, the assessment manager must also take the action."

> "**5.4.2 Compensation for reduced value of interest in land**
>
> An owner of an interest in land is entitled to be paid reasonable compensation by a local government if—
>
> (a) a change reduces the value of the interest; and
>
> (b) a development application (superseded planning scheme) for a development permit relating to the land has been made; and
>
> (c) the application is assessed having regard to the planning scheme and planning scheme policies in effect when the application was made; and
>
> (d) the assessment manager, or, on appeal, the court—
>
> (i) refuses the application; or
>
> (ii) approves the application in part or subject to conditions or both in part and subject to conditions."

As to what constitutes a "change", s 5.4.1 provides:

> "***change***, for an interest in land, means a change to the planning scheme or any planning scheme policy affecting the land".

[29] The assessment manager does not, of course, have to assess the scheme "having regard to the planning scheme and planning scheme policies in effect when the application was made". Instead, as the Council did here, it may advise by its acknowledgment notice that it will assess under the superseded planning scheme. In *Chang v Laidley Shire Council*,[57] Kirby J explained the combined effect of s 5.4.2 and the procedural requirements relating to development applications (superseded planning scheme). They:

> "…envisaged that a body such as the Council was effectively given a choice. Either it could accept a liability to pay compensation for a loss of value of an interest occasioned by a supervening planning scheme, or it could avoid, or reduce, that liability by assessing the development application under the former scheme. In a sense, this option explains the appellation 'DA(SPS)'. In the event that the local government authority, as 'assessment manager', chose to proceed under the earlier planning scheme, the land owner would suffer no relevant economic loss. The development application would then be assessed on its merits as if the supervening planning scheme did not exist.
>
> If, however, the decision was made to assess the application under the supervening scheme, the land owner would be entitled to compensation if the application was then refused or constrained in some way in accordance with the new scheme, as by the imposition of new conditions or the provision of only partial approval. According to the appellants, the two year time limit, afforded for the making of a DA(SPS), permitted a measure of certainty in

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57 (2007) 234 CLR 1.

> considering potential compensation claims of the type they brought. It allowed the new planning scheme a little time to operate and land owners time to obtain proper advice, including as to any true loss of value of their 'interest'."[58]

The judgment in the Planning and Environment Court

[30] In the Planning and Environment Court, Sevmere and DNRW sought competing declarations as to which planning scheme applied to DNRW's assessment of the application; DNRW contending for the existing scheme, Sevmere for the superseded scheme. The primary judge was unconvinced by broader arguments which Sevmere made as to the statutory purpose discernible from s 1.2.3[59] of the *Integrated Planning Act*, and he rejected Sevmere's submission that to give s 3.3.15(1) the reading for which DNRW contended was to ignore the remedial character of the compensation scheme in s 5.4.2. The right to compensation under the Act was, his Honour said, highly conditional; and against Sevmere's arguments was the clear meaning of s 3.3.15(1), which referred to the "planning scheme in force, when the application was made". By definition, that expression could not embrace a superseded planning scheme. The learned judge went on to observe that it did not necessarily follow from the making of the declarations DNRW sought that the appellant had no right to compensation pursuant to s 5.4.2. He suggested that s 5.4.2 could operate to provide compensation if the DNRW assessment resulted in a change which reduced the value of the appellant's interest in the land the subject of the development application.

[31] The learned judge declared that DNRW was required to have regard to the existing planning scheme in assessing the development application. He made a further declaration that DNRW was required, for the purposes of its policies for material changes of use, to determine whether the land the subject of the application was for "urban purposes in an urban area" by reference to the existing planning scheme.

Sevmere's and the Council's submissions on appeal

[32] On this appeal, Sevmere and the Council joined forces to argue against a literal construction of s 3.3.15(1)(b). Their first position was that the subsection ought to be read as incorporating the circumstance in which the assessment manager was proceeding under the superseded planning scheme. According to Sevmere, the words "any planning scheme in force, when the application was made" should be treated as if they said, "any planning scheme which is applicable to the application the subject of the referral". The Council contended for a more specific reading: "the planning scheme which the assessment manager has elected to regard as being '*in force*' for the assessment of the application". For contextual support for their argument, both pointed to the fact that the expression "any planning scheme in force, when the application was made" had been used, rather than "the existing planning scheme", which appeared elsewhere in the Act (including in s 3.2.5(3)(b) and s 3.5.4(4)(b)). The use of different language entailed, they said, a recognition that the "planning scheme in force" might be the planning scheme for which the assessment manager had elected.

[33] If s 3.3.15(1)(b) were not to be read in the way suggested, the alternative conclusion was that there had been an oversight in failing to amend the subsection to

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58 At 11-12.

59 Which refers to "coordinated" decision-making processes.

accommodate the mechanism of a development application (superseded planning scheme). If that were so, these words should be implied into the subsection:

> "except in the case of a development application (superseded planning scheme) where the assessment manager has elected to assess the application under the superseded planning scheme, in which case the referral agency is to have regard to the superseded scheme only."

[34] That construction would allow the Court to meet its obligation to prefer an interpretation which would best achieve the purposes of the Act.[60] One of the purposes of the *Integrated Planning Act* was

> "to seek to achieve ecological sustainability by—
>
> (a) coordinating and integrating planning at the local, regional and State levels . . ."[61]

The Explanatory Notes to the Integrated Planning Bill had similarly referred to the aim of a "single integrated development assessment system for … approval processes". Assessment by different agencies under different planning schemes was the antithesis of the desired co-ordination. Other Explanatory Notes, referrable to the insertion of subparas (c) and (d) of s 3.5.4(4) in 2003 and 2006 respectively, emphasised that the development application (superseded planning scheme) mechanism was intended to allow land-owners to continue to exercise their development entitlements under a previous planning scheme.

[35] To read s 3.3.15(1)(b) according to its terms would create the anomalous situation that while the Council assessed under the superseded planning scheme, DNRW was not entitled to take that scheme into account, but must assess with regard to the existing planning scheme. That anomaly was exacerbated by the provisions governing an appeal to the Planning and Environment Court. Section 4.1.52 provides for appeal "by way of hearing anew". Relevantly to the present argument, s 4.1.52(3) provides as follows:

> "(3) To remove any doubt, it is declared that if the appellant is the applicant or a submitter for a development application—
>
> (a) the court is not prevented from considering and making a decision about a ground of appeal (based on a concurrence agency's response) merely because this Act required the assessment manager to refuse the application or approve the application subject to conditions; and
>
> (b) in an appeal against a decision about a development application (superseded planning scheme) that was assessed as if it were an application made under a superseded planning scheme, the court also must—
>
> (i) consider the appeal as if the application were made under the superseded planning scheme; and

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60 Section 14A *Acts Interpretation Act* 1954.

61 Section 1.2.1.

(ii) disregard the planning scheme applying when the application was made."

[36] Applying s 3.3.15(1)(b) literally, it was argued, DNRW might direct the Council to refuse a development application (superseded planning scheme) for reasons based on the existing planning scheme, and the application would duly be refused on that ground. But the Planning and Environment Court would be bound on appeal, by virtue of s 4.1.52(3)(b), to assess the application under the superseded planning scheme. Because the court was obliged to disregard the existing planning scheme, the DNRW direction based on that scheme must necessarily be set aside. That was an absurd result.

[37] Next, it was argued that if DNRW were to assess by reference to the existing planning scheme, the statutory scheme for compensation would be undermined. The Council would have opted to assess the application under the superseded planning scheme, thus precluding any entitlement to compensation under s 5.4.2; but because of DNRW's directed refusal of the application (at least in part) having regard to the existing planning scheme, the land-owner would in fact have suffered a loss of the type to which the section was directed. The legislation should not be read as destroying valuable property rights without compensation.

[38] The learned judge's suggestion that s 5.4.2 might operate on the basis that DNRW's assessment had resulted in a change reducing the value of the appellant's interest in the land was not tenable, given the definition of "change". If, on the other hand, his Honour's approach were correct, the Council's decision to avoid the potential liability to compensation would be negated by DNRW's assessment under the existing planning scheme; that was plainly contrary to the legislative intention. The scheme of the Act was, as explained by Kirby J, that the local government, as assessment manager, could, where a development application (superseded planning scheme) was made, determine its exposure to payment of compensation. It was absurd to suppose that that right could be defeated by a reading of the Act according to which a referral agency was obliged to ignore the Council's election and was required to assess the application under the current planning scheme.

[39] The reference in s 3.3.15(1)(b)(i) to the "planning scheme in force, when the application was made" should be regarded as simply reflecting a general concern, evident elsewhere in the *Integrated Planning Act*,[62] with ensuring assessment of an application according to the law at the date of the application's making. That was a statutory departure from the common law, which required that a decision-maker decide according to the law applicable at the time of his or her decision, and had its roots in a desire to prevent the unfairness of a local authority's being able to change the law so as to compel a result in its favour.[63] The mechanism of a development application (superseded planning scheme), designed to apply the law in force *before* the date of the making of an application, was a later development again. It had been overlooked by the drafters of s 3.3.15(1)(b)(i), resulting in an internal conflict in the legislation.

DNRW's submissions on appeal

[40] DNRW pointed out that although the *Integrated Planning Act* was concerned with co-ordination and integration of processes, that was not synonymous with different

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62 See, eg, s 3.5.3, s 4.1.52.

63 See the amendment of the *Local Government Act* 1936 by s 16(q) of Act No 19 of 1980, in response to the result in *Behrens v Caboolture Shire Council* (1979) 39 LGRA 138.

agencies using identical assessment criteria. The assessment manager and referral agencies had different jurisdictions and functions. Applications identified in sch 2 of the *Integrated Planning Regulation* 1998[64] were referred to the referral agency identified in that schedule. Schedule 2 detailed the various legislative instruments which gave rise to the referral agency's jurisdiction; here the relevant jurisdiction was for the purposes of the *Vegetation Management Act* 1999.[65] In only one instance was a planning scheme the source of a referral agency's jurisdiction,[66] and when a referral agency assessed an application under s 3.3.15, the planning scheme was not its central concern. Whether the application made was an ordinary development application or a development application (superseded planning scheme) was irrelevant; in either event, the referral agency was required to assess against the laws it administered and its policies, and (merely) to "[have] regard to" the planning scheme.

[41] As to which planning scheme was relevant to DNRW's exercise of its assessment function under s 3.3.15(1), DNRW's policies applicable to a material change of use (which s 3.3.15(1)(a) required it to apply) necessitated a determination of whether the land the subject of the application was in an "urban area". That term was defined by sch 10 of the *Integrated Planning Act*; and that definition referred to the "planning scheme", which, in turn, meant an instrument made by a local government under div 3 of ch 2 of pt 1 of the Act.[67] Thus, as well as being required under s 3.3.15(1)(b) to have regard to the existing planning scheme, DNRW had to apply policies which also related back to it.

[42] Section 4.1.27(1) of the *Integrated Planning Act* did not use the language of appealing against a decision. It enabled an applicant for a development approval to appeal to the court against, among other things, "a matter stated in a development approval, including any condition applying to the development …". That would extend, it was argued, to a referral agency's response, which was required to be stated in the development approval. Section 4.1.43 prescribed the respondent and co-respondents for appeals: the assessment manager was the respondent, but under s 4.1.43(5), if the appeal was "about a concurrence agency response", the concurrence agency[68] was to be co-respondent. If the appeal were limited to a concurrence agency response, under s 4.1.43(6) the assessment manager could apply to withdraw from the appeal. It was evident that, while there might be a single decision by the assessment manager, there could be appeals against various aspects of it; and indeed in some instances the assessment manager would not even be a participant in the appeal. Under s 4.1.54(3), if the court on appeal changed the decision or made a new decision, its decision became that of "the entity making the appealed decision"; that language was apt to include the referral agency's decision to direct the assessment manager to decide the application in a particular way.

[43] Section 4.1.52(3) should be regarded as prescribing distinct approaches to be taken by the court to the referral agency's response on the one hand, and the assessment manager's assessment on the other. Subsection 4.1.52(3)(a) dealt with a decision about a ground of appeal based on a concurrence agency's response; in other words, it operated where there was an appeal against a matter stated in a development

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64 Reprint 6A.

65 Schedule 2, Table 3, Item 11.

66 Schedule 2, Table 1, Item 11A (after amendment of the Regulation, in force on 31 March 2008).

67 s 2.1.1.

68 A term which is embraced by the definition of "referral agency": see the definition in sch 10.

approval. It made it clear that the court, unlike the assessment manager, was not bound by the response of the referral agency; it could decide for itself whether the response should be confirmed or changed or set aside. Thus, in an appeal involving a concurrence agency's response, it would consider the application in accordance with s 3.3.15(1), against the laws and policies administered by the agency, and having regard to the planning scheme in force when the application was made. It would be illogical for the court to perform its task as though it were the assessment manager, without regard to the different criteria applying to the referral agency.

[44] Subsection 4.1.52(3)(b) concerned an appeal against an assessment manager's decision, and it covered the same field of operation as s 3.5.4(4) and s 3.5.5(5). It ensured that the court was bound by the assessment manager's election to proceed under the superseded planning scheme. It did not mean that the appeal as a whole was constrained by a requirement to apply only that planning scheme. The court had the powers of the original decision-maker, who was the assessment manager, but in exercising them, it would deal with the part of the application concerning the referral agency's response by reference to s 3.3.15(1).

Does a literal reading of s 3.3.15(1)(b) produce absurdity, injustice or anomaly?

[45] The argument as to the statutory intent discernible from s 1.2.1 of the Act does not take matters very far. DNRW is correct, in my view, in saying that the aim of "coordinating and integrating planning" does not dictate identical assessment criteria. Nor do I accept that it is inherently absurd that the Council and the referral agency should assess by reference to different planning schemes. It is not beyond contemplation that it may be appropriate for a referral agency obliged to apply a different range of policies and legislative instruments (such as the *Vegetation Management Act*) to apply a current planning scheme, while the Council with different considerations applies a superseded scheme.

[46] In the competing submissions about the significance of the compensation regime to the construction question, there was at least this much agreement: all the parties contended that the learned primary judge had erred in his construction of s 5.4.2, in concluding that Sevmere had not necessarily lost its compensation rights if DNRW's assessment resulted in a change reducing the value of Sevmere's interest in the land. I think, with respect, they are correct in this regard. The reasoning behind that conclusion was not sound; DNRW's assessment could not produce a change as defined in s 5.4.1; that is, a "change to the planning scheme or any planning scheme policy affecting the land" reducing the value of the interest. And it does not seem that a referral agency's assessment could meet the criteria for compensation in s 5.4.2, because s 5.4.2(c) requires that the application be assessed having regard to the planning scheme and planning scheme policies[69] in effect when the application was made. There is no warrant for reading the subsection disjunctively; and although the referral agency must have regard to the planning scheme and to its own policies, it is no part of its role to assess by reference to planning scheme policies.

[47] The consequence in a case such as the present, it would follow, is that a land-owner in the position of Sevmere has no entitlement to compensation, despite having suffered a loss because of the referral agency's response. The precondition of

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69 "Planning scheme policy" is defined in s 2.1.16, while s 2.1.23(4) prescribes what a planning scheme policy may do.

s 5.4.2(c) is not met: the Council has assessed having regard to the superseded planning scheme and superseded planning policies, while the referral agency has assessed having regard to the existing planning scheme; but in neither case has the application been assessed "having regard to the … planning scheme policies in effect when the application was made".

[48] Those compensation implications, however, do not seem to me sufficient ground for concluding that s 3.3.15 cannot be read according to its terms. It is conceivable that the legislature intended to confer a right of compensation against a local authority where it was the local authority's actions, by way of a change in the planning scheme, and a refusal to assess under the old scheme, that had produced the loss; but no equivalent entitlement where the loss arose from the actions of a referral agency, unconcerned with the previous planning scheme and uninvolved in the planning scheme change. Counsel for Sevmere relied heavily on Kirby J's analysis in *Chang*, particularly his statement to the effect that a land-owner would suffer no economic loss where the local government authority chose to proceed under the superseded planning scheme. But that case did not involve any consideration of a referral agency's role or how it might affect loss and compensation for loss, and I do not think it helps to resolve the issue here.

[49] Of more concern is the operation of the appeal provisions in s 4.1.52. With all respect to DNRW's argument, I do not accept that the appeal process can be segmented into consideration of the referral agency's response under s 4.1.52(3)(a) and the assessment manager's response under s 4.1.52(3)(b). The language and function of the subsections is different. Subsection 4.1.52(3)(a) is concerned with a "ground of appeal"; it removes a constraint which might otherwise be thought to apply in dealing with the ground. Subsection 4.1.52(3)(b), in contrast, speaks of "the appeal"; and it directs the court as to how to proceed in "an appeal against a decision about a development application (superseded planning scheme) that was assessed as if it were an application made under a superseded planning scheme". The "decision about a development application (superseded planning scheme)" can only refer to the decision of the assessment manager, which incorporates the requirements of the referral agency; in this case to refuse the application in part.

[50] Subsection 4.1.52(3)(b) is unequivocal in requiring the court to deal with all of the questions comprehended in the appeal against that decision on the basis that the superseded planning scheme applies and, significantly, that the existing planning scheme is to be disregarded. Thus, in this case, the Planning and Environment Court would have to consider Sevmere's appeal as though the entirety of the land the subject of its application were in the Residential 3 zone, disregarding the existing planning scheme's classification of part of it as "Area Zoned for Conservation". There is, indubitably, an anomaly in the result that at appellate level, any decision made by the referral agency on the basis of the existing planning scheme is liable to be set aside because that basis no longer applies.

The proposed reading of s 3.3.15(1)(b) as applying the superseded scheme

[51] I reject the argument put for the Council and Sevmere that all difficulties can be resolved by their respective constructions of the words, "any planning scheme in force, when the application was made, for the planning scheme area". Sevmere's proposed reading, "any planning scheme which is applicable to the application the subject of the referral", simply re-poses the question: which scheme is applicable?

or, worse, raises the prospect of there being two candidates. Council's offering, "the planning scheme which the assessment manager has elected to regard as being in force" is similarly unsatisfactory. Nothing in the Act supports a conclusion that "existing planning scheme" and "planning scheme in force, when the application is made" are other than interchangeable; and in any case, at the time when the application is made, the assessment manager has made no election.

[52] The reality is that the existing words of s 3.3.15(1)(b) will not bear either of the constructions for which Sevmere and the Council contend. The result they seek could only be achieved by addition of an exception to the section so as to remedy the omission to deal with the circumstance of a development application (superseded planning scheme). The proposed addition was:

> "except in the case of a development application (superseded planning scheme) where the assessment manager has elected to assess the application under the superseded planning scheme, in which case the referral agency is to have regard to the superseded scheme only."

The Diplock test

[53] To support their argument that the addition should be made, Sevmere and the Council relied on Lord Diplock's formula in *Wentworth Securities Ltd v Jones*:[70]

> "First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed. Such an attempt crosses the boundary between construction and legislation. It becomes a usurpation of a function which under the constitution of this country is vested in the legislature to the exclusion of the courts."

[54] Those three conditions were met, it was contended: the legislative purpose was to give land-owners the opportunity to rely on the provisions of a superseded planning scheme for two years after the change to it, and to give the local authority the option to proceed on the basis of that scheme, without any exposure to compensation, or to assess under the existing planning scheme. The legislature had overlooked the need to amend s 3.3.15 to ensure that its purpose was effected; and the Court could state with certainty that the legislature would have inserted the proposed words in the section to achieve that end.

[55] Lord Diplock's test in *Wentworth Securities Ltd v Jones* has been applied, sometimes with, sometimes without, variation in Australia. Its recognition seems to

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70 [1980] AC 74 at 105-106.

have commenced with the judgment of McHugh JA (as a member of the New South Wales Court of Appeal) in *Kingston v Keprose Pty Ltd*,[71] in which he set out the test and observed:

> "Once the object or purpose of the legislation is delineated, the duty of the Court is to give effect to it in so far as, by addition or omission or clarification, the relevant provision is capable of achieving that purpose or object."[72]

[56] The New South Wales Court of Appeal went on to apply the Diplock test in *Bermingham v Corrective Services Commission of New South Wales*[73] and in *Tokyo Mart Pty Ltd v Campbell*.[74] In the latter case, Mahoney JA, delivering the judgment of the court (a member of which was McHugh JA), sounded a note of caution with this distinction:

> "Legislative inadvertence may consist, inter alia, of either of two things. The draftsman may have failed to consider what should be provided in respect of a particular matter and so fail [sic] to provide for it. In such a case, though it may be possible to conjecture what, had he adverted to it, he would have provided, the court may not, in my opinion, supply the deficiency. In the other case, the legislative inadvertence consists, not in a failure to address the problem and determine what should be done, but in the failure to provide in the instrument express words appropriate to give effect to it. In the second case, it may be possible for the court, in the process of construction, to remedy the omission."[75]

[57] McHugh J repeated his endorsement of the test in obiter in *Newcastle City Council v GIO General Ltd*,[76] referring to the court's entitlement to read a provision as containing additional words in order to give effect to the legislative purpose. In *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd*,[77] he agreed with Kirby J, who described it as applying "throughout the common law world".[78] And in *Saraswati v The Queen*,[79] McHugh J referred again to the entitlement to give effect to the legislative purpose

> "by addition to, omission from, or clarification of, the particular provision …"[80]

this time with the agreement of Toohey J.

[58] But in *R v Young*,[81] Spigelman CJ took the view that satisfaction of each of the three limbs of the Diplock test was necessary, but not sufficient for the implication of words into a statutory provision. In *Young*, the question was whether a statutory bar on adducing evidence of confidential information (counselling records of sexual

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71 (1987) 11 NSWLR 404.
72 At 424.
73 (1988) 15 NSWLR 292.
74 (1988) 15 NSWLR 275.
75 At 283.
76 (1997) 191 CLR 85 at 113.
77 (1998) 196 CLR 53.
78 At 82.
79 (1991) 172 CLR 1.
80 At 22.
81 (1999) 46 NSWLR 681.

assault victims), except by leave, should be read as extending to production of the information on subpoena. The New South Wales Court of Appeal held that it should not. James J wrote the leading judgment. He accepted, tacitly at least, that the first two of Lord Diplock's conditions were met; but, he said:

> "It seems to me that the present issue turns largely on whether the interpretation urged by counsel for the respondents is 'reasonably open' or whether the language actually used by the legislature intractably or unyieldingly covers only one state of affairs (the adducing of evidence in a court at a hearing) and cannot be 'tortured' so as to apply to another set of circumstances (the production of documents on subpoena) and on whether the third condition stated by Lord Diplock in *Wentworth Securities Ltd v Jones* can be satisfied or whether the attempt by counsel … to add words to the provisions of Div 1B crosses the boundary between construction and legislation."[82]

James J concluded that the expanded interpretation was not reasonably open, given the repeated reference in the relevant provisions of the Act to "the adducing of evidence" as its field of operation and the inaptness of the procedural provisions for granting leave to the circumstance where material was being subpoenaed.

[59] Spigelman CJ pointed to the constitutional objection to the court's introducing words into an Act of Parliament. The court was not:

> "entitled, upon satisfaction of the three conditions postulated by Lord Diplock, to perfect the parliamentary intention by inserting words in a statute. The court may construe words in a statute to apply to a particular situation or to operate in a particular way, even if the words used would not, on a literal construction, so apply or operate. However, the words which actually appear in the statute must be reasonably open to such a construction. Construction must be text based.
>
> … the court supplies words 'omitted' by the draftsperson only in the sense that the words so included reflect in express, and therefore more readily observable, form, the true construction of the words actually used. In my opinion, the authorities do not warrant the court supplying words 'omitted' by inadvertence per se."[83]

It was permissible to read down general words and to give words an ambulatory construction; these were techniques of construction based on the text, but there was "no warrant for supplying omitted words, unless the result of some such recognised technique of construction can be so described".[84] Having made those observations, among others, Spigelman CJ agreed with the judgment of James J in that case.

[60] In *R v PLV*,[85] Spigelman CJ reiterated that the court could not "read words into an Act". The process, he said, was one of construction of the words actually used, and the reformulation of a provision by the addition of words should be understood as a way of clearly expressing the court's conclusion. He added:

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82 At 740.
83 At 687.
84 At 690.
85 (2001) 51 NSWLR 736.

> "I am unaware of any authority in which a court has 'introduced' words to or 'deleted' words from an Act, with the effect of *expanding* the sphere of operation that could be given to the words actually used. This was the actual issue in *R v Young*. There are many cases in which words have been *read down*. I know of no case in which words have been *read up*."[86]

[61] If one were to determine this case on the bases advanced by Spigelman CJ – that the omitted words could be supplied only by means of a recognised technique of construction and that the words to be included must reflect the true construction of the words actually used – it would be impossible for Sevmere and the Council to succeed. Their proposed addition is unrelated to the existing words of the section and is designed to achieve an entirely different effect. But even if one does not take quite so rigorous an approach as that advocated by Spigelman CJ, it does not follow that the Court's considerations end with the three limbs of the Diplock test. In *Inco Europe v First Choice Distribution*,[87] the House of Lords acknowledged that there might be limits to the circumstances in which fulfilment of the three conditions would suffice:

> "Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd v Schindler* [1977] Ch 1, 18, Scarman LJ observed that the insertion must not be too big, or too much at variance with the language used by the legislature."[88]

[62] In Queensland, the question of the circumstances in which legislative gaps could be filled by a court was considered by Muir JA in *Ravenscroft v Nominal Defendant*.[89] Having reviewed many of the authorities to which I have referred, his Honour turned to whether the deficiencies in the Act under consideration there could be overcome by a process of construction. He continued:

> "And for that to be possible, to put it broadly, the court must conclude that its solution is the one Parliament would have adopted had it become aware of the deficiencies. Consequently, it would be appropriate, rarely if ever, to fill a perceived gap by interfering with the framework or scheme of an Act. Also there are cases in which it is desirable for the court to leave any remedy to Parliament. *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* is an example of such a case. In their joint reasons Gaudron and Gummow JJ, having identified problems with the legislation under consideration, said that such considerations:
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> > '... serve to emphasise the need for renovation of the New South Wales legislation, not by judicial grafting to it of tissue which it lacks, but upon detailed reconsideration by the legislature. Judicial interpretative techniques may come close to leaching the existing statutory text and structure of their content and, whilst answering that apparently hard case

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86 At 743-744.
87 [2000] 1 WLR 586.
88 At 592.
89 [2008] 2 Qd R 32.

> then before the court, unwittingly lay the ground for other hard cases."[90]

Should the Court imply the proposed words in to s 3.3.15(1)(b)?

[63] I am not convinced that the third limb of the Diplock test is met in this case, because I do not think it is obvious that the words proposed are those which the legislature would have inserted had it considered the matter. Firstly, it is possible that the legislature would have chosen to remedy the anomaly of the different schemes applicable to the referral agency's assessment and the Planning and Environment Court's consideration of an appeal by amending, not s 3.3.15(1), but s 4.1.52(3), so as to require consideration of different aspects of the appeal by reference to different planning schemes (the result which DNRW contended already existed). And even if Sevmere and the Council are entirely correct in their submissions about absurdity in the referral agency's applying a different scheme from the assessment manager and about the resulting subversion of the compensation regime, there is the problem of what addition would be sufficient to rectify the situation.

[64] As counsel for Sevmere pointed out in submissions, part of the mischief here was that DNRW's policy was based on the existing planning scheme. Ensuring that a referral agency assessed only by reference to the superseded scheme would seem to require a more extensive addition to s 3.3.15(1) than that suggested: the subsection would have to read:

> "(1) Each referral agency must, within the limits of its jurisdiction, assess the application—
>
> (a) against the laws that are administered by, and the policies that are reasonably identifiable as policies applied by, the referral agency; except in the case of a development application (superseded planning scheme) where the assessment manager has elected to assess the application under the superseded planning scheme, in which case any reference to the existing planning scheme, direct or indirect, in the policies applied by the referral agency is to be taken to be a reference to the superseded planning scheme; and
>
> (b) having regard to—
>
> (i) any planning scheme in force, when the application was made, for the planning scheme area except in the case of a development application (superseded planning scheme) where the assessment manager has elected to assess the application under the superseded planning scheme, in which case the referral agency is to have regard to the superseded scheme only …"

[65] That would constitute a very significant alteration to s 3.3.15. But even if one accepts that the only required addition is that proposed, it seems to me that this is a

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[90] At 51.

case in which the legislature has not merely omitted some necessary words, but has, in Mahoney JA's words, "failed to consider what should be provided in respect of a particular matter and so fail[ed] to provide for it".[91] The alteration which Sevmere and the Council propose, it seems to me, falls over the boundary of construction into legislation. The insertion is "too far-reaching … too big … [and] too much at variance with the language used by the legislature".[92] A hiatus in the *Integrated Planning Act* has been demonstrated, at least in respect of the appeal regime for development applications (superseded planning scheme). Nonetheless, it should be left to Parliament to remedy the deficiency.

Orders

[66] I would dismiss the appeal. DNRW should have its costs.

[67] **DUTNEY J:** I have had the advantage of reading the reasons for judgment of the President and Holmes JA.

[68] The central question in this appeal is whether s 3.3.15 of the *Integrated Planning Act* 1997 ("IPA") compels the Department of Natural Resources and Water when acting as a referral agency to assess a development application (superseded planning scheme) having regard to the planning scheme in force at the time the application was made even where the local authority as assessment agency elects to assess the application under the superseded planning scheme.

[69] Materially, s 3.3.15 IPA reads as follows:

> "(1) Each referral agency must … assess the application—
>
> (a) against the laws that are administered by, and the policies that are reasonably identifiable as policies applied by, the referral agency; and
>
> (b) having regard to—
>
> (i) any planning scheme in force, when the application was made, for the planning scheme area …"

[70] In my view, the words in s 3.3.15(1)(b) are unambiguous. Only the addition of words not included by the legislature can alter the meaning. Despite differing in relation to the effect of s 3.3.15 on the entitlement of a landowner to compensation both the President and Holmes JA are agreed that the referral agency must assess the application under the existing scheme at the time of the application. I respectfully agree with this conclusion and with their Honours' reasons for arriving at that conclusion. The existence or otherwise of a landowner's right to compensation does not affect this conclusion.

[71] It is not obvious to me that if there is a drafting error in the IPA which leads to unwanted or absurd results, the error is necessarily in s 3.3.15. I agree with Holmes JA, for the reasons which she gives at paras [51] and following, that even if I concluded that any error was in s 3.3.15, it is inappropriate in this case for the court to insert additional words into the section to change its plain meaning.

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91 *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275 at 283.

92 *Inco Europe v First Choice Distribution* [2000] 1 WLR 586 at 592.

[72] This conclusion is sufficient to dispose of this appeal. It is unnecessary for the purpose of this appeal to decide whether or not a landowner in the position of the appellant is entitled to compensation under s 5.4.2 IPA for diminution in the value of its land.

[73] I agree the appeal should be dismissed.