SUPREME COURT OF QUEENSLAND

CITATION:	*Trask Development Corporation No 2 Pty Ltd v Moreton Bay Regional Council* [2018] QSC 170
PARTIES:	**TRASK DEVELOPMENT CORPORATION NO 2 PTY LTD** (respondent) **v** **MORETON BAY REGIONAL COUNCIL** (applicant)
FILE NO:	BS No 535 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application for dismissal of an application for a statutory review
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	1 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	24 April 2018, 20 July 2018
JUDGE:	Ryan J
ORDER:	The respondent's application for a statutory order of review be dismissed
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – MEANING OF DECISION – GENERALLY – where a developer submitted a "request for mapping change" of an overlay map to the council via an online form – where the council refused the request – where the developer applied for a statutory order of review of that refusal – where the council applied to have the application summarily dismissed under rule 16 of the *Uniform Civil Procedure Rules* 1999 and section 48 if the *Judicial Review Act* 1991 – whether the refusal was a "decision" to which the *Judicial Review Act* 1991 applied ADMINISTRATIVE LAW – JUDICIAL REVIEW – DECISIONS UNDER AN ENACTMENT – DECISIONS UNDER INSTRUMENTS – where the council applied to

summarily dismiss the application by a developer for statutory review of a refusal to amend an overlay map – whether the refusal was made "under an enactment"

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GENERALLY – where the council applied to summarily dismiss the application by a developer for statutory review of a refusal to amend an overlay map – where the council alleged that the application did not comply with section 25 of the *Judicial Review Act* 1991 because it did not set out the grounds – whether the application complied with section 25 of the *Judicial Review Act* 1991

COUNSEL: D Gore QC with J Ware for the applicant
A Morris QC with J Given for the respondent

SOLICITORS: Moreton Bay Regional Council Legal Services for the applicant
MacPherson Kelly for the respondent

Overview

[1] Moreton Bay Regional Council refused a developer's request for amendment of an environmental overlay map which covered the developer's land. The developer applied for a statutory order of review of that refusal. The Council applied for summary dismissal of the developer's review application.

[2] In my view, the decision the developer wishes the court to review is not a "decision" to which the *Judicial Review Act* 1991 applies, in particular, because it does not affect the developer's rights. I therefore order that the developer's statutory order for review be dismissed.

[3] My reasons follow.

Legislation

[4] I gratefully adopt Jackson J's succinct outline of the relevant provisions of the *Judicial Review Act* 1991 (**JRA**) in *Murphy v Legal Services Commissioner*.[1]

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[1] [2016] QSC 174.

"[31] Section 19 of the JRA confers jurisdiction upon the court to hear and determine applications made to it under the Act.

[32] Part 3 of the JRA provides for statutory orders of review. Section 3 defines that term to mean, inter alia, 'an order on an application made under s 20 in relation to a decision'. Section 20 provides that a person who is aggrieved by a 'decision to which [the] Act applies' may apply to the court 'for a statutory order of review in relation to the decision'. The application may be made on one or more of the grounds set out in s 20(2), which are expanded by the provisions in ss 23 to 24. By s 25, an application for a statutory order of review must set out the grounds of the application and be made in the way prescribed by the rules of court. Section 30 provides for orders that the court may make 'on an application for a statutory order of review'.

[33] The statutory remedies, including an application under s 20 resulting in an order made under s 30, provided for in Pt 3 of the JRA are quite separate from the power to make an order in the class of a 'prerogative order' as provided for under Pt 5 …

[34] The right to make an application under s 20 and the power to make an order under s 30 depend on the existence of 'a decision to which this Act applies'. In s 4, that term is relevantly defined to mean 'a decision of an administrative character made … under an enactment …'

[35] Under s 48 of the JRA, the respondent may apply for an order dismissing an originating application made under s 20. The court may dismiss the originating application if the court considers no reasonable basis for the application is disclosed, or the application is frivolous or vexatious, or the application is an abuse of process of the court.[2] If an application is made for a statutory order of review of a decision which is not a decision to which the JRA applies, the court may make an order under s 48. Alternatively, if there is some reason in law why the application cannot succeed, an order under s 48 to dismiss the application may be appropriate."

[5] The section 4(a) definition of a "decision to which this Act applies" has been treated as a three element definition: (1) a decision; (2) of an administrative character; (3) made under an enactment.

[6] The applicant's substantive arguments in this matter concerned the first and third elements of that definition.

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[2] Section 48(1)(b) – (d) JRA.

Background

[7] David Trask is the managing director of Trask Land Corporation No 2 Pty Ltd (TLC).

[8] TLC owns land at 121 – 161 New Settlement Road, Burpengary, within the Moreton Bay Region and subject to the Moreton Bay Regional Council Planning Scheme.

[9] TLC cleared vegetation from its land.

[10] On 27 September 2017, TLC received an enforcement notice under the *Planning Act* 2016 which stated that the Moreton Bay Regional Council (MBRC) reasonably believed that TLC had committed a development offence by undertaking "assessable development", namely vegetation clearing, without a development permit.

[11] The enforcement notice stated that the cleared land was subject to environmental area overlays and that approximately 12500 square metres of the overlay had been cleared of native vegetation.

[12] David Trask wrote to the council, refuting the enforcement notice and asserting that TLC had committed no offence. He argued that the vegetation clearing work was not assessable development requiring a permit but rather exempt clearing work, under schedule 24 of the *Sustainable Planning Regulation* 2017, which fell within the definition of "accepted development" under s 44 of the *Planning Act* 2016 and which did not require a permit or other approval.

[13] After considering his arguments, MBRC rescinded the enforcement notice by letter dated 13 October 2017.

[14] TLC's Project Manager then wrote to the Chief Executive Officer of MBRC, requesting "a mapping amendment". His written request was undated. MBRC received it on or about 26 October 2017.

[15] The application for dismissal of the application for statutory review proceeded on the first hearing day on the understanding that TLC made its request for a mapping amendment having consulted MBRC's website page entitled "Request for mapping

change". That understanding was not challenged by TLC nor did its material suggest otherwise.

[16] The "Request for mapping change" webpage linked interested persons to a "request for mapping change form", however TLC's request did not include that completed form.[3]

[17] In his letter, TLC's project manager asked for the "Environmental Areas overlay mapping" to be removed from 121 New Settlement Road because the area no longer contained vegetation (the vegetation having been cleared by TLC).

[18] MBRC refused the request by letter dated 22 December 2017.[4]

[19] TLC made an application for a statutory order of review of that refusal. The application itself was incomplete – it did not disclose grounds. It was also inconsistent – referring both to MBRC's "conduct" and to its "decision".[5]

[20] MBRC applied for the dismissal of TLC's application.

MBRC's application for dismissal

[21] In its written application, MBRC sought, under r 16 of the *Uniform Civil Procedure Rules* 1999 –

- a declaration that TLC's application had not, for want of jurisdiction, been properly started and an order that it be set aside or permanently stayed; or

- an order that TLC's application be set aside or permanently stayed. [6]

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[3] Page 3 of the exhibits to the affidavit of Rhys Dennison.

[4] Page 5 of the exhibits to the affidavit of Rhys Dennison.

[5] TLC's written and oral submissions referred to MCRB's "refusal" – not its conduct.

[6] A further alternative – that the application be dismissed under s 12 of the *Judicial Review Act* 1991 – was not pursued.

[22] In outlining MBRC's position on the application for dismissal, Queen's Counsel relied upon s 48 of the JRA, which enables a court to stay or dismiss an application for statutory review if the Court considers it would be inappropriate for proceedings to continue.

[23] Queen's Counsel nominated three arguments. The first two related to the substance of TLC's application: the third was a complaint about its form. He said:

> "… there are three points to argue. The first is that the letter [refusing the map change request] does not constitute or reveal any decision … for the purposes of the *Judicial Review Act*. The second is that if there is a decision, it's not a decision under an enactment. And the third point … is that the application for statutory order of review does not comply with section 25 of the JRA … And so it's an application under section 48 of the JRA for dismissal on the basis that it does not set out the grounds."

A request for a mapping amendment

[24] MBRC's webpage and planning scheme policies refer, variously, to a mapping change, a mapping amendment, a mapping correction, and a mapping challenge.

[25] TLC's request was for a mapping "amendment".

[26] As explained on MBRC's website, as part of MBRC's "continued improvement of customer service", MBRC offered a "new service" coinciding with the commencement of the "new" MBRC planning scheme. That new service – known as "Request for mapping change" – enabled a person to request "a review of overlay mapping" "if it is believed the mapping is incorrect".[7]

[27] The Request for mapping change service is not limited to requests for changes to environmental area maps. It allows for requests for changes to overlay maps dealing with bushfire hazards, coastal hazards (erosion), coastal hazards (storm tide inundation), flood hazards, landslide hazards, overland flow paths and riparian and wetland setbacks.

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[7] Rhys Dennison, Affidavit, exhibit pages 1 – 2.

[28] The text under the heading "Request for Mapping Change" makes a distinction between a successful request for a mapping change and the formal amendment to the planning scheme overlay map (provided for in the *Planning Act* 2016). However, it is acknowledged that the text before the heading "Who can apply" *suggests* that a successful request for a mapping change will definitely result in the change requested – with a formal review being a formality only:

> "…
>
> Mapping for the planning scheme has been created using a number of datasets and includes information provided by the State Government and meets the requirements of the *State Planning Policy*. For more information see the mapping datasets information sheet [web address]
>
> Every effort has been made to ensure that the mapping included in the planning scheme is accurate. However, if you believe the mapping displayed in Council's planning scheme requires review, you can make a request to Council for a mapping change.
>
> An example of a mapping error could include the Environmental Areas overlay map incorrectly showing an area of environmental significance over fully developed land as shown below.
>
> [photographs]
>
> In this instance, Council would review the overlay map and information provided. If the **change is agreed to**, the applicant will receive a map showing the **agreed** change. The map **will be formally updated** through a planning scheme amendment as required." (my emphasis)

[29] It is acknowledged that the text under the heading "What happens next" also *suggests* that the following of *Planning Act* processes is a formality:

> "Once your application is accepted, Council will assess the information supplied, aerial photography and other relevant data available. If Council requires extra information you will be contacted.
>
> Where a change in the mapping **is agreed to**, applicants will be sent a snapshop of the **map change supported**. The mapping change request will be linked to the property.
>
> Please note that Council **formally amends planning scheme overlay maps** through the process prescribed in the *Planning Act* 2016. The mapping displayed on the website is periodically updated after these formal amendments are completed." (my emphasis)

[30] Also under that heading is an explanation of what will occur if a request is unsuccessful:

> "Where a change to the mapping is **not approved**, Council will provide a response detailing the reasons behind the decision. **Decisions cannot be appealed.**" (my emphasis)

[31] The *Planning Act* processes for amendments to planning scheme overlay maps are discussed below. No matter what the text on the webpage might suggest, the fact that MBRC approves of, or agrees with, the requested amendment is just the first step in the process of amendment of an overlay may.

Was MBRC's planning scheme policy for Environmental Areas and Corridors relevant?

[32] One of MBRC's arguments was that the "decision" to refuse TLC's map amendment request was not a decision under an enactment (in other words, the third element of the section 4(a) definition had not been met).

[33] It made five points in support of that argument, one of which was that the map amendment request was made in the context of MBRC's online process for the correction of map errors – a "customer service". MBRC submitted that the refusal was not, therefore, "under an enactment".

[34] MBRC also argued that if TLC's map amendment request was in fact a direct request to MBRC to amend its planning scheme by correcting the map, the refusal was not a decision under an enactment because "There is no right under the [*Planning Act* 2016] for an application to be made to amend a planning scheme and no express or implied power or authority to determine such an application."

[35] TLC's written response to this aspect of MBRC's argument was that the refusal was "authorised" by ss 9 and 262(2) of the *Local Government Act* 2009 (LGA). In its written submissions, TLC said:[8]

> "… the process that the Respondent has invited persons to follow by way of a Map Change Request [that is, the online process] is clearly something that

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[8] Paragraph 4.7, Outline of Submissions.

> the Respondent is empowered to do under ss 9 and 262(2) of the LGA. It is a legitimate process devised by the Respondent to fulfil its duties under that Act".[9]

[36] Thus, the potential "enactments" nominated by the parties in their written submissions were the *Planning Act* and the *Local Government Act*.

[37] In oral submissions, Queen's Counsel for TLC argued that the relevant enactment was the "Minister's Guidelines and Rules". He said:[10]

> "Your Honour, as to whether it was a decision under enactment, our primary position is that, for the reasons already advanced, it was a decision explicitly within the terms of the relevant statutory instrument being the minister's rules …
>
> … There can be no question, in our submission, that the minister's rules authorise the council to decide whether or not to make or not to make an amendment."

[38] At the end of the hearing on 24 April 2018, I reserved my decision.

[39] To aid my understanding of the context of this application, I read MBRC's planning scheme, which is a statutory instrument, available online.

[40] On its face, the planning scheme, or more particularly, a planning scheme policy, seemed to me to provide for "decisions" about overlay map amendments or changes. It seemed to me that the planning scheme was therefore *potentially* a relevant "enactment" to which neither party had referred.

[41] On my behalf, my associate asked the parties, by e-mail, to provide written submissions about the planning scheme as a potentially relevant enactment.

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[9] Section 9 of the LGA provides for the powers of local governments generally. Section 9(1) states: "(1) A local government has the power to do anything that is necessary or convenient for the good rule and government of its local area." Section 262(2) provides for powers in support of a local government's responsibilities. It states: "(2) The local government has the power to do anything necessary or convenient for performing the responsibilities [that is, responsibilities under a Local Government Act]."

[10] Transcript of hearing 1-42*ff*.

[42] Her e-mail read:

> "Her Honour seeks further submissions in this matter on the issue of the potentially relevant 'enactment'.
>
> Her Honour notes that the hearing proceeded on the assumption that the map change request by Trask was made in pursuance of the web-based application process for a map change request to correct errors – see exhibit RD-1 to the affidavit of Rhys Dennison.
>
> Counsel for the applicant MBRC described the process as an informal one: 'not a process under a statute … a customer service'. And it is described in that way in RD-1.
>
> In response to a question from her Honour about whether there was a more formal process available to a developer seeking a mapping change, counsel said that this informal process (as per RD-1) was the only way a developer could apply for a mapping change 'if at all'.
>
> He explained that under previous legislation, a developer could apply for a rezoning, via a rezoning application, but that that process had 'disappeared'.
>
> He emphasised: 'But it is an important part of our submission that there is no process provided for in the *Planning Act* for a member of the public to make an application to change any aspect of a planning instrument'.
>
> Counsel for the respondent developer argued (in his written submissions) that the decision (to refuse the request for a map change request) was authorised by the *Local Government Act* 2009.
>
> In oral submissions, he said the decision to refuse the mapping request was within the terms of the Minister's Rules.
>
> Neither counsel referred to the planning scheme itself as the relevant enactment.
>
> Counsel is invited to make submissions on the following:
>
> A planning scheme is a statutory instrument (under the *Statutory Instruments Act* 1992) and therefore an enactment for the purposes of the *Judicial Review Act* 1991.
>
> The *Planning Act* provides for the making or amendment of planning scheme policies, which are to support (among other things) action by a local government in making or amending local planning instruments (see s 4 and s 22).
>
> The MBRC has a policy, in Schedule 6 of its planning scheme, entitled *Environmental Areas and Corridors.*
>
> Paragraph 2.8 explains that a person may apply for an amendment to mapping, outside the development assessment process.

> Paragraph 2.8.1 sets out the requirements for such an application.
>
> In particular, it requires completion of the form contained in Appendix 3.
>
> By part 'D' of the form, a land owner (or someone authorised to act on their behalf) may seek an 'assessment' to amend the environmental area assigned to the property or to correct an obvious map error.
>
> It is not clear whether the web-page process (in exhibit R-D 1) is intended to reflect Option 2 in Appendix 3 .
>
> It is not clear on the evidence whether the developer's application was intended to conform to the requirements of RD-1 or Appendix 3.
>
> Is the application process provided for in Appendix 3 of the policy contained in the schedule to the planning scheme relevant to the present application?
>
> More particularly, is the policy the 'enactment' under which the decision has been made - putting to one side for the moment the question whether the *decision* is one to which the *Judicial Review Act* applies?"

[43] Final submissions and evidence in response to my questions were all filed by 30 May 2018. A brief hearing was held on 20 July 2018.

[44] The parties' responses to my invitation for submissions are discussed below.

Relevant provisions of the *Planning Act* 2016 for amendments to planning schemes

[45] The process for amending a planning scheme is contained in Division 2 of Chapter 2 of the *Planning Act* 2016 which is entitled *Making, amending or repealing local planning instruments.* For present purposes, ss 18 and 20 are relevant.

[46] A local government may amend a planning scheme via one of two processes –

- the tailored approach process (see s 17(1)(a) of the *Planning Act*) under section 18; or
- the process set out in the rules of chapter 2 of the Minister's guidelines and rules (see below) under section 20.

[47] Section 18 provides:

> "**18 Making or amending planning schemes**

(1) This section applies if a local government proposes to make or amend a planning scheme.

(2) The local government must give notice of the proposed planning scheme, or proposed amendment, (the instrument) to the chief executive.

(3) After consulting with the local government, the chief executive –

(a) must give a notice about the process for making or amending the planning scheme to the local government; and

(b) may give an amended notice about the process for making or amending the planning scheme to the local government.

(4) The chief executive must consider the Minister's guidelines when preparing the notice or an amended notice.

(5) The notice, or amended notice, must state at least –

(a) the local government must publish at least 1 public notice about the proposal to make or amend the planning scheme; and

(b) the local government must keep the instrument available for inspection and purchase for a period (the ***consultation period***) stated in the public notice of at least –

(i) for a proposed planning scheme – 40 business days after the day the public notice is published in a newspaper circulating in the local government area; or

(ii) for a proposed amendment – 20 business days after the day the public notice is published in a newspaper circulating in the local government area; and

(c) the public notice must state that any person may make a submission about the instrument to the local government within the consultation period; and

(d) a communications strategy that the local government must implement about the instrument; and

(e) the local government must consider all properly made submissions about the planning scheme or amendment; and

(f) the local government must notify persons who made properly made submissions about how the local government dealt with the submissions; and

(g) the local government must give the Minister a notice containing a summary of the matters raised in the properly

made submissions and stating how the local government dealt with the matters; and

(h) after the planning scheme is made or amended, the local government must publish a public notice about making or amending the planning scheme.

(6) The local government must make or amend the planning scheme by following the process in the notice or amended notice.

(7) If the notice requires the Minister to approve the instrument, the Minister may approve the instrument if the Minister considers the instrument appropriately integrates State, regional and local planning and development assessment policies, including policies under an applicable State planning instrument.

(8) A planning scheme replaces any other planning scheme that the local government administers."

[48] Section 20 provides for the alternative process:

"**20 Amending planning schemes under Minister's rules**

(1) This section applies to an amendment of a planning scheme that the Minister's rules apply to.

(2) Instead of complying with section 18, a local government may amend a planning scheme by following the process in the Minister's rules.

(3) The rules must provide for the local government to publish a public notice about the planning scheme being amended."

The Minister's guidelines and rules

[49] Under s 17 of the *Planning Act*, the Minister was required to make an instrument containing certain guidelines and rules. Those guidelines and rules (the Minister's guidelines and rules (MGR)) are given effect through the *Planning Regulation* 2017 and are published on the website of the Department of State Development, Manufacturing, Infrastructure and Planning.[11]

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[11] *Planning Regulation* 2017, s 10.

[50] Among many other things, the *guidelines* set out[12] the matters the chief executive of the State's planning department must *consider* when preparing a notice for a local government that sets out the process for making or amending a planning scheme where the local government wishes to use the tailored approach under s 18 of the *Planning Act*.

[51] The *rules* include the process which must be followed for amendments to planning schemes where the local government wishes to proceed under s 20 of the *Planning Act*.

The s 18 process for amendment of a planning scheme

[52] The "chief executive" to whom notice must be given of the proposed amendment under s 18 is the chief executive of the State's planning department.[13]

[53] Chapter 1, part 1 of the MGR contains the guidelines the chief executive must consider when preparing a notice under ss 18(3)(a) or (b) of the *Planning Act*.

[54] Among other things, the notice must include certain public notice and consultation requirements. Any person may make a submission about the proposed amendment within the consultation period (s 18(5)(c)). Properly made submissions must be considered by the local government (s 18(5)(e)). The local government must give the Minister a notice containing a summary of the matters raised in properly made submissions and stating how the local government dealt with the matters raised (s 18(5)(g)).

[55] Also, the chief executive is required to consider who is required to approve the proposed planning scheme amendment. If Ministerial approval is required, the Minister may approve the instrument if it accords with s 18(7) of the *Planning Act*.

The s 20 process for amendment of a planning scheme

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[12] See also the *Guidance for the Minister's Guidelines and Rules*, July 2017, published on the Department's website.

[13] Section 33(11) *Acts Interpretation Act* 1954.

[56] The MGR provide for four types of planning scheme amendments: administrative, minor, qualified state interest; and major.

[57] For amendments to which the MGR apply, a local government may choose to follow the process defined therein for amending a planning scheme. Rules about the process to be followed for different types of amendments are in chapter 2 of the MGR.

[58] The mapping amendment sought by TLC was an administrative amendment because it was to correct or change a mapping error.[14]

[59] For an administrative amendment, the relevant Minister's rules require, as mandatory minimum steps, that –[15]

- the local government prepare the proposed amendment;
- the local government decide to adopt, not adopt or not proceed with the proposed amendment;
- if the local government decides to adopt the proposed amendment, it is to publish a public notice about it in accordance with the *Planning Act* and as prescribed by Schedule 5 of the MGR; and
- within 10 days of publishing a public notice, the local government must give the Chief Executive a copy of the public notice and a certified copy of the administrative amendment as adopted.

Cases relied upon by MBRC in support of its arguments about the substance of TLC's application

[60] MBRC argued that the refusal was not a decision to which the JRA applied because –

- it was not a "decision" because it was not final or operative and determinative (lack of finality); or
- it was not made "under an enactment".

Cases: not a decision

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[14] Schedule 1, MGR, 1(a)(iii).

[15] Chapter 2, Part 1, Rules 1 – 3, MGR.

[61] MBRC's arguments about lack of finality were based upon the decision of the High Court in *Australian Broadcasting Tribunal v Bond*[16] which sets out the criteria of reviewable decisions.

[62] MBRC's arguments about lack of finality were developed by contrasting two cases dealing with amendments to planning schemes in which the *Bond* criteria were applied: *Resort Management Services v Noosa Shire Council*[17] and *Redland Shire Council v Bushcliff.*[18]

[63] Those cases will be briefly discussed.

Bond; Resort Management Services; Bushcliff

[64] According to *Bond*, the JRA applies only to decisions which are "final". Mason CJ said:[19]

> "a reviewable 'decision' is one for which provision is made by or under a statute. That will **generally**, but not always, entail a decision which is final or operative and determinative, **at least in a practical sense**, of the issue of fact calling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, although an intermediate decision, might accurately be described as a decision under an enactment." (my emphasis)

[65] Additionally, in accordance with *Bond*, it is an "essential quality" of a reviewable decision that it be a "substantive determination".

[66] *Resort Management Services* was a decision of the Court of Appeal, delivered as a judgment of the court.

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16 (1990) 170 CLR 321.

17 [1985] 1 Qd R 311.

18 [1997] 2 Qd R 97.

19 Op cit at 337.

[67] There was a conflict between the Noosa Shire Council's strategic plan and its draft development control plan. The Noosa Shire Council (**NSC**) sought to resolve that conflict by amending its strategic plan.

[68] NSC resolved to "undertake an amendment" of the Strategic Plan Map in certain ways. NSC subsequently gave public notice of the proposed amendments to the strategic plan, and kept its proposal to amend open for inspection as required under the *Local Government (Planning and Environment) Act* 1990.

[69] Resort Management Services (**RMS**) considered the proposed amendment to be to its disadvantage. A company associated with RMS made a submission to NSC about the proposed amendment. It was one of several submissions made to NSC. Having considered the submissions, NSC resolved to proceed with the amendments it proposed.

[70] RMS applied for a statutory order of review of that "decision" to proceed with the amendments. NSC applied for RMS's application to be dismissed under s 48 of the JRA on the basis that the decision was not reviewable.

[71] One of the questions for the Court of Appeal was whether the decision was "sufficiently final and operative" to be a reviewable decision. The Court held that it was an operative decision:[20]

> "The appellant's other submission was that the resolution is not a decision within the meaning of the *Review Act* [the JRA] because it is not an "ultimate or operative determination".
>
> That assertion is incorrect. The resolution was the final decision required of the appellant in the process of amendment of the strategic plan for its area and is a decision which was specifically referred to in the [*Local Government (Planning and Environment) Act* 1990]. That is sufficient. [The court referred to *Bond* at 338, 375-376.]"

[72] The decision explained the process of amendment to the strategic plan –

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[20] Op cit 318.

- Subsection 218(2)(b) of the *Local Government (Planning and Environment) Act* 1990 provided that a Local Authority may propose to amend a planning scheme "by amending an existing strategic plan …".

- Provision was made in s 2.18 for the local authority to give notice of its proposal, to keep the proposal open for inspection and to receive submissions.

- By s 2.19, every submission had to be considered.

- By s 2.19(3), after considering any submissions and assessing relevant matters, the local authority must decide, by resolution, if the proposal publicly notified should proceed; should proceed with modifications or should not proceed.

[73] Thus, the decision made by resolution was the final step in the process of amendment of the strategic plan – taken after notice was given, submissions were invited and the submissions received were considered.

[74] *Bushcliff* was a decision of Thomas J (as his Honour then was) at first instance.

[75] Redland Shire Council (**RSC**) resolved to adopt a draft strategic plan "for the purpose of public exhibition in accordance with the *Local Government (Planning and Environment) Act*". Bushcliff was aggrieved by the resolution and sought a statement of reasons for it under s 32 of the JRA.

[76] Under s 39 of the JRA, RSC sought an order that Bushcliff was not entitled to make the request because the resolution was not a decision to which the JRA applied.

[77] Thomas J explained that the answer to that question depended on a proper construction of the *Local Government (Planning and Environment) Act* 1990. Under that Act, the adoption of a new or amended strategic plan was regarded as an amendment to a planning scheme. A planning scheme may only be amended by Governor in Council (GIC). One of the ways in which an application to amend a planning scheme might come before the GIC is if it is proposed by a local government, as was the case in *Bushcliff*.

[78] His Honour then set out the procedure required if a local government wished to effect a change to a planning scheme:[21]

> "If a Local Government wishes to effect a change to any one of the various components that comprise a planning scheme (e.g. a strategic plan) the legislative requirements, as it seems to me, contemplate the following:
>
> 1. The Local Government proposes an amendment (s 2.18(2)(b)).
> 2. The Local Government gives public notice of the proposal, including by advertisement, and also gives notice to the Chief Executive (s 2.18(4) and 2.18(4A).
> 3. The details of the proposal are kept open for public inspection for 60 days …(s 218(6) and 218(7)).
> 4. Members of the public may obtain relevant data (s 218.8(8) and 218(8A)), and may make "submissions" in respect of the proposal …
> 5. The Local Government must consider every submission made to it (s 219(1)) …
> 6. The Local Government must decide, by resolution, if the proposal should be proceeded with, with or without modifications, or whether it should not be proceeded with (s 2.19(3)).
> 7. If the decision has been to proceed, the Local Government, as proponent, applies for the approval of the Governor in Council by sending it to the Chief Executive within a prescribed time (s 2.20(1)).
> 8. The Governor in Council may then either approve the amendment, with or without modifications, or refuse it (s 2.20(6) and 2.20(7))."

[79] As to the point at which the local government made a decision which was subject to judicial review, RSC submitted that the initial proposal of the council was no more than a proposal setting out a preliminary view of the content of a new strategic plan, "precent to the carrying out of a deliberate process that might or might not lead to a decision to proceed which, if made at all, will be made under s 2.19(3) … the preliminary decision was not one which is final operative or determinative in relation to legal rights".[22]

[80] Thomas J noted that that argument was supported by Mason CJ's statements in *Bond*, including, as well as the statement cited above, his Honour's observations that –

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[21] Op cit 98 – 99.

[22] Ibid 99.

> "… a reviewable decision is a decision which a statute requires or authorises rather than merely a step taken in the course of reasoning on the way to the making of the ultimate decision".
>
> "… acts done preparatory to the making of a 'decision' are not to be regarded as constituting 'decisions' for if they were, there would be little, if any, point in providing for judicial review of 'conduct' as well as of a 'decision'."

[81] His Honour found the decision to be at most a proposal to attempt to amend a scheme. His Honour concluded that the decision to propose an amendment was "an important step" but it did not "in any sense, legal or practical, resolve any substantive issue. Essentially it raises issues for public input, following which a substantive decision will be made". Bushcliff was not therefore entitled to a statement of reasons for the resolution.[23]

Case: "not under and enactment"

[82] MBRC relied on *Griffith University v Tang*[24] in support of its argument that the refusal was not made "under an enactment".

Tang

[83] By legislation, the university was given power to "manage and control the university's affairs and property". The university council created policies about enrolment and academic misconduct. Applying these policies, a committee, as the delegate of the university council, excluded Ms Tang. Ms Tang applied to judicially review that decision.

[84] The university was ultimately successful in its application for summary dismissal of Ms Tang's application because its decision was not "a decision of an administrative character made under an enactment".

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[23] Ibid 101.

[24] (2005) 221 CLR 99.

[85] In *Tang*, Gummow, Callinan and Heydon JJ said (not all citations included):[25]

> "This appeal involves particular consideration of the third element: that presented by the requirement that the decision be 'made … under an enactment'. Here again, as with the earlier two elements just discussed [that is "decision" and "of an administrative character"], there is involved a question of characterisation of the particular outcome which founds an application for review under the statute. Questions of characterisation provide paradigm examples of the application of the precept that matters of statutory construction should be determined with regard to the subject, scope and purpose of the particular legislation, here the Review Act [the JRA].
>
> In considering the present case, some care is needed lest an answer is given at odds with the subject, scope and purpose of the Review Act. In a leading Australian text, the following passage is in point:[26]
>
> > Many of the difficulties stem from the fact that no statute could possibly spell out the detail of every single decision or step in the decision-making process which it requires of its administrators. Some statutes are admittedly more detailed than others, whilst some do little more than stipulate the administrator's end goals and a few methods. But, whether the statute be detailed or broad brush, they all need to contain a provision which states in substance and in broad terms that a Minister, bureaucrat or other agency has the power (or even the duty) to administer this Act, and to do all things necessary in that regard. The recent trend is to treat decisions which can find no other statutory source of authority than such a clause as not being *under* an enactment for *ADJR* purposes, although there has been scant attempt to identify why that approach should be adopted as a matter of principle. (original emphasis)
>
> It is not necessarily an adequate answer to the suggested attribution to the outcome in question of one character, to urge the possession of additional or alternative attributes …
>
> '*Proximate source of power*'?
>
> The considerations just mentioned point against acceptance of a construction of the legislation here in question which turns upon the identification of 'the immediate or proximate source of power' to make the decision in question; rather than an 'ultimate source residing in … legislation'. The distinction was drawn in these terms in *Post Office Agents*

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[25] Ibid 123 - 125.

[26] Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004) pp 73-74 (footnotes omitted).

> *Association Ltd v Australian Postal Commission* and has been applied in subsequent federal Court decisions. In *Hutchins v Federal Commissioner of Taxation*, Black CJ held that the relationship between the generally expressed administrative provisions of the *Income Tax Assessment Act* 1936 (Cth) and a decision by a Deputy Commissioner to vote against a motion put at a meeting of creditors under Part X of the *Bankruptcy Act* 1966 (Cth) was 'too remote and non-specific' to qualify the decision as made under the taxation statute.
>
> … The circumstance that a decision could not have been made but for the concurrence of a range of circumstances of fact and law does not deny that in the necessary sense it was 'made under' a particular enactment. The search for the 'immediate' and 'proximate' relationships between a statute and decision deflects attention from the interpretation of the Review Act and the AD(JR) Act in the light of their subject, scope and purpose.

[86] After considering, relevant decisions of the High Court, their Honours said:[27]

> "… As noted earlier in these reasons, the presence in the AD(JR) Act of the words '(whether in the exercise of a discretion or not …)' indicates that the decision be either required or authorised by the enactment. *Mayer* shows that this requirement or authority may appear sufficiently as a matter of necessary implication. However, whilst this requirement or authority it a necessary condition for the operation of the definition, it is not, by itself, sufficient.
>
> The decision so required or authorised must be 'of an administrative character'. This element of the definition casts some light on the force to be given to the phrase '*under* an enactment'. What is it, in the course of administration, that flows from or arises out of the decision taken so as to give that significance which has merited the legislative conferral of a right of judicial review upon those aggrieved?
>
> The answer in general terms is the affecting of legal rights and obligations. Do legal rights or duties owe **in an immediate sense** their existence to the decision, or depend upon the presence of the decision for their enforcement? To adapt what was said by Lehane J in *Lewins*, does the decision in question derive from the enactment the capacity to affect legal rights and obligations. Are legal rights and obligations affected not under the general law but by virtue of the statute.
>
> If the decision derives its capacity to bind from contract or some other private law source, then the decision is not 'made under' the enactment in question …

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[27] *Tang* 128 – 131.

> The determination of whether a decision is 'made … under an enactment' involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment, and secondly, **the decision must itself confer, alter or otherwise affect legal rights or obligations**, and in that sense the decision must derive from the enactment. A decision will only be 'made under an enactment' if both these criteria are met. It should be emphasised that this construction of the statutory definition does not require the relevant decision to affect or alter *existing* rights or obligations, and it will be sufficient that the enactment requires or authorises decisions from which new rights or obligations arise. Similarly, it is not necessary that the relevantly affected legal rights owe their existence to the enactment in question. Affection of rights or obligations derived from the general law or statute will suffice." (my emphasis)

[87] It was held that the decisions about which Ms Tang complained were authorised but not required by the *University Act*. The committee (which decided to exclude Ms Tang) depended for its existence and powers upon the delegations of the university council under the *University Act*. But that did not mean that the decisions about which Ms Tang complained were "made under" the *University Act*. The university's decision to terminate a consensual relationship was made under the general law. Ms Tang's application was summarily dismissed.

Other cases

[88] Having regard to the formal process by which amendments are made to a planning scheme, MBRC's decision to refuse TLC's request for a mapping amendment may be viewed as a decision not to propose an amendment to a planning scheme.

[89] Some Queensland decisions concern attempts to review a decision not to act. The first is *Nona & Anor v Barnes & Anor*.[28]

[90] *Nona* concerned a coronial inquest. Under the *Coroners Act* 2003, if, on the basis of information obtained during the inquest, the coroner reasonably suspects that a person has committed an offence, the coroner must give that information to the Director of Public Prosecutions (DPP).

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[28] [2012] QCA 346.

[91] In *Nona*, the coroner was asked by a family member of one of the deceased to consider whether to refer the matter to the DPP. The coroner replied, in correspondence, "… I have concluded there is no basis on which I should refer information obtained during my investigation into these deaths to the DPP".

[92] The coroner refused to provide a statement of reasons for his decision. The question on appeal was whether the coroner was obliged to provide reasons under the JRA.

[93] The primary judge held that the coroner's decision not to give information to the DPP was not a decision to which the JRA applied. As explained by Fraser JA:[29]

> "The primary judge observed that a Coroner's action in sending information to a prosecuting authority could have potential consequences and that the appellants had an interest in the course which had been taken, or not taken, by the Coroner, but that this decision did not itself confer, alter or otherwise affect legal rights or obligations:
>
> > The coroner's decision not to provide information did not itself have that effect. No legal rights or obligations would be affected merely by the receipt (or non-receipt) by the DPP of that information."

[94] The primary judge also rejected an argument that the coroner's conclusion that there was no basis for referral to the DPP, formed before it was manifested in correspondence, was reviewable because the undisclosed content of the coroner's mind lacked the necessary quality of formality. There was no exercise of administrative power constituted solely by a person's mental processes in considering a question.

[95] The appeal from the primary judge's decision was dismissed.

[96] The appeal decision focused on the coroner's state of mind. Fraser JA[30] identified the only relevant "decision" as the manifestation in correspondence of the coroner's decision not to refer.[31]

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[29] Set out in the appeal decision, ibid, at [7].

[30] With whom Philippides and Douglas JJ agreed.

[31] Op cit [20].

[97] His Honour found that that decision did not satisfy the second criteria in *Tang* because, as the primary judge found, the receipt, or non-receipt, of information by the DPP did not confer, alter or otherwise affect legal rights or obligations. Further, however the decisions were characterised (that is, the coroner's state of mind or his refusal to refer to the DPP), they related to the administration of criminal justice and were not amenable to judicial review.[32]

[98] Special leave to appeal this decision was refused.

[99] In the course of his judgment, Fraser JA referred to a passage from *Salerno v National Crime Authority*[33] which analysed the leading cases on the meaning of "decision" in this context.

[100] One passage which Fraser JA quoted from *Salerno* included a reference to French J's judgment in *Bond*, including his Honour's statement that it was not necessary that the determination directly affect legal rights or obligations so long as it had some real or practical effect. Fraser JA observed that the passages quoted from *Salerno* were not inconsistent with *Tang*.[34]

[101] *Nona* was relied upon by the respondent in *Leadpoint Pty Ltd v Legal Services Commissioner*.[35] The Commissioner applied to Jackson J to dismiss the applicant's application for a statutory order of review. The originating application was for a review of the respondent's decision not to take any further action upon a complaint made by the appellant to the respondent that a company providing mortgage services was engaging in legal practice unlawfully. The Commissioner had initially referred the complaint to the Queensland Law Society (QLS), to investigate and report back to the Commissioner. QLS so investigated and recommended, in its report to the Commissioner, that the Commissioner not start proceedings.

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[32] Item 1, schedule 2 and s 31(b) of the JRA.

[33] (1997) 75 FCR 113 at 137 – 138; quoted at [13].

[34] Op cit [17].

[35] [2015] QSC 254.

[102] The Commissioner's application was based on two grounds – one of which was that the respondent's decision was not made "under an enactment" because it did not "itself" affect any rights or obligations. Jackson J agreed:[36]

> "[23] The respondent submits that the decision no longer to deal with the matter (and therefore, not to start proceedings to prosecute, not to give to the Commissioner of Police the results of the investigation of the applicant's complaint and not to refer the complaint to the QLS for further investigation)[37] is one that does not 'itself' affect any rights or obligations.
>
> …
>
> [26] There are not many cases of assistance in considering the question whether there is any effect on a legal right or obligation in this case …
>
> [27] In my view, the precise question in the present case should not be approached initially as though the Commissioner's powers under s 446 are binary [that is, to start proceedings (s 446(2)(a)) or to decide to no longer deal with the matter (s 446(2)(d)] …
>
> [28] … to treat s 446(2) of the LPA in that way generally would be to fail to recognise the other alternatives provided for under ss 446(2)(b) and (c). If the results of an investigation are given to the Commissioner of Police, the Commissioner of Police may become obliged to deal with them. The parties made no submissions on this point.
>
> [29] Similarly, if a complaint is referred to the QLS for further investigation, the QLS would prima facie be subject to the obligation under s 439(1) of the LPA to investigate the complaint and report to the Commissioner about it. The decision would create an obligation for the QLS. I also observe that if the Commissioner decides to start a proceeding to prosecute, and starts the proceeding, in the course of the proceeding the parties will have rights and will be subject to obligations.
>
> [30] In those circumstances, it may be said that to conclude that the decision to no longer deal with the subject matter does not satisfy the criterion that it confer, alter or otherwise affect legal rights or obligations depends on the particular character of a decision 'to no longer deal with the matter'.

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[36] Extracts from [23] – [35].

[37] The respondent's first three options under section 446 of the *Legal Profession Act* 2007 [LPA] – the fourth was to decide to no longer deal with the matter.

> [31] So viewed, in my view, no relevant legal rights or obligations are conferred, altered or otherwise affected by the decision. It is not suggested that the Commissioner's power under s 446(2)(d) of the LPA to decide to no longer deal with the matter is a 'once only' decision. If circumstances were to change, for example, if better evidence became available, nothing would stop the respondent from revisiting the decision to no longer deal with the matter, except for the passing of any relevant limitation period to start a prosecution."

[103] In *Murphy v Legal Services Commissioner*,[38] his Honour was again dealing with an application by the Commissioner to summarily dismiss an originating application for a statutory order of review of his decision to dismiss complaints made by the applicant against two legal practitioners.

[104] One of the Commissioner's arguments was that the decision was not a decision to which the JRA applied, relying upon *Leadpoint*. His Honour agreed (footnotes omitted):

> "[64] In *Leadpoint*, I held that a decision to no longer deal with the subject matter did not confer, alter or otherwise affect legal rights or obligations. Because of that, in my view, the decision was not one that was a 'decision of an administrative character made … under an enactment (whether or not in the exercise of discretion) within the meaning of s 4 of the JRA. Accordingly, it was not a decision to which the JRA applied.
>
> …
>
> [67] The question, then, is whether my decision in *Leadpoint* does apply, or whether the reasoning in it supports the conclusion that the respondent's decision in the present case is not a decision to which the JRA applies because it is not a 'decision of an administrative character … made under an enactment'.
>
> [68] The precise significance of that expression was explored in … *Tang* ...
>
> …
>
> [70] To the extent that the respondent's decision was made under s 446 to no longer deal with the subject matter of a complaint about an unlawful operator, I would follow my earlier decision in *Leadpoint*, unless I were persuaded that it is clearly wrong.

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[38] [2016] QSC 174.

> [71] However, there is an arguable difference on this point between a decision to no longer deal with the matter the subject of a complaint about an unlawful operator under s 446 and a decision to dismiss a complaint about an Australian legal practitioner under s 448. Under s 448 the respondent must give the Australian legal practitioner and the complainant written notice about the Commissioner's decision to dismiss the complaint.
>
> [72] The question becomes whether a decision to dismiss a complaint under s 448 is thereby distinguishable from a decision to no longer deal with the subject matter of the complaint under s 446(2)(d).
>
> [73] First, a decision to dismiss a complaint under s 448 differs from a decision to start a discipline proceeding under s 447. In the latter case, the proceeding when started engages both rights and obligations as between the respondent (as applicant in the discipline application) and the Australian legal practitioner who is a respondent to that application. That person is obliged to respond to the proceeding. But that person and the respondent have a right to proceed to a decision of the tribunal or committee and to obtain a relevant outcome.
>
> [74] However, a decision not to start a discipline application or not to prosecute does not change the position of any party. It does not confer immunity or right upon the person who is subject to a complaint under the LPA. It takes away no right of the complainant to make a complaint. It does not render the respondent functus officio. The respondent can review the decision or make it again.
>
> [75] Similar reasoning applies to, and shows the difference between, a decision not to deal with the matter the subject of a complaint about the conduct of an unlawful operator under s 446 and a decision to start proceedings to prosecute the unlawful operator under that section."

[105] His Honour summarily dismissed the originating application for that reason.

[106] His Honour took a similar approach in *Goodchild v LSC*.[39] In that case, the Commissioner decided to dismiss complaints which were made more than three years after the conduct the subject of the complaints happened. An application to review those decision was summarily dismissed.

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[39] [2017] QSC 117.

[107] His Honour applied the same reasoning he had applied in *Leadpoint* and *Murphy*. His Honour said (footnote omitted):[40]

> "… Reverting to the language of *Griffith University v Tang*, a decision to dismiss a complaint under s 430(2)(b) does not affect legal rights and obligations. The applicant is entitled to make a further complaint. Of course, as a practical matter, if the circumstances are no different from those which led to his current complaints being dismissed, the same results might be likely to follow. Nevertheless, a decision to dismiss confers no rights on a person the subject of a complaint. They are not immune from a further complaint over the same subject matter, as s 432(1)(d) of the LPA recognises.
>
> Accordingly, in my view, the respondent's decisions in the present matters to dismiss the complaints under s 430(2)(b) of the LPA are not decisions to which the JRA applies."

[108] Also, in *Eastman v Besanko,*[41] a majority of the Federal Court held that a decision not to order an inquiry under section 424 of the *Crimes Act* 1914 (Cth) into a murder conviction was not a decision under an enactment because there was no right to the order of the inquiry and the statutory power authorising the decision did not create a duty to order an inquiry. Special leave from this decision was refused.

[109] *Salerno*, referred to above, also contains a statement about policy considerations that is relevant to TLC's argument that the LGA was the enactment under which the refusal was made. The Full Court said:[42]

> If a general authorisation in a statute for a decision by an organisation set up under that legislation is sufficient to make it a decision under the statute, and thus open to judicial review, every ultra vires action of that organisation that has decisional effect and every kind of conduct engaged in by it for the purpose of making a decision would be examinable by the court. The potential for massive disruption of the organisation's activities that would be the consequence of such a conclusion is manifest.

MBRC's arguments about lack of finality and TLC's response

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[40] Ibid [25] – [26].

[41] (2010) 244 FLR 262.

[42] *Salerno* 143.

[110] MBRC argued that the refusal was not a *final* decision to which the JRA applied for five reasons, which to some degree overlapped.

[111] Stated very briefly, they were that –

- the refusal was an initial decision in a multi-step process which may, or may not, result in an amendment to the planning scheme – it was not final, operative or determinative;
- it was akin to the decision considered in *Bushcliff*: further steps were required before a substantive decision was reached;
- the refusal was further away from the substantive decision than the decision in *Bushcliff* because there was uncertainty about the process the Council might adopt to achieve an amendment to the planning scheme;
- unlike in *Bushcliff*, the refusal in this matter was not the subject of a resolution of the MBRC;
- in *Bushcliff*, the decision was a positive one (to adopt a draft strategic plan) which was considered "merely procedural" and not resolving a substantive issue: the present decision was a negative one, with even less connection to the statutory process than the decision in *Bushcliff*.

[112] TLC's response was, in effect, to contrast *Bushcliff* in which the decision was positive with the negative decision – the refusal – in the present matter. It argued that the refusal was a decision of finality, also relying on *Bond*.

[113] TLC argued in its outline:[43]

> "The decision of the respondent was final, operative and determinative in a practical sense of the issue of fact falling for consideration; that is, its refusal to take steps to amend its Planning Scheme to correct the Overlay map. The Respondent's decision on the Map Change Request was not a conclusion reached as a step along the way in the course of reasoning, leading to an ultimate decision, but was, in fact, a decision of finality."

[114] TLC argued that the present refusal was analogous to that in *Resort Management Services* in that the refusal was the final decision by an officer of the respondent in the amendment process.

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[43] At paragraph 4.1.

[115] In oral submissions,[44] Queen's Counsel for TLC emphasised the *practical* finality point made by Mason CJ in *Bond*: "…a reviewable 'decision' is one for which provision is made by or under a statute. That will generally, but not always, entail a decision which is final or operative, *at least in a practical sense*, of the issue of fact falling for consideration". (my emphasis)

[116] He emphasised the distinction between a negative decision which ended a process (it "failed at the first hurdle") and a positive decision which allowed a process to continue. He said:[45]

> "… the decision of the council not to deal with the application, not to follow the statutory process for review, is the decision which is ultimate and has operative effect because nothing else arises."

[117] In reply, Queen's Counsel for MBRC drew upon his other substantive argument about the refusal not being "under an enactment" and said,[46] "Our learned friends described the refusal as a failure at the first hurdle but there is no statutory hurdle with respect to this process. There's no provision made for a request of this kind".

[118] He referred to the distinction drawn by TLC between a refusal and a positive step in a process and said: "It can't, surely, be non-reviewable if it's decided one way but reviewable if it's decided the other". He returned again to his "not under an enactment" argument: "I appreciate that our learned friends are seeking to get comfort from those aspects of decisions that refer to decisions that are final but they still need to be decisions made under an enactment. And this refusal of the mapping request was not under an enactment."

[119] Neither side referred me to a case involving a negative decision at the first step in a step by step process to an ultimate decision.

Was the refusal "final or operative, at least in a practical sense"?

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[44] At page 1 – 39.

[45] At page 1 – 40, ll 5 – 7.

[46] At page 1 – 44.

[120] The distinction between the decisions made by the local councils in *Resort Management Services* and *Bushcliff* is an obvious one. In *Resort Management Services*, the relevant decision was one made at the end of a process and with operative effect. In *Bushcliff* the decision was made at the beginning of a process and was, at most a proposal, some distance removed from an ultimate or operative decision.

[121] In my view, it is the nature of the decision, and more importantly, its effect, and not its timing, or its distance from the end of a process (which was the thrust of several of the arguments for MBRC), that is relevant to the question whether a decision is final or operative *at least in a practical sense*.

[122] A decision to commence a process which *might* end in one of several ways is easily understood as a proposal, or something akin to a proposal, and not a final or operative decision in any sense.

[123] However, the refusal in this case decided that there would be no process. In my view, the refusal cannot be characterised as a preliminary view or a procedural determination (in the sense that it kick-started a procedure). Nor is it a proposal. In practical terms, it determined the issue of whether the mapping amendment would be made, adverse to TLC. The process which might lead to amendment was not started.

[124] That decision is, in my view, "binding" in the sense of being "final", because it answered finally *that particular request* for a mapping amendment.

[125] The decision is, in my view, binding, whether it is a decision "under" the online mapping amendment service or whether it is a decision "under" an enactment.

[126] That deals with the arguments about the first element of the definition of "decision".

[127] MBRC also argued that the refusal was not made "under an enactment" in the *Tang* sense, and that the third element of the definition was therefore not met.

MBRC's arguments that the refusal was not made "under an enactment" and TLC's reply

[128] *Tang* set out the two criteria involved in the determination of whether a decision is made under an enactment. The first is that the decision must be expressly or impliedly required or authorised by the enactment and the second is that the decision must itself confer, alter or otherwise affect legal rights.

[129] As to the second of the criteria, MBRC argued that the refusal made no change to rights or obligations:[47]

> "… The TLC land was subject to a bundle of rights and obligations that arise from the planning scheme designations (including mapping) affecting it prior to the Refusal. That bundle of rights and obligations did not change as a result of the Refusal; in fact, the Land could be used or developed in exactly the same way before and after the Refusal. Only a formal planning scheme amendment, following a deliberative process which was required to be followed by the Council if it chose to do so, could have achieved that. The Refusal, by contrast, did not even result in any formal deliberative process for amendment commencing."

[130] MBRC said nothing, at this point, about TLC's rights or obligations *as a developer* – as distinct from its submissions about the rights and obligations to which the land was "subject".

[131] TLC argued, in its written submissions, that the decision (the refusal) "otherwise affects the legal rights of the Applicant in relation to the use and development of its land".[48]

[132] In oral submissions, Queen's Counsel for TLC submitted that –[49]

> "it would be a mistake to read the second criteria in *Tang* as implying that a decision is only reviewable if it makes a positive conferment, alteration or affection of legal rights. A decision not to issue a licence or a decision not to issue a planning approval or a decision not to award a university degree is a decision which affects legal rights or obligations in the – in the relevant sense. One doesn't have to say, 'This is the position before. This is the position after. And something has changed which makes the rights after the event materially different from the rights before the event'. If it's a negative decision, if it's a decision not to grant the licence or not to issue the

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47 Paragraph 72, outline of submissions.

48 Paragraph 4.5, outline of submissions.

49 Transcript of hearing 1 – 43 ll 10 – 26.

> development approval or not to issue the building permit or whatever it is then that materially is a reviewable decision because, rather than conferring, altering or affecting legal rights, it prevents the conferment, alteration or affection of legal rights."

Whether the refusal affected rights or obligations

[133] While the JRA's definition of "a decision" includes a refusal,[50] *Tang's* second criteria means that the only refusals amenable to review are those which create or affect rights or obligations – and even then, only if that effect may be said to be as a consequence of an enactment.

[134] TLC argued that the refusal affected its legal rights in relation to its use and development of land. But its rights in relation to the use and development of its land depended on the planning scheme and its overlay maps (among other things).

[135] TLC had no *right* to develop the land in accordance with its own perception of "correct" overlay mapping which was denied by the decision.

[136] It had no *right* to an amendment to an overlay map which was denied by the decision.

[137] It did have a right to *apply* for an amendment to an overlay map but that right was not affected by the decision (the refusal to commence the amendment process). That right (to apply) was not exhausted or extinguished by the refusal. TLC could apply again for an amendment to the overlay map – including for example via the online process, via appendix 3, via a variation request or perhaps by a direct request to MBRC.

[138] I conclude therefore that the second of the Tang criteria is not met and the decision is not one to which the JRA applies.

[139] I draw support for that conclusion from the decisions of Jackson J and from *Eastman* discussed above.

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[50] Section 5 JRA.

[140] It may well be that, as Jackson J observed in *Goodchild*, as a practical matter, another application to amend the overlay map in the same terms might be met with the same fate – but the right to apply (again) for an amendment to an overlay map is not affected by the refusal.

[141] Also, as pointed out by MBRC, the *Planning Act* does impose a duty on MBRC to consider or propose an amendment to its planning scheme if a development application is made to it with a variation request.

[142] And, as further pointed out by MBRC in its reply to TLC's supplementary submissions, TLC has other options for addressing any grievance it has about overlay mapping affecting its land in the context of the determination of a development application or as a request to apply a superseded planning scheme.[51]

[143] My decision that the refusal did not affect TLC's rights (or any other rights or obligations) is sufficient to determine MBRC's application. However, for completeness, I will deal as briefly as I can with the other arguments made to me.

Arguments about whether the decision was expressly or impliedly required or authorised by an enactment

[144] As noted above, the hearing proceeded initially on the basis of MBRC's argument that the refusal was made in the context of a customer service – unrelated to any enactment.

[145] In its written submissions, MBRC argued that the *Planning Act* did not impose a duty on the Council to consider or propose an amendment to its planning scheme except in three circumstances, namely, if it were directed to do so by the Minister (s 26(5)(c)); during its 10 year review (s 25(1)(b)); or if a development application were made to it for a preliminary approval to seek to vary the effect of a planning scheme, known as a variation request (s 61). The present matter involved none of these circumstances.

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[51] Supplementary written submissions in reply, paragraphs 15 – 18.

[146] MBRC also argued that if the request were alternatively considered a direct request of council, the refusal was not "under an enactment".

[147] TLC argued that the relevant enactment was the LGA or, as added in in oral arguments, the MRG.

[148] In short, s 262 of the LGA empowers a local government to do anything that is necessary or convenient for performing responsibilities it is required or empowered to perform under a Local Government Act, which includes a planning scheme.[52]

[149] At 4.7 of its written submissions, TLC said (footnotes omitted):

> "4.4 Section 9 of the LGA empowers a Local Authority to do anything that is necessary and convenient for the good rule and local government of its Local Government Area. A Local Authority has the power to do anything that is necessary or convenient for performing its responsibilities. The Local Authority must first be required or empowered to perform a responsibility under a Local Government Act. A Local Government Act for the purposes of s 262 is a law under which a Local Authority performs its responsibilities, including the LGA, the [*Planning Act*] and a Planning Scheme.
>
> 4.5 The decision of the Respondent in refusing the Map Change Request was authorised by the LGA and the decision otherwise affects the legal rights of the Applicant in relation to the use and development of its land. The Respondent has not suggested that it lacked authority or power to invite a Map Change request and decide whether to implement a change to a Overlay Map in its Planning Scheme.
>
> 4.6 In accordance with its functions, the Respondent had a process for reviewing the accuracy of certain Overlay maps. It allowed a constituent to make a 'request for mapping change' if that person believes the mapping is incorrect …
>
> 4.7 … the process that the Respondent has invited persons to follow by way of a Map Change Request is clearly something that the Respondent is empowered to do under ss 9 and 262(2) of the LGA. It is a legitimate process devised by the Respondent to fulfil its duties under that Act."

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[52] Dictionary, schedule 4 LGA.

[150] Queen's Counsel for MBRC also argued that TLC's recognition that it was not able to appeal the decision highlighted the point that the decision was not made under an enactment.[53]

Was the decision made "under" the LGA?

[151] In my view, *Salerno* deals with TLC's argument. The LGA contained too general an authorisation for decisions by local authorities to be the "enactment" for the purposes of the third limb of the definition of a "decision".

[152] TLC referred me to no authority in which such general provisions were held to be relevant enactments in this context.

Submissions about the planning scheme as an enactment

[153] In response to my e-mail seeking submissions about the planning scheme and its policies as a potentially relevant statutory instrument/enactment, each of the parties filed two sets of written submissions. In each case, the second set of submissions filed responded to the first set of submissions of the opposing party. Each party filed affidavit material in support of its submissions.

[154] In its first set of submissions, MBRC repeated its argument that the refusal was made "under" MBRC's online processes – which had nothing to do with the planning scheme policies (**PSPs**). It also argued that even if the decision were made under the relevant PSP, it was not a reviewable "decision" because it failed the definition.

[155] If it was a decision under the PSP and therefore under an enactment, this court had no jurisdiction to review it because of section 231 of the *Planning Act*. TLC's application did not allege jurisdictional error. Further, even if section 231 did not apply, TLC's application should be dismissed under section 12(b) of the JRA because TLC was entitled to seek a review of the matter in the Planning and Environment Court under the declaratory power in section 11 of the *Planning and Environment Court Act* 2016.

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[53] Transcript of hearing 1 – 1, l 39 – 1 – 18, l 5.

[156] In support of its submissions, MBRC relied upon two affidavits of Catherine Ross, a Team Leader at MBRC.

[157] Ms Ross's first affidavit explained the way in which the online request for mapping change service worked, including the process of electronically submitted requests. Her investigations revealed that TLC's request had been lodged online under the online request for mapping change service.[54]

[158] In her second affidavit,[55] Ms Ross explained that it was only in respect of environmental areas overlay maps that the PSPs provided for an application for an amendment.[56]

[159] In its first submissions, TLC frankly said that it "did not seem" that either TLC or MBRC knew about Appendix 3 of the PSP when TLC made its request or when it prepared its application for a statutory order of review.[57]

[160] Its critical submissions included that –

- TLC's initial nomination of sections 9 and 262 of the LGA were nominations of the general legislative basis for making a decision to change and overlay map – the PSPs provided the specific statutory authority for such a decision;
- the case was not clear enough to justify summary intervention, about which there was the need for exceptional caution.

[161] Having considered MBRC's first submissions and Ms Ross's second affidavit, in its second submissions, TLC obtained an affidavit from Bradley Gates,[58] a town planner employed by TLC as a project manager.

[162] In his affidavit, Mr Gates referred to a prior map change request made by him after he had determined that the "North Lakes Map" was incorrect because it included an

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[54] Paragraphs 13 – 18, Affidavit of Catherine Ross, sworn 11 May 2018.

[55] Sworn 25 May 2018.

[56] Paragraph 5.

[57] Paragraph 2.10, TLC's supplementary outline of submissions.

[58] Sworn 17 May 2018.

environmental overlay map over the whole of the land the subject of the North Lakes Map. The request to amend was partly successful. I note that the letter from MBRC advising that the request was partly successful included this paragraph:[59]

> Council will now **endeavour** to formally amend the Planning Scheme overlay maps through the process prescribed in the *Sustainable Planning Act* 2009. Council cannot amend the overlay maps until this process is followed.

[163] Mr Gates also explained that – on one view contrary to that which had been originally submitted by TLC in response to my e-mail – he had reviewed the Environmental Protection Areas and Corridors Planning Scheme Policy, and in particular section 2.8 of the policy, before making the request for a mapping amendment which is the subject of this hearing. Relying on MBRC's advice in relation to a previous map change request relating to flood mapping – to use the map change request process found online – Mr Gates did so for the present request.

[164] I note that the previous recommendation for use of the online process did not concern environmental overlay maps – the only overlay maps in respect of which the PSP provides for applications for amendment.

[165] TLC's critical submissions, stated briefly, included that –

- there was a need for exceptional caution in summarily dismissing an application;
- the court had to be satisfied that the interests of justice required summary dismissal;
- its primary submission was that the refusal was made under the PSP – and it mattered little that PSP procedures had not been correctly followed;
- the refusal was final, operative, determinative, and substantive, and made under an enactment which conferred, altered or otherwise affected TLC's legal rights and obligations in relation to the development of its property;

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[59] Page 5 of the exhibits to the affidavit of Bradley Gates.

- section 231 offended the principles discussed in *Plaintiff S157/2002 v Commonwealth of Australia*[60] and *Kirk v Industrial Relations Commission of New South Wales*[61] "and this result will not be endorsed";
- TLC had in fact brought an application for relief under part 5 of the JRA;
- whether declaratory relief was available to TLC, it is not appropriate for this court to exercise its discretion under section 12(b) of the JRA because there was a "very live issue" between the parties as to whether the refusal was made under the PSP and "some 900 odd pages of Affidavit material and Exhibits have been filed by the Respondent, meaning the issues cannot be determined summarily without a trial involving further disclosure and probably, the cross-examination of Council Officers …"; and
- this was not an appropriate case for summary dismissal.

[166] In its reply to the second submissions of TLC, the critical submissions of MBRC were that –

- even if the refusal was properly characterised as a decision not to propose an amendment under the *Planning Act*, it did not meet the first of the *Tang* criteria because sections 18 and 20 of the *Planning Act* did not expressly or impliedly require MBRC to make a decision such as the refusal;
- the powers given to local authorities under the LGA are broader than the *Planning Act* provisions and do not expressly or impliedly require MBRC to make a decision such as the refusal;
- the evidence is to the effect that the request was made and determined under the online process, and was at least one step removed from a decision under the MGR;
- the online process was not devised to give effect to the PSP application process; the processes are mutually exclusive;
- this is an appropriate matter for summary dismissal – the relevant ascertainable facts have been disclosed in affidavit material;
- mapping scheme amendment requests are not provided for in the *Planning Act* because that could lead to unlimited requests and an unlimited right to review in each instance; and
- TLC has other options for addressing any grievance with the overlay mapping.

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[60] (2003) 211 CLR 476.

[61] [2009] 239 CLR 531.

[167] It was also submitted for TLC, relying on *ANU v Burns,*[62] that a decision "under an enactment" included a decision "in pursuance of or under the authority of an enactment". Even if the refusal was made under the online process, it was made "under" in the sense of "in pursuance of" the authority of the LGA.

[168] In an attempt to avoid the operation of section 231 of the *Planning Act*, TLC argued, for the first time, that MBRC had made a jurisdictional error.

Was the planning scheme the enactment under which the refusal was made?

[169] On 3 July 2017, the *Planning Act* 2016 (*Planning Act* or PA) replaced the *Sustainable Planning Act* 2008.

[170] The Moreton Bay Regional Council Planning Scheme commenced on 1 February 2016. By section 286 of the *Planning Act*, it continues to have effect, according to its terms and conditions (sections 286(1) and (7(a)(xi)) and the *Planning Act* applies to it as if it had been made under the Planning Act (section 286(3)).

[171] MBRC made planning scheme policies under s 22 of the *Planning Act*. They are included in schedule 6 of the planning scheme and provide information and guidance about planning matters.

[172] The Planning scheme policy – Environmental Areas and Corridors applies to "*development applications* … for land mapped by the Environmental Areas Overlay and the Environmental Offset Receiving Areas Overlay (1.2)" (my emphasis)

[173] As 2.8 explains, the mapping is reviewed and refined where required as part of the development assessment process. A person who wishes to amend the mapping outside of the development assessment process is referred to Appendix 3.

[174] Section 2.8.1 of the policy *suggests* that an requested amendment *will* be incorporated into the planning scheme –

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[62] [1982] 43 ALR 25 at 31.

> "After Council has considered all available information, you will be sent a draft amendment and advice when the amendment has been incorporated into the planning scheme. If your proposed changes are not accepted, Council will provide you with information detailing the reasons behind our decision and offer you the opportunity to supply additional information. The Environmental Areas overlay map is updated periodically to incorporate changes resulting from map corrections or development assessment outcomes."

[175] On one view of things, appendix 3, the Map Change Amendment Form, is a document isolated from the policy because the policy only applies to development applications.

[176] In other words, it may be that appendix 3, and the request for a map change made in pursuance of it, ought not to be considered part of the policy which concerns development applications. That would briefly dispose of the issue of whether the policy is the enactment in this case. However neither party made this argument or referred to this issue.

[177] According to Ms Ross, the online request for mapping change service commenced on 16 March 2017. There was no evidence before me about the date upon which the Environmental Areas and Corridors policy was made. It may be that Appendix 3 was the mapping error amendment process available for environmental overlay maps outside a development process *before* the creation of the online policy. And it may be that the online policy was intended to replace it as well as extend the opportunity for correction of errors to other overlay maps. This would explain the similarities between the online process and appendix 3. However, no material was placed before me to enable me to reach a view about this.

[178] Regardless, for the reasons canvassed above, I accept the argument of MBRC that even if the refusal were made "under" the policy, it is not a decision to which the act applies because it does not fulfil the second of the *Tang* criteria.

[179] I will not further discuss the many other arguments made, several of which repeated arguments already made, other than to say that, in my view, section 231 would apply to the refusal were it made under the PSPs. TLC's application has not been brought under Part 5 of the JRA.

Did the application comply with section 25(b) of the JRA?

[180] Even though it is not necessary for me to reach a decision about MBRC's arguments that the application itself was so deficient as to warrant its dismissal, I consider, with some hesitation, that TLC's application met the requirements of section 25(b) of the JRA – just barely. One may discern one or two grounds from the declarations "claimed". One may discern the particulars from the correspondence attached. While it is an unsatisfactory document, MBRC is able to gain sufficient information from the case it has to meet from the application notwithstanding its several flaws. It would require amendment however, and the provision of particulars, before any final hearing could take place.

Costs

[181] I will hear from the parties as to cost.