Section 119 PA16

GROUND 3

Section 119 PA16

The Function of s 119 in the process of issuing an ICN

1. **The Respondent states: @ 50 & 51**

The third ground of appeal is stated in the Notice of Appeal as follows:

> 50. The third ground of appeal is stated in the Notice of Appeal as follows:
> "*The Tribunal erred in finding that the law provided circumstances that supported Council's power, under section 119 of the Planning Act, to issue the ICN.2*" [footnote omitted] [Notice of Appeal]

And

> 51. While this ground does not specify which paragraph of the Decision Notice to which it relates···

Appellant Response:

The appellant did not cite a specific section of the Decision Notice of the Tribunal because paragraph 33 was actually the 'finding of the tribunal' for Appeal 25-021 and while the Respondent has correctly identified the paragraph in which the Tribunal published its "findings" the appellant was of the view that this was **self-evident**.

3. **The Respondent states: @ 52**

> In the Council's submission, the Appellants have not established an error or mistake in law on the part of the Development Tribunal or jurisdictional error in its finding that the Council was empowered by section 119 of the PA to give the ICN.

4. **The Respondent states: @ 53**

> Section 119(2) of the PA imposes an obligation on a local government to give an infrastructure charges notice if:
> (a) a development approval has been given (section 119(1)(a)); and
> (b) an adopted charge (being a charge adopted by resolution28 [28 PA, s.113(1) and sch.2.)] applies to providing trunk infrastructure for the development (section 119(1)(b)).

5. **Appellant Response:**

Missing from that summation is the very crucial element that s 119, subsection (12)(a) requires that s 120 must also be **complied with** before the authority is effective.

The Tribunal in reaching their determination that section 119 had been satisfied, was required to address the issue presented by **section 120**

Section 120(1) was the determination of *extra demand* created by the development on the relevant trunk infrastructure.

6. In addressing the s 120 issue the Tribunal advised:

> *35. The levied charge under the ICN is subject to section 120 of the Planning Act. As was considered in Toowoomba Regional Council v Wagner Investments Pty Ltd & Anor [2020] QCA 191, a levied charge must satisfy two requirements:*
>
> *(a) There must be demand on relevant trunk infrastructure as a consequence of the proposed development; and*
>
> *(b) That demand must be over and above what the current uses of the subject land generate.* [Affidavit A - Attachment F]

7. However, the Tribunal consideration of that aspect was based, it appears, to be entirely on the advice of Council in their Submission that the **law on this issue was settled.**

> 37. The Tribunal accepts the Council's submissions that there is no requirement to calculate the levied charge by reference to **actual** additional demand generated by the development.
>
> Moreover, the Tribunal accepts that it is irrelevant that, in a technical sense, **the mere reconfiguration does not give rise to additional demand**.
>
> In that regard, the Tribunal refers to the Court of Appeal's reasons at [115]. [Affidavit A - Attachment F]

8. **The Respondent states: to the Tribunal @20**

In their **Submission** (19/8/25) this view in their submission:

> [20] It is irrelevant that, **in a technical sense, the mere reconfiguration (as opposed to the further use of the lots so created) does not give rise to additional demand.** It is enough if the **further use** of the lots so created gives rise to the additional demand, in order for section 120 to be satisfied [21]. As the Court of Appeal observed:
>
> [21] Toowoomba Regional Council v Wagner Investments & Anor (supra) at [115]

9. **Appellant Response:**

The appellant addressed that position in their **Final Submission** (25/8/25) to the **Tribunal** at page 1 by advising the Tribunal that: [Affidavit A - Attachment C]

> Firstly, what was missing in the observation from the Court of Appeal case cited, was Judge Mullins previous sentence.
>
> *The relevant development is the proposed uses of the land as a result of the* ***reconfiguration*** [RAL/2012/6226 [Apeal-186/2017]] *and the accompanying application for a* ***material change of use.*** [MCUC/2016/1844 [Apeal-184/2017]]

And page 2

> **The misconstruing of the content.**
>
> *It was not to the point that, technically, the mere reconfiguration of a lot did not result in any change to the demand on infrastructure networks (as observed by the primary judge at [98] of the reasons).* ***What was relevant was that the reconfiguration of a lot is one of the trigger points for the issuing of an ICN in relation to that development.***
>
> Thus, making no mention of section 120 of the Planning Act or **Justice Jones** opinion that **Reconfiguring a Lot does not constitute a Use** as within a land planning context
>
> And importantly - the following
>
> > *Section 5.2(b) of the Charges Resolution expressly limits the accumulation of the charges, so that they do not exceed the maximum adopted charge for the development. Whether the maximum adopted charge for the development will be exceeded cannot be determined until the time for payment of the infrastructure charge arises. In the meantime, there was* ***no error in issuing the ICN in conjunction with the reconfiguration of lot application,*** *as it will be a matter of timing as to which ICN is paid first (which was recognised in the report prepared within the Council that preceded the issue of the ICN in respect of the reconfiguration).*
>
> The '*trigger point*' referred to obviously is in a *Charge Resolution* not the Planning Act 2016 (PA16) or the Planning Regulations 2017 (PR17) and it is the matter of the *Charge Resolution* that we will get to later, as being the crucial element in this appeal.

10. The appellant's **Final Submission** page 10 to 13 provided the Tribunal with an interpretation of the Wagner 2 decision - which show a different conclusion than that presented by Council @ **30** of the **Respondents submission** (19/8/25).

Para 30 of the **Respondents submission** stated:

> *The basis upon which the Appellants allege section 120 of the Planning Act has not been complied with are:*

a. "development for reconfiguring a lot does not of itself generate demand on infrastructure"27; [27-> "Premise 3" on page 10 of the Appellants' "Submission"]

31.Both of those grounds reflect a fundamental misunderstanding of the law as it applies to section 120 of the Planning Act

Here is **Premise 3** on page 10 of that Appellant's **Submission** (12/7/25) [Affidavit A - Attachment A]

Premise 3
A development for *Reconfiguring a lot* does not of itself generating a demand on infrastructure.

The Planning and Environment Court determined that:

> *While under the SPA the term "development" includes "reconfiguring a lot", it does not follow that that form of development would be capable of generating a demand on infrastructure.*
> *The reconfiguration of a lot of itself does not involve the carrying out of work on land, nor does it involve a material change in use of premises. Instead, it is concerned with the re-arrangement of boundaries of premises rather than the use to which those premises may be put.*
> *A distinction identified by Everson DCJ in Johnson v Cassowary Coast Regional Council.*[1]

It then went on to determine:

> *While the evidence concerning this particular appeal is not entirely satisfactory, the evidence, such as it is, is sufficient to satisfy me that there is no rational link between the reconfiguration of the land to create the subject lot and the estimated additional demand the Council considers will be placed on the transport trunk infrastructure network.*

And what did the Court of Appeal (CoP) say about that position?

Firstly, it said this

> ***If*** *the charge applied for reconfiguring a lot, the charge became payable .....*

The use of the term "***If***" clearly indicating that it is simply **not automatic** that a development for *reconfiguring a lot*, would, solely because of the 'type' of development, qualify to attract the application of a charge under an Infrastructure Charge Notice (ICN) which in order to be levied must firstly satisfy Section 120 of PA16.

This significantly challenged the Respondent view:

[1] *(2008) QPEC 102, [10],*

*32.that it is **irrelevant that**, in a **technical sense,** the mere reconfiguration of land (as opposed to the use that results from it) **does not give rise to additional demand***

*It is enough for section 120 to be satisfied **if** the further use of the lots so created **gives rise to additional demand** -Citing Toowoomba Regional Council v Wagner Investments & Anor (supra) at [115]*

11. And the appellant's **Final Submission** (25/8/25) page 13 provided and extract from the judgement cited above. [Affidavit A - Attachment C]

Extract from the Wagner 2 judgement

Reconfiguring a Lot -

The relevant development is the proposed uses of the land as a result of the reconfiguration (DA RAL/2012/6226 -Appeal 186/2017) and the accompanying application (DA-MCUC/2016/184 - Appeal184/2017) for a material change of use.

It was not to the point that, technically, the mere reconfiguration of a lot did not result in any change to the demand on infrastructure networks (as observed by the primary judge at [98] of the reasons).

What was relevant was that the reconfiguration of a lot is one of the trigger points (under Council Charges Resolution) for the issuing of an ICN in relation to that development. [115]

What would have been relevant to assessing the authority of the opinion of Justice Jones in QPEC [2019] @ 24 regarding the status of reconfiguring a lot, as a development capable of generating a use, would have been a determination by the CoA, if **DA RAL/2012/6226** had simply been for solely reconfiguration itself, without a concurrent material change of use application.

and also, **Final Submission** on page 13 and 14

Extra demand- Section 120(1)

The court of appeal clearly has dispelled the mythology that extra demand is whatever an assessment managers Charges Resolution says it is. The Court of Appeal (CoA) supported Justice Jones conclusion in QPEC [2019] 24 that the process required to be undertaken by the assessment manager in determining to issue an Infrastructure Changed Notice (ICN) is a two fold exercise as described in paragraph 78 of the CoA reasons.

The CoA was not afforded the opportunity of forming a view on Justice Jones determination regarding the ability of the reconfiguring a lot to not generate a 'use' required as part of the process of making a determination in relation to the correct adopted charge to be levied under the Charge Resolution, as the concurrent material change of use rendered the issue mute.

We are still, as a consequence, lacking a statutory definition or an opinion of the courts, that conclusively defines the meaning of extra demand and the

intent of the application of that in relation to criterion No2 under 120(1) of PA16.

However, the current legislation regarding the requirement to assess the impact of 'demand' by a particular development was first introduced in 2014 in the Sustainable Planning Act.

The Explanatory Notes to the bill, stated, when dealing with the scope of appeals advice about the 'reasonableness of a levy charge' and consideration of 'if the cost had been correctly apportioned between existing and future users taking into account the anticipated usage of the infrastructure or the capacity of the infrastructure, allocated to developments"

Specifically identifying of the term capacity in relation to the 'infrastructure servicing the development' is a significant element when considering a 'demand' application

The fact that the Respondent has demonstrated the process by which they arrived at their determination that 'extra demand' was not required by specfic exercise when considered RAL21/0138, demonstrates without argument, that they failed to undertake part 1 of the statutory requirement of 120(1) of PA16 before issuing the ICN.

Further, the evidence provided in the Representation stage to the Respondent for the ICN and reiterated in the Submission for this Appeal, provides good grounds for arriving at the determination that, had the required competent assessment been undertaken, at the appropriate stage, a significant possibility exists that it could have resulted in a finding, for this particular development application, in this specific location, that a distinct possibility existed that no extra demand would occur on the infrastructure identified.

Finally, lot 51 MCH 567, the subject of DA RAL21/0138 (Subject Development) was created in 1908. In the 117 years since its creation, this lot has made no demands upon trunk infrastructure.

Demonstrating the fragility of a position that the mere creation of lot of land is a reliable indicator that it will result in subsequently posing a demand on trunk infrastructure.

It is the Appellants position that the Respondents, in ***working out of extra demand, for section 120*** failed to undertake the required process to determine if DA RAL21-0138 will generate an extra demand on the relevant trunk infrastructure before issuing ICN 5138178 and thereby the ICN is ultra vires.

12. The appellant in their **initial Submission** (12/7/25) to the Tribunal stated at pages 10 and 11- [Affidavit A - Attachment A]

Premise 3

A development for Reconfiguring a lot does not of itself generating a demand on infrastructure.

The **Planning and Environment Court** determined that:

> While under the SPA the term "development" includes "reconfiguring a lot", it does not follow that that form of development would be capable of generating a demand on infrastructure.
>
> The reconfiguration of a lot of itself does not involve the carrying out of work on land, nor does it involve a material change in use of premises. Instead, it is concerned with the re-arrangement of boundaries of premises rather than the use to which those premises may be put.
>
> A distinction identified by Everson DCJ in Johnson v Cassowary Coast Regional Council.

It then went on to determine:

> While the evidence concerning this particular appeal is not entirely satisfactory, the evidence, such as it is, is sufficient to satisfy me that there is no rational link between the reconfiguration of the land to create the subject lot and the estimated additional demand the Council considers will be placed on the transport trunk infrastructure network.

And what did the Court of Appeal (CoP) say about that position?

Firstly, it said this

> If the charge applied for reconfiguring a lot, the charge became payable .....

The use of the term "**If**" clearly indicating that it is simply not automatic that a development for reconfiguring a lot, would, solely because of the 'type' of development, qualify to attract the application of a charge under an Infrastructure Charge Notice (ICN) which in order to be levied must firstly satisfy Section 120 of PA16.

The CoP went on to state the primary judge's position thus:

> The proceeding below was conducted on the basis of pleadings and expert evidence and the agreed issues before the primary judge were summarised at [9] of the reasons. The approach of the primary judge to the construction of s 636 and other relevant provisions of the SPA is set out at [12]-[15] of the reasons. The primary judge found (at [17] of the reasons) that there are two pre-conditions that must be satisfied before a local authority can issue an ICN:
>
> - there must be a relevant trunk infrastructure and
> - there must be additional demand placed on that trunk infrastructure .

And

> The primary judge concluded (at [99] of the reasons) that there was no rational link between the reconfiguration of the land to create the subject lot and the estimated additional demand the Council considers will be placed on the transport trunk infrastructure network and that "the levied infrastructure charge could not sensibly be said to be based on a reasonable estimate of likely additional demand placed upon trunk infrastructure that would be generated by this approval".

Then

> The relevant development is the proposed uses of the land as a result of the reconfiguration and the accompanying application for a material change of use. It was not to the point that, technically, the mere reconfiguration of a lot, did not result in any change to the demand on infrastructure networks (as observed by the primary judge at [98] of the reasons). What was relevant was that the reconfiguration of a lot is one of the trigger points for the issuing of an ICN in relation to that (material change of use) development.

And finally

Orders

> It therefore follows that the orders should be:
>
> 1. Application for leave to appeal granted, but not including leave to argue that there was an error in the legal approach of the primary judge to the appeals.

So, the legal approach by the primary judge was to express the opinion that there is 'no link between a development application for reconfiguring a lot, in determining whether or not there is additional demand, as a consequence of that development'

Claim 1

The assessment manager under section 120 of PA16 is required to undertake the exercise of determining whether or not additional demand on existing trunk infrastructure will occur as a consequence of that development, in order to issue a ICN.
No material has been produced or discovered to that identifies that this process was undertaken by the assessment manager.

13. Then on **initial Submission** pages 11 and 12

Evidence for extra demand

Council provides on its website information in relation to its current LGIP. Amongst the information provided is an Excel spreadsheet which details trunk infrastructure Schedule of Works Model (SOW) Within the file is a spreadsheet labelled Existing Trunk assets – Transport.

This particular spreadsheet lists all the road assets identified as a trunk asset

The development, the subject of the ICN, is located on Wilkinson's Road. It is the trunk asset that would be subjected to the maximum impact of any increase in demand placed upon the trunk infrastructure asset for road transport.

Column O of the spreadsheet indicates the 'current valuation' of the road asset: Column V indicates the 'current replacement cost' of the asset.

The current replacement cost for the asset of Wilkinson's Road is exactly the same as the current valuation for Wilkinson's Road.

Under accounting principles this indicates that the asset has not depreciated below its replacement value, indicating no requirement for the allocation of funds for capital upgrading of the assets value.

No historic data is provided as to the traffic counts for the history of Wilkinson's Road that would support the proposition that road traffic in and out of Tuan is continuing to expand in demand and that the design of Wilkinson's Road would be required to be upgraded to handle this increased demand.

One of the two principal indicators used in the LGIP to assess potential generation of extra demands on infrastructure is population growth.

The appellant provided details to Council in their Representation to support the position that the village of Tuan is actually contracting in population PLUS the population density of Tuan is significantly less than larger urbans residential areas in the LGA area.

Further Tuan hosts a significant boat ramp facility with low tide access to the Great Sandy Strait providing for significant demand for traffic on this road not associated with residential development in the village. This creats the proposition that Wilkinson's Road already has reserve traffic capacity and corresponding standard in excess of that required to cater for transport generated by the development of 4 additional residential lots.

The principal of the LGIP system is to provide funds for capital works required to expand existing infrastructure. The LGIP system is not for the purposes of raising funds for the maintenance of existing infrastructure- This is a function of a local governments rates system.

Conclusion

The Appellant asserts that the onus is upon Council to undertake the process required by Section 120 of PA16, to arrive at a determination that a

development actually is responsible for 'extra demand' over and above that which is within the capability of current existing trunk infrastructure.

The courts have determined that the mere classification of a development type is of itself not necessary a criterion indicating the generation of extra demand.

Proposed Finding

The Council failed to undertake the necessary assessment required by section 120 of PA16 to determine if extra demand on existing trunk infrastructure actually existed and thereby required for the issuing of the ICN.

The ICN is therefore flawed and should be withdrawn.

14. The Respondent states:

18. After having determined its jurisdiction to hear the appeal, the Development Tribunal observed the two pre-conditions of giving an infrastructure charges notice under section 119 of the PA and the requirements for a levied charge under section 120 of the PA.12. [Affidavit A - Attachment F]

Appellant Response:

As a review of s119 will establish:

s119 Requires Three Preconditions

Under s119(1), an ICN may only be issued if:

(a) a development approval has been given; and

(b) **an adopted charge applies** to providing trunk infrastructure for the *development.; and

(c) @[10(a)] -The issuing of ICN under this section - *is subject to sections 120*

**Prescribed Development*

15. The Tribunal consideration of the satisfaction for s 120 compliance was arrived at by this process:

38. As section 120 of the Planning Act makes clear, in working out extra demand, the demand on trunk infrastructure generated by a "**prescribed development**" (defined to include "development that may be carried out on the premises without a development permit") may also be included. In this case, upon reconfiguration of the subject land, the new lots may be used for a variety of uses as "accepted development" under the Council's Planning

Scheme.9 [9-See Fraser Coast Planning Scheme, Part 5 Tables of Assessment, Table 5.5.1 Low Density Residential zone.]

Kefford DCJ consider a very similar case in Douglas Construction & Engineering Pty Ltd v Logan City Council [2023] QPEC 28 about future *accepted* assessable developments relevant to generating demand on Trunk infrastructure

Firstly Her Honour Determined
@ 29. In accordance with s 52(1) of the Planning Regulation 2017, the prescribed amounts in sch 16 relate to **various types of use,** not the **individual types of development** that might require a permit for such **use** to proceed lawfully. This is apparent when one reads the whole of sch 16.

@77 in relation to the reference in s 120(2)(c) of the *Planning Act 2016* to "*without the need for a further development permit*" (accepted development) should be properly construed as a reference to additional development permits beyond those currently in existence?

And determined

@78 I do not consider the Appellant's submissions persuasive. I do not accept that the ordinary meaning of the word "*further*" includes a future connotation.

Her honour has made a contribution to the question as to if future developments can be use in determining trunk infrastructure demand

16. That Tribunals was wrong on possibly two accounts

1. The '*development* 'must first be determined to be a "*prescribed development*" : and
2. Only if the prior decision of the P&E Court regarding the nature of a RAL are overturned – There is no evidence that has occurred .

17. An Adopted Charge Cannot Apply Unless the Development Is Prescribed

(a) Under s112(3)(b), only development **prescribed by regulation** may be charged.

(b) RAL is not prescribed as demand-generating development.

(c) Johnson v Cassowary Coast supported by Wagner Investments Pty Ltd & Anor v Toowoomba Regional Council [2019] QPEC 24 confirms a RAL **does not of itself generate demand.**

(d) The Tribunal did not consider this.

18. An Adopted Charge Cannot Apply Unless the Land Is in a PIA

- The PIA occupies less than 1% of the LGA.

- The Tribunal's interpretation provides for levying and adopted charge for development on land outside the PIA.

This would be unlawful

19. Misapplication of s120

- The Tribunal relied on s120 to justify "extra demand".
- But s120 only applies **after** an **adopted charge** is found to apply to **a** *prescribed development;*
- The Tribunal reversed the statutory sequence.

This is an error of law.

20. The Tribunal's Interpretation Depends on Errors in Ground 2

1. Because the Tribunal misconstrued Table A capacity to lawfully assign an adopted charge (Because of ambiguity); and
2. Dismissal of the precent law in relation *Wagner 1* and *Johnson* for a RAL only to generate *extra demand*

its conclusion under s119 was also wrong.

This is a derivative error of law

33. The Respondent states:

55. Turning to the second pre-condition in section 119(1)(b) of the PA, the Development Tribunal made findings about the second pre-condition at paragraphs 27 to 32 and 42 to 47 of the Decision Notice. Relevantly, the

Development Tribunal found that:

(a) the Charges Resolution applied to all of the Council's local government area;30 [30 Decision Notice, para.28 and 44].

(b) the Charges Resolution adopted charges for providing trunk infrastructure for reconfiguring a lot;31 [31 Decision Notice, para.28].

(c) the adopted charge for reconfiguring a lot was set out in Schedule 1, Table A of the Charges Resolution;32 [32 Decision Notice, para.31].

(d) neither party argued that the subject land fell within the localities described in row 1 of Table A or Maryborough, Howard, Tornanlea or Tiaro in row 2 of Table A;33 [33 Decision Notice, para.45].

(e) the subject land should be treated as being in a "Rural township" for the purposes of Schedule 1 of the Charges Resolution in circumstances where:

(i) the Charges Resolution applied to the whole of the Council's local government area;

(ii) there was no indication anywhere in the Charges Resolution that it was intended to exclude any part of the Council's local government area from the application of the adopted charges;
(iii) the subject land was not contained in the other localities described in Table A; and
(iv) "*Rural townships*" would act as a catchall to capture other areas in the Council's local government area not otherwise described in Table A;34 [34 Decision Notice, para.44 and 45. and 13]

(f) section 3.6 of the Charges Resolution supported its findings in sub-paragraph (e) above.35 [35 Decision Notice, para.47].

56. The findings of the Development Tribunal at paragraph 55(a) to (d) above were **findings of fact**. Those findings at paragraph 55(e) and (f) above were **findings of law** as they involved the construction of the Charges Resolution and the Charges Resolution is a statutory instrument36 [36 *Statutory Instruments Act 1992* (**SIA**), s.7. The Charges Resolution was made under s.113 of the PA and is a notification of a public nature].

Appellant Response:

- The finding of fact (a) above depends on the assumed finding of lawfulness of the Charges Resolution.
- The finding on law (b) above is the purpose of this Appeal

57. It is submitted that the Development Tribunal did not misconstrue the Charges Resolution. In fact, the construction adopted by the Development Tribunal is both orthodox and consistent with the established principles and canons of statutory construction.

Appellant Response:

The material before the court does not support that conclusion neither in fact nor law

34. The Respondent states:

58. First, the Development Tribunal's construction allows all words in Table A, Column 1 to be given meaning and for a harmonious construction between Table A and other parts of the Charges Resolution (such as section 3.6) to be adopted.37 [37 see, for example, Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at [69]-[71].

35. Appellant Response:

"*First, the Development Tribunal's construction allows all words in Table A, Column 1 to be given meaning*"

Correct But what are the consequences for planning administration

36. The Respondent states:

59. Secondly, the Development Tribunal's construction is consistent with and best achieves the purpose of the Charges Resolution, which is to adopt charges for providing trunk infrastructure for development (including reconfiguring a lot) in all of the Council's local government area.38 [38 Charges Resolution, s.1.6].

Appellant Response:

- Firstly, the Tribunal's overarching obligation is to operate in a way that best achieves the **purpose** of the Act.

- Also, the Charges Resolution itself, when clearly read for **Table A**, can only be interpreted to apply to what is correctly is a **subset** of the local government area

Those word *in Table A, Column 1* that have *be given meaning* are **also** in **Table B -** which has the *Rural townships* localities BUT only for some Use

There are 76 Use listed in Table B some are restricted to localities, like *Rural townships* most are not an have application anywhere within the LGA

Adopting the Tribunals definition of *Rural townships* destroys the planning intent of **Table B** to restricts some use to defined localities.

I am not sure the respondent understands the complexity of the application of Tribunal Definition of *Rural townships* to Schedule 1 in its current format.

37. The Respondent states:

59. Pursuant to section 14A of the AIA and section 14 of the SIA, an interpretation of a provision of a statutory instrument that will best achieve the purpose of the statutory instrument is to be preferred to any other interpretation.

Appellant Response:

Correct and the **purpose** of the statutory instrument is that the interpretation of the **Charge Resolution** is required to achieve the **purpose of the Planning Act 2016** (section 3) which requires **clarity** and **transparency** not confusion and s 5 that required the **Council** to ensure their **documentation lawfully complied** with the Act not some satisfactory assumption of the Tribunal.

38. The Respondent states:

60. Thirdly, the Development Tribunal's construction enables a practical, broad and sensible reading of the Charges Resolution, which is appropriate in circumstances where, like planning schemes, it is not "drawn with the precision of an Act of Parliament".39 {39 Westfield Management Ltd v Pine Rivers Shire Council & Anor [2004] QPELR 337 at 342 at [18]; see also Zappala Family Co Pty Ltd v Brisbane City Council [2014] QPELR 686, 700 at [56] and [57]}

Appellant Response:

It is not the responsibility nor the authority of the Tribunal to join in partnership with the Council to provide a practical, broad and sensible reading of the Charges Resolution. - See comments in No 36

It is the primary responsibility of the Tribunal to ensure that the Charges Resolution complies with legislation.

39. The Respondent states:

61. Fourthly, contrary to the Appellants' contention, Table A is "workable"40 [40 Decision Notice, para.32 and 42.] and it would not be difficult to determine which row in Table A that may be applicable to a particular parcel of land in the Council's local government area.

Appellant Response:

It is hard to know where to start in responding to this claim

Firstly, the Tribunal acknowledges that the term "R*ural townships*" is ambiguous

Secondly the clear reading of Table A of the *Charge Resolution* indicates that it only applies to particular localities.

Applying the definition of "*Rural townships*" to the whole of the 7,105 square kilometres of the Council area is verging on the absurd and applying the definition without a definition of what actually comprises a "*township*: is also fraught with great difficulties.

Further
The Council has a LGIP. The LGIP must comply with the Ministers Guidelines and Rules (MGR). The MGR provides that the LGIP will identify a *trunk infrastructure* for the local government area. The LGIP must develop *planning assumptions* one of the functions of those planning assumptions is to identified *Priority Infrastructure Areas* (PIA).

A LGIP identify' s the PIA for ***urban development*** in accordance with the definition of Schedule 2 PA16.

PIA are essential for the application of *adopted charges* for *trunk infrastructure* under a Charge Resolution

It's hard to imagine any responsible entity could conceive that a blanket definition for R*ural townships* for the whole of a local government area with in excess of 100 locality names, most with undefined cartography, over 7,105 k² of area given the constraints placed by the LGIP and PIAs - could **rationally** let alone even **legally functional.**

33. The Respondent states:

62. When the Charges Resolution is read as a whole, it is clear that the Charges Resolution applies to all of the Council's local government area. With that in mind, when one then turns to Table A, the first step is to determine whether a parcel of land would fall within the specified localities in row 1. If it does not, the parcel of land would fall within row 2. Table A should be given its full effect and not be read down.

Appellant Response:

The statement reflects a total absence of the understanding about the application of *adopted charges* under Chapter 4 of the *Planning Act 2016.*

Firstly Column 1 of Table A "use category" includes an application to not just the **locality** but **All zones** in those localities.

The application as proposed by the respondent would if applied for the whole area, select not just the **urban areas** that get caught within a PIA, but every parcel of land including mining and state government and private schools, which under the planning act are exempt from the application of adopted charges. [s 113(3)PA16]

And urban areas undeclared as a PIA.

Adopting the solution decided by the Tribunal would wreak havoc to the application of Chapter 4 of the Planning Act within the local government area.

Plus, I could not find anywhere legislation that devolved to the Development Tribunal the authority to be involved in the drafting and application of planning legislation.

34. The Respondent states:

63. The Development Tribunal was correct in finding that an adopted charge under the Charges Resolution applied to the development approved by the development approval (RAL21/0138).41 [41 Decision Notice, para.33, 44 and 46]. The second pre-condition in section 119(1)(b) of the PA was therefore met.

Appellant Response:

The appellant respects the obvious opinion of the Respondent in this regard but the appellant will await the opinion of the court on the material placed before it.

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35. EXTRA DEMAND

36. Your honour there are at least **two** judges of this court that have expressed the opinion that *reconfiguring a lot* is a process for rearranging boundaries on **titles;** and

Of itself **does not constitute a use of a parcel of land**.

37. Judge Everson in 2008 in *Johnston v Cassowary Coast Regional Council [2008] QPEC 102* was asked to consider the effects of *reconfiguring a lot* for the purposes of rearranging the boundaries of **2 lots** by registering a *plan of subdivision* under IPA.

The development submitted to Council was in relation to adjoining parcels of land in a rural zoned.

- One, a larger parcel of land of some hectares used for growing cane that had a **class I** building attached to it; and
- The adjoining lot was a small lot of only a few thousand square metres on which there was a **class 2** building called a duplex

The result of the reconfiguration of the boundary would shift both buildings onto the one lot comprising a **class 2** duplex and a **class I** dwelling. - The other lot would now be vacant.

Councils' planner Mr Morzone submits that whilst ordinarily a reconfiguration would not trigger a material change of use, the result is different on the facts before the court.

Mr Morzone submitted that the consolidation of the **residential uses** as a consequence of the development application before the Council for the ***reconfiguring a lot*** thus moving both buildings on to the **smaller** lot - constitutes the **start of a new use** or an **intensification** of the **residential use** when compared to the existing configuration

In support of the proposition Morzone makes reference to the definition of *Multiple Dwelling* in the respondent's planning scheme which refers to the presence of three or more dwelling units on one lot.

The result, of the boundary realignment, it was submitted, will cause the start of a **new use** of *Multiple Dwelling* as distinct from the **relevant existing uses** of *duplex dwelling* and *dwelling houses* on the current configuration.

Under Council's planning scheme a Multiple Dwelling was an **impact assessable** use in the Rural Zone.

Judge Everson had this to say: [@ 9]

> The difficulty for the respondent is that the **size** of the lot and the **intensity** or scale of a use are not necessarily related concepts.
>
> Support for this view is found in the definition of material change of use in s 1.3.5.
>
> It is framed in terms of "the **premises**" not "the **lot**".
>
> The term "**premises**" is defined in Schedule 10 of IPA as meaning "**a building or other structure" or "land** (whether or not a building or other structure is situated on the land)".
>
> The term "**lot**" is defined in s 1.3.5 as "a lot under the Land Title Act 1994" and pursuant to other legislation which creates a separate and distinct **interest in real property.**

Your honour both these definitions are reflected in the current planning act 2016

Judge Everson went on to say

> The development application, the subject of this appeal, **will not result in a change in the use** of the residential buildings **or of the land itself**

Judge Everson determined-[@10]

> Reconfiguring a lot is a **different type of development** to making a material change of use of premises.
>
> **Premises** are distinct from a **lot**.
>
> **On the facts before me the reconfiguration of the lots proposed by the appellant will not change the use of the premises within the lots in question.**

Then Judge Everson then went on to say:

> It is not relevant in this regard that the consequence of the reconfiguration will be to bring the existing lawful residential uses into a different category pursuant to the respondent's planning scheme.
>
> **Any development applications in the future** will obviously be constrained by the definitional status of the dwellings and the fact they are within the Rural Zone but a change in the **categorization of the use** pursuant to the

planning scheme as a result of the reconfiguration **cannot without more "make" a material change of use of the premises** in question.

Judge Everson also went on to cite

As Brabazon QC DCJ noted in Fox & Anor v Brisbane City Council & Ors4:-

"All of the concepts in the definition of "development" depend on actions rather than the result of actions."

38. Your honour **Judge Jones** in the **2019** case *Wagner Investments Pty Ltd & Anor v Toowoomba Regional Council [2019] QPEC 24* explained at **98** that:

While under the SPA the term "development" includes "reconfiguring a lot",110 [cited the definition] **it does not follow that that form of development would be capable of generating a demand on infrastructure.**

The reconfiguration of a lot of itself **does not involve** the carrying out of work on land, nor does it involve a material change in use of premises.

Instead, it is concerned with the re-arrangement of boundaries of premises rather than the use to which those premises may be put.111 [cited the definitions]

A distinction identified by Everson DCJ in Johnson v Cassowary Coast Regional Council.112

Judge Jones @ 99 went on:

While the evidence concerning this particular appeal is not entirely satisfactory, the evidence, such as it is, is sufficient to satisfy me that there is no rational link between the reconfiguration of the land to create the subject lot and the estimated additional demand the Council considers will be placed on the transport trunk infrastructure network.

To put it perhaps another way and adopting the language of s 636 of the SPA, I am satisfied that the levied infrastructure charge could not sensibly be said to be based **on a reasonable estimate of likely additional demand** placed upon *trunk infrastructure* that would be generated by this approval.

39. Your honour no doubt Mr Yuen will bring to your attention that this matter QPEC 24 ended up in the Court of Appeal

Mr Yuen I am anticipating would want to argue that the Court of Appeal overturned Judge Jones's decision - which is partially correct the Court of Appeal did overturn some of Judge Jones's decision but I would invite your honour to read the Court of Appeal's determination because my finding was that for the particular part that involved Judge Jones determination on reconfiguration based on Judge Everson's position in Johnson that **'reconfiguring a lot is a process about changing land titles it's not a process that governs the use of land'** that part was not **overturned**

40. Briefly your honour

The Wagner Court of Appeal matter involved 11 appeals to the planning environment court amalgamated into one hearing

Of the 11 appeals only one was in relation to a matter involving the issuing of an infrastructure charge notice (ICN) relevant to a ***reconfiguring a lot*** the remainder were all to do with ICN related to material change of use approvals

The other crucial element your honour will see in the Court of Appeal judgement is that the parcel of land that involved the reconfiguration was also a **combined** approval involved, with a material change of use **as well.**

And it was this material change of use that undoubtedly provided the **use criteria** which is one of the legislative gateways to issuing an ICN --- **The need for a defined USE**

Further I found nothing in the Court of Appeal's decision that removed Judge Jones's determination that the reconfiguring of a lot by itself is not a development that is **'capable of generating a demand on infrastructure' [@98]**

And as I am sure your honour will find - the requirement to establish a **use** in conjunction with a **development type** is the mandatory statutory gateway to the issuing of an **infrastructure charge notice.**

41. FINALLY

The Respondent states:

64. There was no error of law or mistake on the part of the Development Tribunal in its construction and application of section 119 of the PA and the Charges Resolution.

Appellant Response:

The Appeal should be upheld

Conclusion and Finding Sought

42. The Tribunal committed errors of law and jurisdictional error in relation to all 3 Grounds

43. The Appellants seek orders that the Court:

- (a) set aside the Tribunal's decision; and
- (b) either:
    - (i) substitute its own decision that the ICN was unlawfully issued; or
    - (ii) remit the matter to the Tribunal with directions to determine the statutory preconditions according to law.

44. The Appellants submit that no basis exists for a costs order under s60 of the PECA.