SUPREME COURT OF QUEENSLAND

CITATION:	*Toowoomba Regional Council v Wagner Investments Pty Ltd & Anor* [2020] QCA 191
PARTIES:	**TOOWOOMBA REGIONAL COUNCIL** (applicant) **v** **WAGNER INVESTMENTS PTY LTD** ACN 011 055 271 (respondent) **MARCOOLA INVESTMENTS PTY LTD** ACN 103 682 382 (respondent)
FILE NO/S:	Appeal No 7008 of 2019 P & E No 178 of 2017 P & E No 179 of 2017 P & E No 181 of 2017 P & E No 182 of 2017 P & E No 183 of 2017 P & E No 184 of 2017 P & E No 185 of 2017 P & E No 186 of 2017 P & E No 189 of 2017 P & E No 675 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Planning and Environment Court Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane – [2019] QPEC 24 (R S Jones DCJ)
DELIVERED ON:	7 September 2020
DELIVERED AT:	Brisbane
HEARING DATE:	13 November 2019
JUDGES:	Fraser, Morrison and Mullins JJA
ORDERS:	**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.** **2. Appeal against orders 1 and 2 made by the primary judge on 21 June 2019 is dismissed.** **3. Appeal against orders 4 and 5 made by the primary judge on 21 June 2019 is allowed.** **4. Set aside orders 4 and 5 made by the primary judge on 21 June 2019.**

5. **Appeals 178, 179, 181, 182, 185, 186 and 675 of 2017 to the Planning and Environment Court concerning traffic trunk infrastructure charges are dismissed.**

6. **The appellant's submissions on costs must be made in writing within 14 days of the date on which these reasons are published.**

7. **The respondents' submissions on costs must be made in writing within 14 days after the appellant's submissions on costs are served on the respondents.**

CATCHWORDS: STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – INTERPRETATION ACTS AND PROVISIONS – EXERCISE OF POWERS AND DUTIES – IN RELATION TO INSTRUMENTS – where s 630(1) *Sustainable Planning Act* 2009 (Qld) (SPA) permitted a council, by resolution, to adopt charges for providing trunk infrastructure for development – where s 635 SPA permitted a council to give an infrastructure charges notice if a development approval had been given and an adopted charge applied for providing the trunk infrastructure – where s 636 SPA provided that a levied charge may be only for additional demand placed upon trunk infrastructure that will be generated by the development – where the Council issued an infrastructure charges notices for the development – whether the identification of additional demand generated by the development was a threshold issue for issuing the notice or whether the notice must issue for the additional demand generated by the development

STATUTES – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – INTERPRETATION ACTS AND PROVISIONS – EXERCISE OF POWERS AND DUTIES – IN RELATION TO INSTRUMENTS – where the respondents were the developers for a new airport and business park development – where the Council under the charges resolution issued infrastructure charges notices for the respondents' development – where the development was classified as "air services" – where "air services" fell within the "special uses" development category in the table of adopted charges for non-residential development – where the charges resolution provided for the adopted charge for the "specialised uses" charges to be "the charge the Council determines should apply for the use at the time of assessment based on an assessment of use and demand" – where the Council assessed use and demand by selecting a development category from the table that best related in general terms to the proposed use of air services and the demand from that use – whether the Council was required to make a development specific assessment of use and demand

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENTAL JURISDICTION – QUEENSLAND – PLANNING AND ENVIRONMENT COURT AND ITS PREDECESSORS – RIGHT AND AVAILABILITY OF APPEAL – where the respondents were the developers for a new airport and business park development – where the Council issued infrastructure charges notices for the development – where the respondents seek to appeal against the infrastructure charges notices – where s 478(2)(b) SPA allows grounds for an appeal where there is an error relating to the application of the relevant adopted charge – where the Council calculated the infrastructure charges notices by applying the adopted charge for the relevant development category to the gross floor area (GFA) of the development – where the primary judge accepted that there was little correlation between GFA and additional demand on trunk infrastructure – whether the challenge to the GFA methodology was precluded by s 478(3)(a) SPA

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENTAL JURISDICTION – QUEENSLAND – PLANNING AND ENVIRONMENT COURT AND ITS PREDECESSORS – RIGHT AND AVAILABILITY OF APPEAL – where the Council issued infrastructure charges notices for the development for use of stormwater trunk infrastructure – where the preconditions to issuing an infrastructure charges notice were that there must be a relevant trunk infrastructure and there must be additional demand placed on that trunk infrastructure by the development – where the relevant waterway was trunk infrastructure – where none of the identified trunk infrastructure was downstream of the development – where the primary judge found that no additional demand would be placed upon the trunk infrastructure – whether the primary judge erred in finding infrastructure charge notices relating to stormwater trunk infrastructure were invalid

Acts Interpretation Act 1954 (Qld), s 14A, s 14B
Planning and Environment Court Act 2016 (Qld), s 43, s 47, s 76
Sustainable Planning Act 2009 (Qld), s 478, s 625, s 627, s 629, s 630, s 631, s 633, s 635, s 636, s 982, s 983

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41, cited
Australian Retailers Association v Reserve Bank of Australia (2005) 148 FCR 446; [2005] FCA 1707, cited
Como Glasshouse Pty Ltd v Noosa Shire Council [2018] QPELR 321; [2017] QPEC 75, considered
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297; [1981]

HCA 26, cited
FKP Residential Developments Pty Ltd v Maroochy Shire Council [2009] QPELR 666; [2009] QPEC 35, cited
Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd [2017] 1 Qd R 13; [2016] QCA 19, cited
MC Property Investments Pty Ltd v Unity Water [2018] QPELR 312; [2017] QPEC 74, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Queensland Heritage Council v Corporation of the Sisters of Mercy of the Diocese of Townsville [2015] 1 Qd R 146; [2014] QCA 165, considered
Western Australia Planning Commission v Southregal Pty Ltd (2017) 259 CLR 106; [2017] HCA 7, cited

COUNSEL: D R Gore QC, with M J Batty, for the applicant
R S Litster QC, with B D Job QC and L V Sheptooha, for the respondents

SOLICITORS: A J & Co Lawyers for the applicant
QuDA Law for the respondents

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Mullins JA. I agree with those reasons and with the orders proposed by her Honour.

[2] **MORRISON JA:** I have read the reasons of Mullins JA and agree with those reasons and the orders her Honour proposes.

[3] **MULLINS JA:** The applicant Toowoomba Regional Council applies for leave to appeal against the orders of the learned primary judge in the Planning and Environment Court allowing appeals by the respondents Wagner Investments Pty Ltd and Marcoola Investments Pty Ltd in respect of infrastructure charges notices (ICNs) issued by the Council under the *Sustainable Planning Act* 2009 (Qld) (the SPA) following development approvals issued between 2013 and 2016 for an airport and a business park in the Charlton Wellcamp Enterprise Area within the Council's local government area. The primary judge's reasons are set out in *Wagner Investments Pty Ltd v Toowoomba Regional Council* [2019] QPELR 914 (the reasons). The respondents concede that the construction and application of s 636(1) of the SPA is raised by the proposed appeal and do not oppose leave to appeal, but submit the appeal should be dismissed.

Background

[4] Wagner is the developer of the airport and the business park. The Enterprise Area has a total area of about 2,000 hectares. The airport is currently operational, but significant future expansion is planned. The proceeding before the primary judge involved ten appeals by Wagner against the ICNs and were concerned with transport and stormwater infrastructure charges. Wagner was unsuccessful in three appeals relating to transport infrastructure charges, but was otherwise largely successful in relation to the balance of the appeals.

[5] The formal orders made by the primary judge on 21 June 2019 were:

"1. Insofar as they are concerned with stormwater infrastructure charges, appeals 179/17, 181/17, 185/17, 182/17, 183/17, 184/17, 178/17, 675/17 and 189/17 are allowed;

2. Each of the stormwater charges associated with the above mentioned appeals are set aside;

3. Appeals 183/17, 184/17 and 189/17, insofar as they are concerned with traffic trunk infrastructure charges, are dismissed;

4. Appeals 178/17, 179/17, 181/17, 182/17, 185/17, 186/17 and 675/17, insofar as they are concerned with traffic trunk infrastructure charges, are allowed;

5. Appeals 178/17, 179/17, 181/17, 182/17, 185/17, 186/17 and 675/17 concerning traffic trunk infrastructure charges should be returned back to the respondent for further consideration and assessment;"

Issues on the application for leave to appeal

[6] The application for leave to appeal was argued by reference to the proposed six grounds set out in the amended notice of appeal. The proposed grounds are:

1. the primary judge erred by adopting an incorrect legal approach to the determination of the appeals by not applying the restrictions inherent in an appeal under s 478 of the SPA, incorrectly adopting a merits assessment approach to the appeals, failing to address the reasonableness of the Council's decision on the basis of the materials before the decision-maker, and failing to have regard to the approach accepted in *Como Glasshouse Pty Ltd v Noosa Shire Council* [2018] QPELR 321;

2. the primary judge erred by misconstruing Council's Charges Resolution No 1 and Charges Resolution No 2 by misconstruing Table 3 and the term "based on an assessment of use and demand";

3. in allowing the appeals relating to stormwater infrastructure charges, the primary judge erred by misconstruing the Council's Planning Scheme (the scheme) in failing to recognise Westbrook Creek as trunk infrastructure, by assuming that a charge would be invalid if particular infrastructure could not be identified for the purposes of s 636 of the SPA and by carrying out a merits assessment, contrary to the limited grounds of appeal contained in s 478 of the SPA;

4. the primary judge failed to give adequate reasons as to why he adopted a merits assessment approach, by not addressing the Council's arguments about the correct legal approach and by not addressing the Council's arguments about the proper construction of Charges Resolutions;

5. in remitting the appeals concerning traffic trunk infrastructure charges, the primary judge erred in not applying the statutory framework applicable to those appeals by concluding it was unreasonable to adopt gross floor area (GFA) to calculate infrastructure charges for the uses the subject of those appeals, in that the primary judge carried out a merits assessment, did not

correctly apply the *Wednesbury* test and offended the terms of s 478(3)(a) of the SPA;

6. the primary judge erred in Appeal 186 of 2017 in concluding no additional demand would be created by the subdivision of the subject land by carrying out a merits assessment and in offending the terms of s 478(3)(a) of the SPA.

[7] The primary judge used the expression "traffic trunk infrastructure charges" in the orders, but used the terms "transport infrastructure charges" and "traffic trunk infrastructure charges" interchangeably in the reasons. The definition of "trunk infrastructure" in s 627 of SPA includes "development infrastructure" which is defined in s 627 to include "transport infrastructure". The Council's Charges Resolutions provide for an adopted charge for the "transport" network. I will therefore use "traffic" and "transport" interchangeably in these reasons, as the primary judge and the parties have done.

Relevant statutory provisions

[8] The key statutory provisions relating to the Council's grounds are s 478 and s 636 of the SPA which were inserted into the SPA by the *Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Act* 2014 (Qld) (the 2014 Amendment Act). They provided as follows:

> "**478 Appeals about infrastructure charges notice**
>
> (1) The recipient of an infrastructure charges notice may appeal to the court about the decision to give the notice.
>
> (2) However, the appeal may be made only on 1 or more of the following grounds—
>
> (a) the charge in the notice is so unreasonable that no reasonable relevant local government could have imposed it;
>
> (b) the decision involved an error relating to—
>
> (i) the application of the relevant adopted charge; or
>
> (ii) the working out, for section 636, of additional demand; or
>
> (iii) an offset or refund;
>
> (c) there was no decision about an offset or refund;
>
> *Examples of possible errors in applying an adopted charge —*
>
> - the incorrect application of gross floor area for a non-residential development
> - applying an incorrect 'use category' under an SPRP (adopted charges) to the development
>
> (d) if the infrastructure charges notice states a refund will be given—the timing for giving the refund.

(3) To remove any doubt, it is declared that the appeal must not be about—

(a) the adopted charge itself; or

(b) for a decision about an offset or refund—

(i) the establishment cost of infrastructure identified in an LGIP; or

(ii) the cost of infrastructure decided using the method included in the local government's charges resolution.

(4) The appeal must be started within 20 business days after the day the recipient is given the relevant infrastructure charges notice.

…

636 Limitation of levied charge

(1) A levied charge may be only for additional demand placed upon trunk infrastructure that will be generated by the development.

(2) In working out additional demand, the demand on trunk infrastructure generated by the following must not be included—

(a) an existing use on the premises if the use is lawful and already taking place on the premises;

(b) a previous use that is no longer taking place on the premises if the use was lawful at the time it was carried out;

(c) other development on the premises if the development may be lawfully carried out without the need for a further development permit.

(3) However, the demand generated by a use or development mentioned in subsection (2) may be included if an infrastructure requirement that applies or applied to the use or development has not been complied with.

(4) In this section—

charges notice means—

(a) an infrastructure charges notice; or

(b) a notice mentioned in section 977(1).

infrastructure requirement means a charges notice, or a condition of a development approval, that requires infrastructure or a payment in relation to demand on trunk infrastructure."

[9] The Explanatory Notes for the Bill that was enacted as the 2014 Amendment Act set out the policy objectives and the reasons for the amendments. It was stated at p 1 of the Explanatory Notes that:

> "Since July 2011, an interim infrastructure planning and charging framework ('the maximum charges framework') has been in place under the *Sustainable Planning Act 2009* (SPA). In February 2013, the Queensland Government commenced a review of the maximum infrastructure charges framework in consultation with key local government, distributor-retailer and development industry stakeholders. The purpose of the review was to establish a framework that is equitable, certain and strikes a balance between local authority sustainability and providing confidence to the development industry when planning projects."

[10] The policy objectives for the Bill set out at pp 1-2 included to:

> "1. Establish a long-term local infrastructure planning and charging framework that is certain, consistent and transparent and which supports local authority sustainability and development feasibility in Queensland.
>
> 2. Simplify, streamline and clarify the operation of Chapter 8 of SPA and the supporting appeal and dispute resolution processes for infrastructure charges matters within the SPA."

[11] The 2014 Amendment Act replaced the existing chapter 8 in the SPA dealing with infrastructure with a new chapter 8. Part 1 and divisions 1, 2 and 3 of part 2 are relevant for trunk infrastructure and comprised s 625 to s 664.

[12] Section 625 was an interpretative provision that set out a simplified outline of chapter 8. Relevantly s 625(2) stated:

> "Part 2—
>
> (a) authorises local governments to do the following for development approvals—
>
> (i) for trunk infrastructure, either or both of the following—
>
> (A) adopt, by resolution, charges for development infrastructure and levy charges in accordance with the resolution;
>
> (B) impose particular conditions about development infrastructure;
>
> (ii) for non-trunk infrastructure, impose particular conditions about development infrastructure; and
>
> (b) provides for a State planning regulatory provision to govern local government adopted charges and charges by distributor-retailers under the SEQ Water Act for trunk infrastructure."

[13] Definitions for chapter 8 were set out in s 627 of the SPA. They included the definitions of LGIP and PIA:

"***LGIP*** (an acronym for local government infrastructure plan) means the part of a local government's planning scheme that, to the extent applicable, does any or all of the following—

(a) identifies the PIA;

(b) states assumptions about—

(i) population and employment growth; and

(ii) the type, scale, location and timing of future development;

(c) includes plans for trunk infrastructure;

(d) states the desired standard of service for development infrastructure."

…

"***PIA*** (an acronym for priority infrastructure area) means an area—

(a) used, or approved for use, for non-rural purposes; and

(b) serviced, or intended to be serviced, with development infrastructure networks; and

(c) that will accommodate at least 10 (but no more than 15) years of growth for non-rural purposes."

[14] When the 2014 Amendment Act commenced, the scheme included a Priority Infrastructure Plan (PIP) and the PIP became the Council's LGIP: s 982(1) of the SPA.

[15] The definition of "trunk infrastructure" in s 627 relevantly meant development infrastructure identified in the LGIP as trunk infrastructure. It could also include development infrastructure that, because of a conversion application under s 659, became trunk infrastructure, and development infrastructure that was required to be provided under a condition imposed under s 647(2) in circumstances where the LGIP did not identify adequate trunk infrastructure to service the subject premises. The term "development infrastructure" was defined in s 627 to mean land or works or both land and works for water cycle management infrastructure (that was not State infrastructure), transport infrastructure, public parks infrastructure and land, and works that ensured the land was suitable for development, for local community facilities.

[16] Section 629(1) of the SPA provided for a State planning regulatory provision (SPRP) to impose a maximum for each adopted charge under chapter 8 in relation to providing trunk infrastructure. The term "SPRP (adopted charges)" was defined in s 629(5) of the SPA to mean "a State planning regulatory provision that imposes a maximum for each adopted charge under this chapter". The term "maximum adopted charge" was defined in s 629(5) to mean "the maximum for an adopted charge imposed under an SPRP (adopted charges) as mentioned in subsection (1) as the amount of that maximum is changed, from time to time, under subsection (2)". Section 629(4) permitted the SPRP (adopted charges) also to provide for the charges breakup and for the parameters for working out an offset or refund under part 2 of chapter 8 of the SPA, in accordance with s 633(2) of the SPA.

[17] Section 630(1) of the SPA empowered a local government by resolution (referred to as "a charges resolution") to adopt charges (with each being referred to as an "adopted charge") for providing trunk infrastructure for development. Section 631(1) then prescribed that an adopted charge may be made only if it was permitted under the SPRP (adopted charges) and was no more than the maximum adopted charge for providing trunk infrastructure for development. Section 631(2) permitted a charges resolution to provide for automatic increases in levied charges from when they are levied to when they are paid. Section 633 required a charges resolution to include a method for working out the cost of the infrastructure the subject of the offset or refund and specified that the method must be consistent with the parameters for the purpose provided for under the SPRP (adopted charges) or, if the parameters were not provided for under the SPRP (adopted charges), a guideline made by the Minister and prescribed by regulation. Section 635 provided for when a charge may be levied and recovered. It was specified in s 635(1) that s 635 applied if a development approval had been given and an adopted charge under a charges resolution applied for providing the trunk infrastructure for the development. Under s 635(2), the local government was then bound to give the applicant an ICN. Section 638(1) of the SPA specified when a levied charge became payable. If the charge applied for reconfiguring a lot, the charge became payable when the relevant local government approved the plan of subdivision for the reconfiguration. If the charge applied for a material change of use, it became payable when that change happened.

[18] On the commencement of the 2014 Amendment Act, the SPRP (adopted charges) dated July 2012 became the SPRP (adopted charges) under the SPA pursuant to the transitional provision contained in s 983(1) of the SPA. Pursuant to s 629(2) and s 629(3) of the SPA, the Minister increased the amount of the maximum adopted charges by gazette notice that provided for the Adopted Infrastructure Charges Schedule 2016. The 2016 schedule applied to the SPRP (adopted charges) July 2012 which remained unchanged, except for the application of the maximum charge values. Section 2.1 of the SPRP (adopted charges) 2012 sets out that the maximum charge for trunk infrastructure that may be levied for development for a use mentioned in column 2 of schedule 1 is the charge specified in column 3 of schedule 1 for that use. Section 2.2 of the SPRP (adopted charges) explains what development applications trigger a maximum adopted charge and how the maximum is applied, when there is more than one development application for the same development. Section 2.2 states that "[a] maximum development charge may be levied for development that is reconfiguring a lot, a material change of use of premises or carrying out building work, that is for a use mentioned in schedule 1, column 2". An example is given of separate development applications being made for reconfiguration, material change of use and building work for the one development with the explanation that separate charges may be levied for each application "only if the total charge does not exceed the maximum adopted charge for the development".

[19] The use of "Air services" in column 2 of the 2016 Schedule 1 falls within the adopted infrastructure charge category of "Specialised uses" in column 1 of the 2016 Schedule 1. Column 3 of the 2016 Schedule 1 provides that for all the uses in column 2 that fall within "Specialised uses":

> "The maximum adopted charge is the charge (in column 3) for the charge category (in column 1) that the local government determines should apply for the use at the time of assessment."

[20] In order to put the Council's grounds into context, Mr Gore of Queen's Counsel who appeared with Mr Batty of Counsel for the Council provided a brief history of infrastructure charging in Queensland by reference to the evolution of the legislation. The respondents do not contradict the history, but submit that it does not assist in the construction of s 636 of the SPA, relying on the statement in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47]. The respondents submit that historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text of s 636.

[21] The passage the respondents rely on from *Alcan* does not preclude reference to historical considerations, but makes the point that historical considerations cannot be relied on to displace the clear meaning of the text. Many decisions have included the background or historical development of a legislative provision, in order to put the interpretation of the provision into context: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 306, 310-311, 324, 334; *Western Australia Planning Commission v Southregal Pty Ltd* (2017) 259 CLR 106 at [69]. As the primary judge acknowledged (at [15] of the reasons), the duty of the court is to give the words of a statutory provision the meaning that the Legislature is taken to have intended them to have, referring to *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [78].

[22] Section 14B of the *Acts Interpretation Act* 1954 (Qld) (AIA) governs the consideration of extrinsic material capable of assisting in the interpretation of the provision of an Act, whether the provision is ambiguous or obscure, the ordinary meaning leads to a result that is manifestly absurd or unreasonable or to confirm the interpretation conveyed by the ordinary meaning of the provision. There is therefore no reason not to consider the extrinsic material that applies to the interpretation of s 636 of the SPA, in accordance with s 14B of the AIA. To the extent that the history relied on by the appellants is taken from provisions of legislation that preceded the applicable provisions of the SPA, that history cannot be relied on directly for the interpretation of s 636 of the SPA, but it does provide background to understanding the development of the statutory regime for the levying of infrastructure charges and the purpose of ICNs. Naturally, reference to the history cannot displace the meaning of the provisions under consideration that must otherwise be determined by applying the approach to the interpretation of a provision of an Act required by the AIA, including s 14A and s 14B.

[23] The brief history of infrastructure charging in Queensland can be summarised as follows. Chapter 5 of the *Integrated Planning Act* 1997 (Qld) (the IPA) was based upon a "user pays" approach for infrastructure for which an end user could be identified and required the preparation by a council of an infrastructure charges plan as part of a planning scheme (see s 5.1.4 and s 5.1.6). Under s 5.1.4(1), an infrastructure charges plan referred to the part of a planning scheme that identified development infrastructure items making up a network of development infrastructure items, stated the desired standard of service for the network and evaluated alternative ways of funding the items. A development infrastructure item was defined in s 5.1.1(1) as land, capital works or land and capital works for any of the infrastructure in that provision which included urban water cycle management

infrastructure and transport infrastructure. Under s 5.1.4(2), the infrastructure charges plan had to explain for development infrastructure items for which an infrastructure charge was intended why an infrastructure charge was intended, the estimated portion of the capital cost to be funded by the charge and the method or methods by which the charge was to be calculated. Under s 5.1.6, an infrastructure charge could not be fixed for a development infrastructure item, unless it was identified in the infrastructure charges plan, and the charge had to be fixed in accordance with the plan and could not be more than the proportion of the cost of the item that reasonably could be apportioned to the premises for which the charge was fixed, taking into account the likely share of the usage of the item for the premises. If an infrastructure charge was fixed, s 5.1.8 of the IPA provided for a notice to be given of the amount of the charge to the person who was to pay the charge. Under s 4.1.21(1)(d) of the IPA, a person could bring proceedings in the P & E Court for a declaration about an infrastructure charge. There was no specification of the grounds on which the declaration could be sought.

[24] The IPA was amended by the *Integrated Planning and Other Legislation Amendment Act* 2003 (Qld) which omitted s 4.1.21(1)(d) and chapter 5 and inserted a new s 4.1.36 and a new chapter 5 into the IPA. The new chapter 5 required a council to prepare a priority infrastructure plan for trunk infrastructure and to levy a charge for supplying trunk infrastructure under an infrastructure charges schedule. The requirement for an infrastructure charges schedule was set out in s 5.1.6 and provision was made for infrastructure charges in s 5.1.7 for a trunk infrastructure network that serviced, or was planned to service, premises and was identified in the priority infrastructure plan. Section 4.1.36 permitted a person who had been given, and was dissatisfied with, an ICN the power to appeal to the P & E Court, but limited the grounds to the methodology used to establish the charge in the infrastructure charges schedule or an error in the calculation of the charge.

[25] When the SPA replaced the IPA in 2009, the right of appeal was retained in s 478, but the grounds of appeal in relation to an ICN issued by a local government were restricted to whether a charge in the notice was so unreasonable that no reasonable relevant local government could have imposed it or there was an error in the calculation of the charge. This provision therefore precluded a challenge about the methodology used to establish the charge in the relevant infrastructure charges schedule and that was expressly declared in s 478(5).

[26] In 2010 the Queensland Government appointed an Infrastructure Charges Taskforce to review infrastructure charges. The report was published in March 2011 and resulted in the enactment of the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act* 2011 (Qld). It was explained in the Explanatory Notes at p 2 that the Bill that resulted in that 2011 Act was the response to the Taskforce's report and the Government was "committed to introducing a maximum infrastructure charge to apply throughout Queensland as an interim arrangement for three years, pending development of long term reforms to the infrastructure charging framework under SPA". The 2011 Act inserted a new chapter 8, part 1, division 5A into the SPA that enabled the establishment, through a State planning regulatory provision (SPRP), of a new "adopted infrastructure charge" for trunk infrastructure and introduced a maximum charge for trunk infrastructure. The 2011 Act did not alter materially the appeal rights under s 478 of the SPA.

[27] Further reform was then introduced by the 2014 Amendment Act which substituted the existing chapter 8 with a new chapter 8. Some further, mainly inconsequential, amendments were made to chapter 8 in subsequent Amendment Acts. A new subsection (3A) was inserted into s 636 by the *Queensland Heritage and Other Legislation Amendment Act* 2014 (Qld) which commenced on 1 September 2015:

> "Also, the demand generated by development mentioned in subsection (2)(c) may be included if—
>
> (a) an infrastructure requirement applies to the land on which the development will be carried out; and
>
> (b) the infrastructure requirement was imposed on the basis of development of a lower scale or intensity being carried out on the land."

The Charges Resolutions

[28] Charges Resolution No 1 had effect on and from 1 July 2015 and Charges Resolution No 2 had effect on and from 5 December 2016. Some of the ICNs which had originally been issued under Charges Resolution No 1 were the subject of negotiations and were re-issued when Charges Resolution No 2 had taken effect. As two of the requests for negotiated ICNs were refused, the ICNs as originally issued which are the subject of Appeals 178 and 183 of 2017 remained issued under Charges Resolution No 1. The structure and terms of these Resolutions are substantially the same. I will therefore set out provisions of Charges Resolution No 2, in order to deal with the grounds of appeal and, particularly, the issue of the proper construction of the Resolutions.

[29] Section 1.1 recites that the Charges Resolution is made pursuant to s 630 of the SPA and is to be read in conjunction with the SPRP and the scheme. Section 630(2)(b) provided that the making of a charges resolution was subject to subdivisions 1 and 2 of division 1, part 2, chapter 8 of the SPA.

[30] The purpose of the Charges Resolution is set out in s 1.2(a) as to assist with the implementation of the scheme in accordance with chapter 8, part 2, division 1 of the SPA. It is noted in s 1.2(b) that the charges adopted in the Resolution when levied, will help fund part of the establishment cost of the trunk infrastructure identified in the Council's LGIP. Section 1.4 of the Resolution sets out the definitions. Words or terms defined in the SPA or the scheme that are used in the Resolution have the meaning given in the SPA or the scheme.

[31] Section 2 of the Resolution deals with its application. Under s 2(a), the Resolution applies to the entire local government area of the Council. Section 2(b) provides that the Resolution adopts a charge for particular development that is no more than the Maximum Adopted Charge (which has the meaning given to it in s 629(5) of the SPA). Section 2(b) of the Charges Resolution is explicit about the relationship between the Maximum Adopted Charge under the SPRP for a particular development and the adopted charge under the Charges Resolution for the same development.

[32] Section 2(c) of the Resolution explains that different charges are adopted in the Resolution for particular development in different parts of the Council's area, being

broken into "charge areas", as per the appendix attached to the Resolution. That conforms with s 631(2) of the SPA that provided that there may be different adopted charges for developments in different parts of the local government's area. Section 2(d) refers to the categorisation by the Resolution of development defined in the scheme (as stated in column 2 of Table 1), as per the development categories provided in column 1 of Table 1. Section 2(e) of the Resolution provides:

> "Where development is not listed in column 2 of Table 1 (including where a use is unknown because the development application does not specify a proposed use or where a use is undefined in the Planning Scheme), Council will allocate that development an applicable Development Category, based on an assessment of use and demand."

[33] Table 1 then sets out the development category in column 1 and development under the planning scheme in column 2. There are 17 development categories ranging from residential, different aspects of commercial development, industry, rural and specialised uses. Specialised uses includes a whole range of development in column 2, including air services.

[34] The adopted charges vary for development types that are identified in s 3.1(a) of the Resolution as reconfiguring a lot, material change of use of premises and carrying out of building work. The adopted charges for reconfiguring a lot are set out in s 3.2 of the Resolution. The adopted charges for material change of use of premises or building work are set out in s 3.3 of the Resolution.

[35] Section 3.3(b) of the Resolution provides that the adopted charges for a material change of use or building work for non-residential development are stated in Table 3. Section 3.3(f) provides:

> "If non-residential development located in the Urban charge area or the Township charge area is not planned to be serviced by any of the following trunk infrastructure networks, the adopted charge for that development stated in Table 3 is to be reduced by thirty three percent (33%) for each network that will not service the development:
>
> (i) Water supply
>
> (ii) Sewerage."

[36] Table 3 has four columns. Except for the development categories "Low impact rural" and "Minor uses" for which "Nil charge" is shown and the development category "Specialised uses" (which is dealt with below), the first two columns deal respectively with the development category and the charge area. The third column is headed "Adopted charge for the water supply, sewerage and transport networks ($/m² of GFA)". There are then figures in the third column for each charge area relating to each development category. The fourth column is headed "Adopted charge for the stormwater quantity network ($/m² of impervious area)". There is then a series of figures in the fourth column for each charge area relating to each development category. For the development category of specialised uses, there are no separate charge areas identified or adopted charges specified, but instead there is the statement that is set out across the second, third and fourth columns of Table 3:

> "The adopted charge is the charge that Council determines should apply for the use at the time of assessment based on an assessment of use and demand."

[37] Section 4 of the Resolution deals with credits and provides for the circumstances in which a credit can be applied for a use or development. A number of instances are outlined in paragraph (a) that may result in a credit. The credit will be the greatest allowable under the various instances then set out, as it is possible that more than one might be applicable for the purpose of determining the credit. For example, s 4(a)(i) provides that, if the premises is subject to a continuing existing lawful use and is serviced by infrastructure networks, the credit may be the adopted charge for the existing lawful use calculated in accordance with s 3.3. Under s 4(a)(ii), if the premises is subject to a previous payment of a charge for trunk infrastructure, an adopted infrastructure charge or a trunk infrastructure contribution, the credit is the amount of the previous payment or trunk infrastructure contribution indexed in the manner provided. To take another example, under s 4(a)(v), if the premises is subject to other development that may be lawfully carried out without the need for a further development permit and is serviced by trunk infrastructure networks, the credit may be the adopted charge for the development not requiring a further development permit calculated in accordance with s 3.3. It is noteworthy that the same tables that are used in s 3.3 for determining the adopted charges are also used for determining any credit. In other words, the same methodology applies for determining the adopted charge and any applicable credit.

[38] Section 5 deals with the calculation of the charge to be levied and provides in s 5.1(a) that the charge to be levied will be calculated by determining the adopted charges for the development and then subtracting from it the greatest applicable credit. Section 5.2 deals with indexation of the levied charge. Section 5.2(a) permits the levied charge to be increased from the date the charge is levied to the date the charge is paid using the 3-yearly Producer Price Index average (as permitted by s 631(5) of the SPA). Section 5.2(b) then specifies that "the levied charge is not to exceed the maximum adopted charge the Council could have levied for the development at the date the levied charge is paid". Section 6 of the Resolution then deals with the process of working out the cost of infrastructure for offset or refund as required by s 633 of the SPA.

The reasons

[39] 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.

[40] The primary judge dealt with the stormwater infrastructure charges at [20]-[34] of the reasons. One of the issues before the primary judge was whether there was any relevant trunk infrastructure for the purpose of imposing a stormwater infrastructure charge or, if there were relevant trunk infrastructure, whether there was any additional demand placed upon the trunk infrastructure generated by the

developments. The primary judge noted (at [20] of the reasons) that the Council's position was that pursuant to s 4.6.2 of the scheme Westbrook Creek is trunk stormwater management infrastructure for the purposes of the scheme. The primary judge referred (at [21] of the reasons) to the table of trunk infrastructure networks, systems and items set out in s 4.6.2 that was expressly described in terms of "broadly" outlining the trunk infrastructure networks, systems and items covered by the PIP. The primary judge (at [26] of the reasons) then quoted s 4.6.3 of the scheme that referred to Plans for Trunk Infrastructure (PFTI) as identifying the existing and future trunk infrastructure, as well as the service catchments, for each infrastructure network, including the stormwater infrastructure. The primary judge noted (at [27] of the reasons) that none of the stormwater trunk infrastructure is located downstream from the subject development and that Westbrook Creek is not specifically identified in either the PIP or the LGIP as trunk infrastructure. Section 4.6.1 sets out the purpose of PFTI as identifying the existing and proposed trunk infrastructure networks intended to service the assumed development at the Design Standard Services stated in the PIP.

[41] On the basis of the wording of s 4.6.1 and s 4.6.3 of the scheme that both existing and proposed trunk infrastructure networks were those set out in the PFTI, the primary judge found (at [29] of the reasons) that both existing and proposed trunk infrastructure are those identified in the PFTI and those plans show "that no part of Westbrook Creek in the vicinity of the subject land is part of the stormwater trunk infrastructure". The primary judge referred (at [32] of the reasons) to the evidence of Dr Johnson (the civil engineer who gave expert evidence for the Council) who accepted that no trunk infrastructure for stormwater was provided or planned to be provided for the subject developments. The conclusion was therefore reached (at [33] of the reasons) that Westbrook Creek, insofar as it has any relationship with the subject land, is not stormwater trunk infrastructure for the purposes of either the scheme or the SPA.

[42] The primary judge (at [35]-[37] of the reasons) also dealt briefly with the alternative argument advanced in relation to stormwater charges that there was no additional demand placed upon stormwater trunk infrastructure that would be generated by the development and concluded at [37] of the reasons that no additional demand had been identified. The primary judge's findings in relation to stormwater trunk infrastructure resulted in the conclusion (at [40] of the reasons) that the appropriate outcome was to set aside the stormwater infrastructure charges.

[43] In relation to the transport infrastructure charges, the primary judge dealt with the ground on which it is permissible to challenge an ICN under s 478(2)(a) of the SPA of *Wednesbury* unreasonableness: "the charge in the notice is so unreasonable that no reasonable relevant local government could have imposed it."

[44] At [57] of the reasons, the primary judge noted that the respective traffic engineers called by the respondent (Mr Trevilyan) and the Council (Mr Healey) agreed that all the subject land was likely to create a transport demand on the Council's trunk road and transport infrastructure, but the experts did not agree on the reasonableness of the method used by the Council in calculating the charges.

[45] The primary judge referred (at [59] of the reasons) to the evidence of Ms Plumbe who is the Council's principal planner (appeals management and major projects)

about how the traffic infrastructure charges were calculated in relation to the air services appeals (Appeals 179, 181, 182 and 185 of 2017) including:

> "c. I have always been of the view that the 'Industry' development category for Appeals 179 and 181 and 'Essential Services' development category for Appeals 182 and 185 is a reasonable approach to take in terms of the uses on the basis that, in my opinion, the charges associated with 'Industry' and 'Essential Services', are some of the more reasonable charges that could be applied.
>
> d. The decision to apply the 'Industry' and 'Essential Services' charges as the most appropriate adopted charges has, especially since the institution of the original appeal (Appeal 1888 of 2014), been considered by senior staff of the Planning and Development Group and Council generally.
>
> e. It seemed obvious (at least to me) that the intent under the charges resolution for 'Specialised Use' was to identify an appropriate use category given the infrastructure charging system in place throughout Queensland, the nature of the developments involved in this proceeding and the terms of the applicable Council documents."

[46] The charges in respect of each of those developments the subject of those four appeals had been calculated by reference to their GFA.

[47] The primary judge (at [69] of the reasons) accepted the opinion of Mr Trevilyan that there was little or no correlation between GFA and the local traffic that would be generated by the development. The primary judge (at [74] of the reasons) set out his conclusions in respect of the approach adopted by the Council:

> "First, in failing to identify what trunk infrastructure might be impacted upon, it is difficult to find any rational connection between the likely additional demand placed upon trunk infrastructure that would be generated by a number of the proposed developments for the purposes of s 636 of the SPA. Second, notwithstanding that there will undoubtedly be additional traffic movements generated by the subject developments, the evidence of Mr Trevilyan, which was really unchallenged on this topic, establishes that in respect of a number of the developments the subject of these appeals, the methodology adopted by the Council has resulted in estimations of likely traffic generation outcomes that bear no legitimate or reasonable correlation with what is likely to actually occur."

[48] The primary judge then dealt with the methodology adopted by the Council identified by Ms Plumbe. At [79] of the reasons, the primary judge identified fundamental errors with that approach, namely that it ignored "the fact that the uses of Industry, Essential Services and Specialised Uses are placed into separate and specific categories for the purposes of the Council's adopted infrastructure charge regime" and "it impermissibly 're-categorised' aspects of what are clearly specialised uses (air services) into either essential services or industry categories for the purposes of deciding the infrastructure charge methodology to be adopted".

[49] The primary judge was critical (at [80] of the reasons) of the Council's decision to categorise as "Essential Services" for the purpose of assessing the appropriate traffic infrastructure charge the airport terminal services development (Appeal 182 of 2017) and the airport terminal (Appeal 185 of 2017) when both fall within the definition of "Air Services" for the purpose of the scheme. This was because airport terminal services development and airport terminal bear no resemblance to the type of uses captured in the category "Essential Services" under the scheme. The primary judge expressed the view (at [81] of the reasons) that the hangars (Appeal 179 of 2017) and the fuel storage facility (Appeal 181 of 2017) fell within "Air Services", but did not fall "comfortably" within the category of "Industry" under the scheme.

[50] The primary judge concluded (at [82] of the reasons) that each of Appeals 179, 181, 182 and 185 of 2017 ought to have been dealt with as "Specialised Uses" for the purposes of assessing the appropriate infrastructure charges and observed:

> "This required a meaningful attempt to calculate or estimate the demand on transport trunk infrastructure each of those uses might generate, rather than the adoption of the broad brush GFA approach adopted by the Council." (*footnote omitted*)

[51] The primary judge noted (at [83] of the reasons) that for those four appeals, there was no relationship between the GFA and the likely traffic outcomes. The primary judge concluded (at [87] of the reasons) that the approach adopted by the Council in those four appeals was not a lawfully reasonable approach in the sense that it would result in outcomes that would be unlikely to bear any legitimate relationship between these developments and any additional demand placed upon trunk infrastructure for the purposes of s 636 of the SPA.

[52] The primary judge then dealt with Appeals 178 and 675 of 2017, noting (at [92] of the reasons) that Appeal 178 involved a material change of use warehouse (freight) and Appeal 675 involved a material change of use warehouse. The primary judge referred to Mr Trevilyan's evidence that the predominant use of both warehouses was for the dispersal of goods on or from an aircraft. As a result, the primary judge was satisfied (at [94] of the reasons) that those two warehouses ought to be dealt with in the same manner as the other four appeals that the primary judge found ought to have been assessed as "Specialised Uses". The primary judge therefore concluded (at [94] of the reasons) that the application of the GFA methodology adopted by the Council had resulted in charges "that could not sensibly be said to fall within the range of possible lawful outcomes".

[53] The primary judge then dealt with Appeal 186 of 2017. 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".

Legal approach to the appeals

[54] A minor aspect of the Council's argument takes issue with the primary judge's reference (at [18] and [19] of the reasons) to the observations made by McMurdo P

at [46] and Morrison JA at [97] in *Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd* [2017] 1 Qd R 13 as to s 636 of the SPA requiring additional demand placed upon trunk infrastructure that will be generated by the development for the issue of an ICN. The observations merely reflect the actual wording of s 636(1) of the SPA and there could be no error in the primary judge's legal approach as a result of referring to those observations.

[55] It is fundamental to the Council's submissions based on ground 1 that the primary judge erred in not approaching the appeals, as was done by Robertson DCJ of the P & E Court in *Como*. The respondents are critical of the process of statutory interpretation undertaken in *Como* and seek to distinguish it from the present proceeding on the basis that it did not concern the application of a charges resolution that expressly required an assessment of use and demand.

[56] The appeal in *Como* was pursuant to s 478 of the SPA. The Noosa Council gave the appellant an ICN, as a result of the appellant applying for a development permit for a material change of use for cultivation. Prior to the appellant's purchase of the land, it had been used as a turf farm. The material change of use related to a greenhouse and a multi-purpose shed with a total GFA of 20,635m². The grounds for the appeal were that the charge in the ICN was so unreasonable that no reasonable relevant local government could have imposed it and the decision involved an error relating to the working out for s 636 of additional demand.

[57] It was noted at [11] of *Como* that the appellant accepted, consistently with the majority judgment in *Queensland Heritage Council v Corporation of the Sisters of Mercy of the Diocese of Townsville* [2015] 1 Qd R 146, that the appeal rights under s 478(1) of the SPA are not "at large" and that it is only if the court determines that either one or both of the grounds of appeal are made out that the court can then consider matters on a de novo basis pursuant to s 495(1)(a) of the SPA. For the purpose of determining the threshold issue, it was also noted at [11] of *Como*, that the court was required to have regard to the material that was before the decision-maker at the time Noosa Council made its decision to issue the ICN.

[58] Robertson DCJ in *Como* referred to the legislative framework that resulted in the passing by the Noosa Council of its Charges Resolution which allowed the adopted charge rate to be charged by Noosa Council pursuant to its Charges Resolution for a development such as the appellant's greenhouse development as $12 per m² of GFA. It was noted at [19] of *Como* that, having regard to s 636(1) and s 636(2)(b) of the SPA, the decision-maker was required to assess "additional demand placed upon trunk infrastructure that will be generated by the development" and, in "working out additional demand", the demand generated by "a previous use that is no longer taking place on the premises if the use was lawful at the time it was carried out", "must not be included". The material before the decision maker included the GFA of the greenhouse development and the GFA associated with the previous lawful use of the land as a turf farm.

[59] Robertson DCJ observed at [25] of *Como* that the decision-maker appeared to have followed the infrastructure charges regime set out in the SPRP, in accordance with its own Noosa Charges Resolution which had been prepared and adopted in accordance with the requirements of the SPA. It was clear that no credit had been given for lawful existing development associated with the turf farm which related to two small sheds and the dwelling house. Robertson DCJ noted that the greenhouse

use involved a very substantial increase in GFA and, having regard to the SPRP and the legislative regime, did involve "additional demand". Robertson DCJ then found that the unreasonableness ground had not been established by the appellant, observing at [25]:

> "The legislative scheme as promulgated and adopted by Council, uses increase in GFA to effectively calculate 'additional demand,' and does not in any way permit of a form of 'comparative demand analysis' as proposed by the appellant's experts, Ms Gorton and Mr Crank. It may lead to unfair results in some cases, but it seems to me that the scheme mandated by the legislature clearly calls for 'demand placed upon trunk infrastructure by development (to be) determined broadly having regard to the increase in GFA,' to adopt the opinion expressed by Mr Adamson on behalf of Council."

[60] The appellant in *Como* was therefore unsuccessful on the unreasonableness ground, but succeeded on the other ground, as in working out additional demand, it was held at [28] that the Noosa Council had not complied with s 636(2)(b) of the SPA. It was observed at [30] of *Como* that the success of the appellant on the second ground did not permit the court on a rehearing de novo to formulate its own methodology of assessing "additional demand" by reference to other than the legislative scheme based on GFA adopted by Noosa Council in this case. Robertson DCJ at [33] accepted the evidence of the Council's expert that "the methodology adopted by the legislative scheme is based on GFA and not on an 'actual comparative demand analysis, comparing the actual demand on trunk infrastructure generated by the new use with the actual demand on trunk infrastructure generated by (the former) use'". The conclusion was set out in [36] of *Como* that:

> "… 'additional demand analysis' for individual development is not mandated by the scheme lawfully adopted by Council for the purposes of calculating additional demand on trunk infrastructure."

[61] As the present proceeding involves the construction of s 636 of the SPA, it is necessary to consider that question in detail, rather than by analysing the reasoning undertaken by Robertson DCJ in *Como*, except to note the Council's submissions on the interpretation of s 636 are consistent with that applied in *Como*.

[62] It was unnecessary for Robertson DCJ in *Como* to determine whether the approach of the majority in *Queensland Heritage Council* applied to an appeal under s 478(1) of the SPA, as both parties in *Como* accepted that was appropriate. It is therefore necessary to consider whether the two step approach in *Queensland Heritage Council* should have been applied to the appeal before the primary judge.

[63] In *Queensland Heritage Council*, the QHC entered the Townsville convent owned by the Sisters of Mercy in the Heritage Register kept under the *Queensland Heritage Act* 1992 (Qld). The Sisters appealed against the QHC's decision to the P & E Court. The QHC sought to strike out part of the notice of appeal, but an interlocutory order was made by the P & E Court giving the Sisters leave to file and serve an amended notice of appeal by reference to s 51(2) and s 51(3) of the *Queensland Heritage Act*. The QHC applied for leave to appeal to the Court of Appeal against this order on the basis that the P & E Court was precluded by s 162 of the *Queensland Heritage Act* from considering the matters contemplated by the amendment to the notice of appeal and the order was therefore beyond jurisdiction.

By the majority comprising Gotterson JA and Douglas J (with McMurdo P dissenting) leave to appeal was granted, the appeal was allowed and the impugned order of the P & E Court set aside.

[64] Section 35 of the *Queensland Heritage Act* sets out the criteria for entry in the register. Section 51 then sets out relevant matters which the QHC could have regard to in making its decision. Relevantly, s 51(2)(b) permitted the QHC to have regard to other information it considered relevant to the application and s 51(3), without limiting s 51(2)(b), permitted the Council to have regard to whether the physical condition or structural integrity of the place may prevent its cultural heritage significance being preserved. The Sisters, as the owner of the convent, had been given notice of the QHC's decision and were entitled to appeal the QHC's decision, but s 162 of *Queensland Heritage Act* limited such an appeal to the ground "that the place the subject of the appeal does or does not satisfy the cultural heritage criteria" which are those set out in s 35(1). Section 164 of the *Queensland Heritage Act* provided that chapter 7, part 1, division 13 of the SPA applied to the appeal. Under s 495(1) of the SPA that appeal to the P & E Court "is by way of hearing anew". Section 496 of the SPA then conferred on the P & E Court extensive powers as to the orders which could be made on an appeal, including confirming or changing the decision appealed against or setting aside the decision appealed against and making a decision replacing it. The issue to be resolved was the tension between s 162(1) of the *Queensland Heritage Act* and subsections (1) and (2) of s 496 of the SPA. Douglas J's conclusion is set out at [35]-[36]:

> "[35] When one approaches the issue here, the proper resolution of the potential conflict between the two statutes – looking at the provisions as a whole and seeking to give them harmonious goals – leads to the conclusion that a ground of appeal asserting the place the subject of the appeal did not satisfy the cultural heritage criteria referred to in s 162(1) of the *Queensland Heritage Act* must be made out in order for it to be open to the Planning and Environment Court to exercise any powers under ss 496(1) or 496(2) of the *Sustainable Planning Act*.
>
> [36] If such a ground of appeal is made out, however, it then seems to be appropriate to permit the court, in exercising its powers, to hear the matter anew pursuant to s 495(1) and, for example, to set aside the decision appealed against and make a decision replacing it under s 496(2)(c), to examine the issues which the Council itself had to examine under s 51(3) of the *Queensland Heritage Act*, namely whether the physical condition or structural integrity of the place may prevent its cultural heritage significance from being preserved."

[65] Douglas J therefore suggested at [40] of *Queensland Heritage Council* how the notice of appeal to the P & E Court might be amended to clarify that the powers of that court could be exercised in relation to the issues relevant under s 51(2)(b) and s 51(3) of the *Queensland Heritage Act* only if the ground of appeal under s 162(1) were first made out.

[66] Gotterson JA agreed (at [7]) with the two stage process for an appeal to the P & E Court described by Douglas J:

> "For the reasons his Honour gives, I agree, firstly, that the only permissible ground for challenging in the Planning and Environment Court the decision of the applicant, Queensland Heritage Council, to enter St Patricks Convent on the Heritage Register is that set out in s 162(1) of the *Queensland Heritage Act* 1992 and, secondly, that where that ground is made out, that court may, for the purpose of making orders for which ss 496(1) and (2) of the *Sustainable Planning Act* 2009 provide, examine issues which, pursuant to ss 51(2)(b) and (3) of the *Queensland Heritage Act*, were open to the Council itself to examine in making the decision to register."

[67] Section 43 of the *Planning and Environment Court Act* 2016 (Qld) (PECA) is the analogue provision for s 495(1) of the SPA and has been modified to the extent that an appeal to the P & E Court is still "by way of hearing anew", but subject to any relevant enabling Act. Pursuant to s 7(1) of PECA, the enabling Act is the Act which gives the jurisdiction to the P & E Court. Presumably, the Legislature had regard to the decision of the majority in *Queensland Heritage Council* which was published on 22 July 2014 in making the nature of the hearing of an appeal to the P & E Court subject to any relevant enabling Act. Even though the respondents' appeals to the P & E Court were commenced prior to the commencement of PECA, the provisions of PECA apply to the appeals pursuant to s 76(1)(a) and s 76(2) of PECA. Section 47 of PECA sets out the powers of the P & E Court in deciding an appeal and is the analogue of subsections (1)-(3) of s 496 of the SPA.

[68] The rationale of the approach in *Queensland Heritage Council* to the exercise of the jurisdiction by the P & E Court on an appeal, where the appeal ground was expressly limited to defined statutory criteria, but the underlying decision-making could be reviewed (if the appeal ground was made out) by reference to broader statutory criteria, can be applied by analogy, in some respects, to an appeal against an ICN pursuant to s 478 of the SPA. Because the respondents' appeal grounds were limited to those grounds set out in s 478(2) of the SPA, it is arguable that the review of the decision making on the appeals should be largely confined to the material before the decision-maker and it was only if error were established and the P & E Court were proposing to consider the matters anew that any relevant additional evidence could be relied on to make the decisions in lieu of the decision-maker. The restrictions on an appeal under s 478 of the SPA are not identical to the limited grounds of appeal under the legislation considered in *Queensland Heritage Council* in conjunction with the general jurisdiction of the P & E Court on an appeal, but the approach of Robertson DCJ in *Como* at [11] was a practical way to deal with an appeal of limited nature provided for by s 478 of the SPA, where the grounds focus on the decision-making process.

[69] It is not apparent that the Council or the respondents considered the approach in *Como* in the course of obtaining directions before the primary judge at the outset in relation to the conduct of the appeals. When directions were given by the primary judge on 24 February 2017 in relation to the first nine appeals, the parties contemplated calling expert evidence and that those experts in the same area of expertise would participate in a meeting of experts and prepare a joint report which resulted in the expert evidence adduced before the primary judge. There was no

discrimination in the directions about the relevance of evidence for establishing the appeal grounds and then evidence that was relevant, if the grounds were successfully established. In August 2018 directions were given for the parties to file and serve consolidated points of claim and a response to the consolidated points of claim. The Council contended in paragraph 22(d) of its response that the P & E Court may not consider the merits of each of the appeals, on a hearing anew basis, unless the respondents, on the material before the applicable Council delegate first established at least one of the grounds referred to in s 478(2) of the SPA. The respondents in their reply to the Council's response admitted the allegation in paragraph 22(d). Presumably the position reflected in these pleadings explains why the parties' summary of issues recorded in [9] of the reasons did not raise as an issue that the appeals were to be decided by reference to the material before the decision-maker and it was only, if an appeal ground were successfully established, that additional evidence would then be relevant, if the primary judge was proposing to hear the matter "anew".

[70] The Council had submitted to the primary judge at the conclusion of the hearing that the leading authorities on the nature of an appeal against ICNs were *Como* and another decision of Robertson DCJ in *MC Property Investments Pty Ltd v Unity Water* [2018] QPELR 312 that was given on the same day as *Como*. The appeal in *MC Property* concerned the decision of a water distributor to issue an ICN under legislation where the grounds of appeal were in similar terms to 478(2) of the SPA. Again, Robertson DCJ did not have to determine the approach of the P & E Court to the appeal, as the parties proceeded on the basis set out at [10] that the appeal right was not "at large", and the court may only consider matters more broadly pursuant to s 495(1)(a) of the SPA "if (and only if) it is first made out that the review decision was unreasonable or involved an error on application or calculation of a charge" and unless that were established, there was no need for the court to go any further, as the appeal would fail on the threshold issue. Robertson DCJ described the appeal at [11] as "akin to a form of judicial review" of the decision that was the subject of the appeal.

[71] The Council's written submissions before the primary judge expressly referred to the reliance placed by Robertson DCJ in both of his Honour's decisions on *Queensland Heritage Council*. The Council had therefore submitted to the primary judge in reliance on *Queensland Heritage Council* that the primary judge should have regard only to the material that was before the decision-maker at the time the Council made its decision to issue the ICNs for the purpose of determining whether there was material error of a requisite kind in the decision making process of the Council. Although the Council made that submission, the Council still relied on the expert evidence that was adduced before the primary judge to address the grounds of appeal.

[72] The Council renewed its argument before this court that the primary judge was confined to the material before the decision-maker in deciding whether any ground of appeal was made out. Even though it is a helpful analogy to describe the appeal to the P & E Court on this ground as "akin to a form of judicial review", it is not a judicial review hearing, but remains an appeal for which there is no express proscription in the SPA or PECA on relevant evidence being adduced for the purpose of deciding that ground. Even for a judicial review application based on *Wednesbury* unreasonableness, evidence may be admissible in an appropriate case: *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446

at [454]-[459]. The specification of a well understood ground for judicial review as the appeal ground shows the Legislature's intention to confine the ambit of the appeal on that ground. The focus for consideration of this ground must therefore be on the decision-making process of the decision-maker.

[73] In this case, the Council had delegated its authority mainly to town planner Ms Plumbe to issue the ICNs that were the subject of the appeals to the P & E Court. It is apparent from Ms Plumbe's evidence that she used her expertise as a town planner, and the other town planners employed by the Council and supervised by Ms Plumbe who were involved in the processes that resulted in the ICNs used their expertise as town planners, in issuing the relevant ICNs. It may be arguable that the expert evidence was of assistance in addressing the concepts that were applied in the decision-making. Some of the evidence was also directed to factual matters that were relevant to the grounds of appeal, such as whether the developments created any additional demand on the stormwater trunk infrastructure. Despite the Council's written submissions urging the primary judge to deal with the threshold issue of whether a material error in the decision-making process of the Council was demonstrated on the basis of the material before the Council, the Council did not demur from the manner in which the appeals were conducted in the P & E Court, participated in adducing additional evidence by calling its three experts and did not seek to exclude the evidence of the respondents' experts.

[74] The other relevant aspect to consideration of the Council's argument in respect of ground 1 that there was an error in the legal approach is that it was common ground before the primary judge that if there was a relevant error found by the primary judge that required the calculation of the infrastructure charges to be re-done, that was a matter that should be returned to the Council to do. The effect of the exchange of pleadings between the parties was that they were agreed that the P & E Court could not consider the merits of each of the appeals on a hearing anew basis, unless the respondents first established at least one of the grounds of appeal in s 478(2) of the SPA on the material before the delegate. In light of that agreement, it was not necessary for the primary judge to address the Council's arguments based on the approach in *Como*. I would therefore not be prepared to grant leave to appeal to permit the Council to argue that there was an error in the legal approach of the primary judge to the appeals. Even if it were the case that the primary judge had erred in not adopting the two step approach to the appeals, as was applied in *Como*, it would be an unattractive outcome in the circumstances in which these appeals were conducted in the P & E Court to dispose of the appeals on the basis of that legal approach error.

[75] I will therefore consider the other grounds of appeal to work out if any relevant error of law was made by the primary judge that affected the outcome of the appeals to the P & E Court.

Interpretation of s 636 of the SPA

[76] In order to deal with the construction of the Charges Resolution that is the subject of ground 2, it is necessary to dispose of the parties' competing arguments about the proper construction of s 636 of the SPA. The respondents emphasise the requirements set out in s 636 of the SPA that limit an infrastructure charge to additional demand placed upon trunk infrastructure that will be generated by the development. They contend that the Charges Resolution must be construed in that

context, so that a specialised use required that an approval-specific assessment of actual demand of the development on the trunk infrastructure be carried out by the Council. The Council's response is that s 636(1) must be construed by having regard to s 636(2) which shows the Legislature's intention was to set up a statutory regime that did not require an approval-specific assessment to be carried out to determine the additional demand generated by the development. Instead, the Council points to the methodology of the Charges Resolution that works out the additional demand by the selection of the adopted charge for the appropriate development category and charge area and the provision for deductions for a credit that are also calculated by reference to the appropriate adopted charge for the use which gives the entitlement to the credit or an offset or refund. The Council submits that the working out of additional demand for the purpose of s 636(1) is by the application of the adopted charge that is applicable under the Charges Resolution.

[77] Section 636(1) of the SPA expressly provided for a limitation on the charge that may be levied by the Council for trunk infrastructure. That limitation is there must be "additional demand placed upon trunk infrastructure that will be generated by the development". That must be considered in the context of s 635(1) and s 635(2) that empowered the Council to give an applicant for development an ICN where "an adopted charge applies for providing the trunk infrastructure for the development". The relationship between s 635 and s 636 is important. Whereas s 635 authorised the levying of an infrastructure charge, s 636(1) imposed a limitation on the levied charge. The nature of the additional demand contemplated by s 636(1) is set out in the Explanatory Notes for s 636 in the Bill that was enacted as the 2014 Amendment Act:

> "Section 636 provides that a levied charge may be only for additional demand placed upon trunk infrastructure. For example, an application is lodged for the subdivision of 1 lot into 3 and there is an existing 3 bedroom house on the original lot. Assuming that each lot is intended to be used for a 3 bedroom dwelling and the local government has set an adopted charge of $28,000 per 3 or more bedroom house, the applicant should receive an infrastructure charge for the 2 new lots only ($56,000). The adopted infrastructure charge for the third lot, which includes the existing house, does not warrant an infrastructure charge as there is no additional infrastructure demand created by the lot.
>
> The recognition of the existing lawful use of a site or the existing (uncommenced) rights to develop a site through a discounted infrastructure charge is an established practice undertaken by many local governments and is commonly known as a 'credit'. Stipulating the parameters which govern how a 'credit' is issued within the SPA provides greater certainty to all stakeholders."

[78] There are therefore two aspects to demand in s 635 and s 636. There must be demand which links the development with the relevant trunk infrastructure, but there must be additional demand over and above what the current uses of the subject land generate in respect of that trunk infrastructure. On the basis of the express terms of s 635(1) and s 636(1), there are two pre-conditions for the levying of an infrastructure charge by the issue of an ICN. These were correctly identified by the

primary judge (at [17] of the reasons) as relevant trunk infrastructure and additional demand placed on that relevant trunk infrastructure by the development. Where the parties disagree is how that additional demand is determined and reflected in the ICN.

[79] The key to construing "additional demand" in s 636(1) is again the relationship between s 635 and s 636, the emphasis in s 635(1)(b) on the adopted charge applicable for providing the trunk infrastructure for the development and the relationship between the adopted charge and the SPRP (adopted charges). When the development generates additional demand on the relevant trunk infrastructure, the adopted charge for the appropriate development category is applied to calculate the levied charge. Section 636 does not require the calculation of the levied charge to be by reference to actual additional demand generated by the development, provided there is some additional demand. The appropriate infrastructure charge for additional demand generated by the development is reflected in the "broad brush" application of the adopted charge. This approach to the interpretation of s 636 that allows for the additional demand to be reflected by the adopted charge for the relevant development category is consistent with the policy objectives of the Bill that was enacted as the 2014 Amendment Act to establish an infrastructure planning and charging framework that was "certain, consistent and transparent" and to "[s]implify, streamline and clarify" the operation of chapter 8 of the SPA for infrastructure charges matters. It provides for the setting of the maximum adopted charge for development and a transparent method of calculating the infrastructure charge by the application of the adopted charge under a charges resolution that is permitted under the SPRP (adopted charges) for providing trunk infrastructure for development.

Interpretation of the Charges Resolutions

[80] Ground 2 dealing with the interpretation of the Charges Resolutions relates to the transport infrastructure charges in Appeals 179, 181, 182 and 185 of 2017. The primary judge preferred (at [82] of the reasons) the approach of the respondents that for a specialised use, an approval-specific estimate of the demand on transport trunk infrastructure was required, in contrast to the Council's approach that the Charges Resolutions did not require an ad hoc assessment of individual applications, but required the Council to select one of the other development categories in Table 3 for the purpose of applying the adopted charge for that category to the air services use that was the subject of the particular application. It is therefore necessary to interpret what is meant by the description of "adopted charge" against the "specialised uses" development category in Table 3.

[81] The Charges Resolution is for the purpose of implementing the statutory regime under chapter 8 of the SPA for the Council to charge for trunk infrastructure for development. The Charges Resolution closely follows the structure of the SPRP. The express requirement under section 1.1(b) that the Charges Resolution is to be read in conjunction with both the SPRP and the scheme makes it relevant to consider the approach of the SPRP in setting maximum adopted charges. For each adopted infrastructure charge category in column 1 of the 2016 Schedule 1 of the SPRP (other than specialised uses or other uses), the maximum adopted charge set out in column 3, if it is not a "Nil charge", is a dollar amount per m² of GFA plus a dollar amount per impervious m² for stormwater, where the relevant dollar amounts are set out in column 3. There is one difference between the language used to

express the maximum adopted charge for specialised uses in the SPRP and the language used for specialised uses in working out the adopted charge under Table 3. Under the SPRP the maximum adopted charge is "the charge (in column 3) for the charge category (in column 1) that the local government determines should apply for the use at the time of assessment", whereas under the Charges Resolution the adopted charge is the charge that the Council determines should apply for the use at the time of assessment "based on an assessment of use and demand".

[82] The Council had argued before the primary judge that, as a matter of construction of the Charges Resolution, s 3.3(b) of the Charges Resolution is explicit that the adopted charges for material change of use or building work for non-residential development are stated in Table 3, for a charge to be "stated", it must be expressed "definitively or specifically" consistently with the ordinary meaning of that term, and the structure of Table 3 is such that the determination for "Specialised uses" covers each of the second, third and fourth columns of Table 3, which is consistent with the intention that the use to be made of each of these columns will flow from the identification of "the adopted charge" stated elsewhere in Table 3 to be applied for the relevant specialised use. The Council had argued, consistent with the evidence of Ms Plumbe, that all that was required of the assessment of use and demand in the circumstances was to identify an appropriate use category, given the infrastructure charging system in place throughout Queensland and the nature of the development involved in the particular development application, and the terms of the applicable Council documents. The Council does not resile from its acceptance before the primary judge (referred to at [65] of the reasons) that its approach to the transport traffic infrastructure charges was a "broad brush approach", but maintains that was what was required under chapter 8 of the SPA.

[83] The Council relied on support from s 2(e) of the Charges Resolution, as to what was required where a development is not listed in column 2 of Table 1, where Council was required to allocate that development an applicable development category "based on an assessment of use and demand". Although identical language is not used in the description of what the adopted charge will be for "Specialised uses" in Table 3, it is to the same effect, and shows that the Council has to work within the boundaries of Table 3 to select the appropriate adopted charge for the particular specialised use, having regard to the criteria of use and demand.

[84] Whereas the Council focuses on what is meant by "the charge" in the identification of the adopted charge for a specialised use in Table 3, the respondents focus on the words "based on an assessment of use and demand" and submit there is no ambiguity about the phrase "based on an assessment of use and demand" which should be given its plain meaning. The respondent points out that the Council could easily have used the same language found in the SPRP of "the use at the time of assessment", that the Council had departed from that language and therefore must not have intended the same meaning. Had the Council intended that it would simply allocate another development category to a use within "Specialised uses", the Charges Resolution would have said something to that effect. The respondents submit no error was made by the primary judge in reaching the conclusion (at [82] of the reasons) that the Council was required to estimate the demand on transport trunk infrastructure that each of the uses the subject of these four appeals might generate. The respondents submit that the Council, in defining what the adopted charge was for a specialised use in Table 3, did not use language similar to s 2(e) of

the Charges Resolution and therefore imposed on itself the obligation to assess use and demand to determine the adopted charge for a specialised use.

[85] The Charges Resolution conforms to the parameters set out in subdivisions 1 and 2 of division 1, part 2, chapter 8. The Charges Resolution sets out the adopted charges. It does not set out a means for calculating the charge for trunk infrastructure, other than by the application of the adopted charge. Apart from the *Wednesbury* unreasonableness ground in s 478(2)(a) of the SPA, the appeal grounds that are set out in s 478(2)(b) that are clarified by the further qualifications in s 478(3) correlate with the provisions in chapter 8 that regulate adopted charges.

[86] Section 478(2)(b)(i) allows an appeal on the ground the decision involved an error relating to the application of the relevant adopted charge. The two examples that are given in the section are possible errors that relate to the incorrect application of GFA for a non-residential development or applying an incorrect "use category" under an SPRP (adopted charges) to the development. Further examples were given in the Explanatory Notes for the Bill enacted as the 2014 Amendment Act at p 14:

> "Subsection (2)(b)(i) allows appeals about the application of the relevant adopted charges resolution in determining a levied charge. This might include matters such as:
>
> - the calculation of gross floor area (GFA) for a proposed development and converting the GFA into an adopted infrastructure charge;
> - applying an incorrect use category to the type of development proposed in the development application (for example, imposing a charge based on the 'commercial – bulky goods' adopted charge rate when the development application is for a 'commercial – retail' development);
> - levying a charge where a charge is not appropriate (e.g. imposing a charge where the development does not result in additional demand on the infrastructure networks); and
> - errors in the mathematical calculation of the charge."

[87] These type of errors are consistent with the specification of the adopted charge itself in a charges resolution being immutable and it is only its application, such as where the charge is calculated by reference to GFA and an error is made in respect of the calculation of the GFA or where an incorrect use category is selected for the development, that can give rise to an appealable error.

[88] The ground under s 478(2)(b)(ii) that the decision involved an error in the working out for s 636 of additional demand relates to the requirement under s 636(2) of what must be credited in order to work out additional demand. The respondents submit that s 478(2)(b)(ii) also mirrored the words of s 635(6) of the SPA, but that is not correct. Section 635 dealt with when an infrastructure charge may be levied and recovered. The reference in s 635(6) to the working out of the infrastructure charge in the ICN is to the circumstance where the levied charge is "worked out by applying the adopted charge". The reference in s 478(2)(b)(ii) is to the working out of additional demand for s 636 which is the identical concept dealt with by s 636(2).

This is also confirmed by the Explanatory Notes for the Bill that became the Amendment Act 2014 at p 14:

> "Subsection (2)(b)(ii) allows appeals about the working out, for section 636, of additional demand. This might include matters such as:
>
> · the calculation of additional demand when the demand for the exiting lawful uses have been subtracted (e.g. where an applicant is reconfiguring one lot into three and there was an existing house on the original lot, the levied charge must be for the two new lots only); and
>
> · where there is a development approval for a site however the development approval has not been acted on and a new development approval is issued for the site, in working out the infrastructure charge it must be assumed that the development the subject of the original approval is existing on the site."

[89] The ground under s 478(2)(b)(iii) that the decision involved an error relating to an offset or refund relates to the requirement under s 633 that a charges resolution must include a method for working out the cost of the infrastructure the subject of the offset or refund. It is consistent with the adopted charge that is specified in the Charges Resolution being immutable that s 478(3)(a) provides that the appeal must not be about the adopted charge itself.

[90] Mr Gore of Queen's Counsel in providing the brief history of infrastructure charging in Queensland had made the point that, since 1997, the right to challenge an infrastructure charge had "become very narrow". That accurately reflected the unrestricted right of a person to challenge an infrastructure charge in a proceeding by way of declaration under the IPA through to s 4.1.36 inserted into the IPA in 2003 and the various versions of s 478 in the SPA. The respondents disputed that appeal rights had contracted and pointed to the difference between s 478 as originally enacted in 2009 and the version of s 478 after the 2014 Amendment Act. That most recent version of s 478 was longer than s 478, as enacted in 2009, only because the instances of what can amount to an error in the calculation of the charge had been expanded in s 478(2)(b) by reference to the various mechanical steps involved in applying the adopted charge, including the working out of a credit, offset or refund, under the relevant charges resolution, but that expansion all falls under the description of "an error in the calculation of the charge" in s 478(4)(b) of the 2009 version of the SPA. The Legislature's intention expressed in the terms of s 478 is to confine narrowly the grounds of appeal about the decision to give an ICN.

[91] The approach of the respondents based on an actual assessment of the demand generated by the development on the trunk infrastructure that was embraced by the primary judge gives no recognition to the relationship between the Charges Resolution and the SPRP (adopted charges) under the SPA that is expressly recognised in s 2(b) of the Charges Resolution. It would be inconsistent with the relationship between the Charges Resolution and the SPRP (adopted charges), if the maximum adopted charge under the SPRP for the specialised use of air services were the charge for the charge category that the Council determined should apply for the use at the time of assessment, but the adopted charge were worked out by reference to actual demand on the trunk infrastructure. It would be an odd result, if

the Council for the purpose of working out the maximum adopted charge for a use of air services selected the charge category in column 1 of the SPRP that should apply, but did not make a like selection from the development categories under the Charges Resolution for the purpose of working out the adopted charge. To the extent that the respondents assert ambiguity in the actual wording used in the Charges Resolution for the selection of the adopted charge for a specialised use, that is resolved by having regard to the manner in which the maximum adopted charge is determined under the SPRP which is incorporated by reference in the Charges Resolution.

[92] The actual language used for the development category of "Specialised uses" in Table 3, when considered in conjunction with s 3.3(b) of the Charges Resolution does suggest, as a matter of construction of the Charges Resolution, that the charge the Council determines for the relevant specialised use is selected from the balance of Table 3 "based on an assessment of use and demand". The assessment of use and demand that is required is for the purpose of selecting the appropriate development category from Table 3 of the Charges Resolution that relates, in general terms, to the proposed use of air services and the demand from that use. That construction of the Charges Resolution is also consistent with the statutory framework for the issue of ICNs set up under chapter 8 of the SPA and particularly s 635 and s 636.

[93] The primary judge overlooked dealing with this issue of construction in the application of the Charges Resolution by deciding Appeals 179, 181, 182 and 185 of 2017 on the basis of Mr Trevilyan's opinion (referred to at [69] of the reasons) that "there was little or no correlation between GFA and the local traffic that would be generated". That opinion was irrelevant, unless the construction of the Charges Resolution was decided in the respondents' favour. The following question had been posed by the traffic engineers in their joint report:

> "Does the terminology identified in the [Charges Resolution] in relation to Specialised Uses which reads 'based on an assessment of use and demand' require a detailed modelling exercise to be undertaken of the trunk road usage generated by the proposed use or is its intent to direct Council to select an appropriate 'best fit' from those uses defined in the [Charges Resolution] and to which an adopted charge has been specified as defined by the State Government in the Adopted Infrastructure Charges Guideline which reads 'The maximum adopted charge is the charge (in Column 3) for the charge category (in column 1) that the local government determines should apply for the [use] at the time of the assessment'?"

[94] By not addressing the question which the expert traffic engineers had clearly raised in their joint expert report, the primary judge erred in dealing with these appeals on the basis of the expert evidence about the relationship between the calculation of the adopted charge by reference to GFA and the demand of the relevant development on transport infrastructure, rather than applying the Charges Resolution. The primary judge erred by rejecting the application of the adopted charge for the development category selected by the Council in accordance with the requirement that applied for a use of "Air services" that fell within the development category of "Specialised uses". Section 478(3) of the SPA made it clear that any appeal could not be about the adopted charge itself. The respondents had sought to distinguish

between the adopted charge and the levied charge. Provided the threshold issue of additional demand being generated by the development on the relevant trunk infrastructure was satisfied, it was a distinction without a difference, as the levied charge was determined by the application of the adopted charge.

[95] The primary judge's error in the construction of the Charges Resolution in relation to the use "Air services" that falls within the development category of "Specialised uses" is an error of law. That means that appeal against the order of the primary judge allowing Appeals 179, 181, 182 and 185 of 2017, insofar as they are concerned with traffic trunk infrastructure, must be allowed on the basis of ground 2 and the primary judge's orders set aside. The question then arises whether, on the appeal to this Court, the outcome of Appeals 179, 181, 182 and 185 of 2017 (relating to the traffic trunk infrastructure charges) can be otherwise determined, applying the correct approach to the construction of the Charges Resolutions.

[96] The selection of the development category of Industry by the Council for the purpose of calculating the adopted charge for transport trunk infrastructure for the developments the subject of Appeals 179 and 181 of 2017 and the selection of Essential services for the developments the subject of Appeals 182 and 185 of 2017 were not the subject of a ground of appeal (even in the alternative), because of the approach taken by the respondents to the requirement for an actual assessment of additional demand generated by the development. An issue raised by the respondents in each of Appeals 181 and 182 of 2017 in respect of the GFA that was used for the purpose of calculating the traffic trunk infrastructure charge was set out in paragraph 9 of the agreed summary of issues in [9] of the reasons. During cross-examination, Ms Plumbe had conceded that the GFA used in respect of the application that was subject of Appeal 181 of 2017 was not based on the final plan of the proposed development (exhibit 36 before the primary judge) which showed that the office area had been reduced from 112m² to 43m² and that an error had been made in including the area for loading and unloading gantries in calculating the GFA. Despite Ms Plumbe's concession in respect of the latter aspect, the Council's submissions before the primary judge disputed that the area for loading and unloading gantries should be excluded from the GFA. An error in the calculation of GFA for the proposed development falls properly within s 478(2)(b)(i) of the SPA. A similar error in including areas that fell outside the definition of GFA was asserted by the respondents in relation to the calculation of GFA for Appeal 182 of 2017 in reliance on Mr Trevilyan's report.

[97] The primary judge did not decide whether there was an error relating to the calculation of the GFA for the purpose of applying adopted charge in each of these appeals. The respondents continued to assert in the hearing of the appeal to this court that the ICNs in Appeals 181 and 182 of 2017 should be set aside, so those errors could be corrected as one of the reasons to oppose the Council's appeal on ground 2 in respect of Appeals 181 and 182 of 2017. The amounts involved in the GFA errors are inconsequential in respect of the total amount of the infrastructure charges that was in issue on the appeal to this Court. Both parties had conducted the appeals before the primary judge on the basis that, if there were any relevant error in the charges in the ICNs, the ICNs should be set aside and the matters remitted to the Council for further consideration, but the quantum that is in issue in relation to these two appeals does not warrant such a course. The omission of the primary judge to decide the minor issue of the calculation of the GFA therefore does

not preclude the relief the Council is otherwise entitled to, as a result of succeeding on ground 2.

[98] The appeal to this Court should be allowed in respect of Appeals 179, 181, 182 and 185 of 2017, insofar as they relate to transport infrastructure charges, and the orders made by the primary judge in respect of those appeals should be set aside and, in lieu, Appeals 179, 181, 182 and 185 of 2017 to the P & E Court should be dismissed.

Stormwater infrastructure charges

[99] The first aspect of ground 3 relating to the stormwater infrastructure charges asserts that the primary judge misconstrued the scheme in failing to recognise Westbrook Creek as trunk infrastructure. As the primary judge recognised (at [21] of the reasons), s 4.6.2 of the PIP included Westbrook Creek within the description of "Natural, formed and unformed waterways" as part of the trunk infrastructure networks for stormwater management quantity. The Council challenged the primary judge's conclusion that it did not follow that, because Westbrook Creek fell within the description in s 4.6.2, it was stormwater trunk infrastructure.

[100] There are two concepts under s 4.6 of the scheme. One identifies in broad terms the trunk infrastructure networks and the other (the PFTI) identifies the existing and proposed trunk infrastructure networks relevant to a particular development. Trunk infrastructure is not defined for the purpose of chapter 8 of the SPA by reference to a particular development. The trunk infrastructure is the development infrastructure identified in the LGIP as the trunk infrastructure. It is the step of charging for trunk infrastructure that makes the consideration of the relationship between the proposed development and the trunk infrastructure relevant.

[101] In addressing the first step of the construction of the scheme, Westbrook Creek falls within the identified trunk infrastructure for the purpose of stormwater management quantity. The Council must succeed on the aspect of ground 3 concerned with the construction of s 4.6 of the scheme, but that is not the only issue that has to be determined in respect of this ground of appeal. The next step is whether Westbrook Creek is stormwater trunk infrastructure that can be the subject of an ICN for the subject developments.

[102] There is no challenge to the primary judge's finding (at [27] of the reasons) that none of the stormwater infrastructure situated in Westbrook Creek and in the Charlton Wellcamp Enterprise Area is located downstream of the subject developments.

[103] An issue is raised about the application of the Charges Resolution, as the approach of the primary judge (at [37] of the reasons) to the alternative argument was that there could not be a stormwater infrastructure charge, if the development did not place any additional demand upon stormwater trunk infrastructure. As is set out above, s 635(1) and s 636(1) of the SPA provide that one of the pre-conditions for the issue of an ICN is that the development will generate additional demand upon the relevant trunk infrastructure. Even though the Charges Resolution does not expressly set out this threshold requirement as a condition precedent before the levying of the charge, the Charges Resolution must be construed in the context of the requirements of s 635 and s 636, as s 1.2(a) refers to the purpose of the Charges

Resolution being to assist with the implementation of the scheme in accordance with chapter 8, part 2, division 1 of the SPA.

[104] The substance of what the primary judge did in relation to the alternative argument in respect of the stormwater infrastructure charges was determine that there was no additional demand and therefore that the threshold requirement for the levying of a stormwater infrastructure charge pursuant to s 635 and s 636 of the SPA was not satisfied. The Council argued that was a merits assessment. That was not so. It is a more accurate characterisation of what the primary judge did to describe it as detecting an incorrect application of the Charges Resolution for the Council to have imposed stormwater infrastructure charges, when there was no additional demand on the stormwater trunk infrastructure, as a result of the developments.

[105] It was also argued (faintly) by the Council that, in any case, it could not be correct that there was no additional demand placed on trunk infrastructure for stormwater, given the massive scale of the overall development. The Council drew an analogy with the approach at first instance in *FKP Residential Developments Pty Ltd v Maroochy Shire Council* [2009] QPELR 666 to a condition imposed by the council requiring the developer of a residential development to pay infrastructure charges associated with stormwater runoff on the basis there was evidence establishing that the quality of runoff water leaving the site would meet or exceed the council's water quality objectives. The condition was held to be reasonable and relevant on the basis set out at [29] that increasing the population of any part of the council area by opening up newer urban areas will add to the pollutant loads upon existing urban areas and their facilities. Apart from relying on the different statutory regime dealt with in *FKP*, the respondents submit that *FKP* was a decision about water quality and not water quantity and it is the latter that is the subject of the ICNs. The test for the appropriateness of a condition relating to infrastructure imposed on a development approval is not comparable to the application of the statutory pre-condition to the imposition of an infrastructure charge under s 636 of the SPA.

[106] On the basis of the evidence before the primary judge that there was no additional demand on the stormwater trunk infrastructure, as a result of the respondent's developments, the statutory pre-condition under s 636(1) for issuing an ICN for providing stormwater trunk infrastructure was not met, and the respondents had established the ground of appeal under s 478(2)(b)(i) of the SPA which applied to levying a charge where the development did not result in additional demand on the infrastructure networks.

[107] There was no error in the primary judge's decision to allow the appeal in respect of each of the stormwater charges associated with the nine appeals referred to in order 1 made by the primary judge and to set aside the stormwater infrastructure charges in the relevant ICNs. The Council's appeal against orders 1 and 2 made by the primary judge must be dismissed.

Traffic trunk infrastructure charges

[108] As the four appeals concerning traffic trunk infrastructure charges which were the subject of the Charges Resolution interpretation error have been dealt with by reference to ground 2, it is only necessary to consider ground 5 in respect of Appeals 178, 186 and 675 of 2017 to the extent they relate to traffic trunk infrastructure charges. As the primary judge dealt with Appeals 178 and 675 of

2017 which both involved ICNs issued as a result of an application for a material change of use separately from Appeal 186 of 2017 which involved an ICN issued on the reconfiguration of a lot, I will follow the same approach.

[109] In relation to Appeals 178 and 675 of 2017, the primary judge found (at [94] of the reasons) that the application of the GFA methodology resulted in charges that amounted to *Wednesbury* unreasonableness. The use of the GFA methodology was consistent with the methodology used in the SPRP for calculating the maximum adopted charge and was the methodology imposed by the Charges Resolutions.

[110] The ICN for the material change of use to warehouse (freight) that was the subject of Appeal 178 of 2017 was issued on the basis that the development category under Charges Resolution No 1 was Industry which expressly included "warehouse". There is a specific charge area that related to the subject application of "Urban charge area - Charlton Wellcamp Enterprise Area". The adopted charge for the water supply, sewerage and transport networks is listed as $50/m² of GFA. As the subject site was not planned to be serviced by two of the relevant trunk infrastructure networks (namely water supply and sewerage), the adopted charge was reduced by 33 per cent per network. The charge was calculated at $12,614 on the basis of 742m² of GFA at $17 per m². The ground on which the respondents appealed against the imposition of the trunk infrastructure charge that was the subject of Appeal 178 of 2017 was *Wednesbury* unreasonableness. As a result of the rejection on the appeal to this court of the respondents' contention as to what was required of the Council under s 636 of the SPA and the respondents' argument that an ad hoc assessment of the additional demand generated by the proposed development on the transport trunk infrastructure was required, the respondents should not have succeeded before the primary judge in Appeal 178 of 2017. The respondents' challenge to the GFA methodology was precluded by s 478(3)(a) of the SPA.

[111] The ICN for the material change of use to warehouse was the subject of Appeal 675 of 2017 was issued on the basis that the development category under Charges Resolution No 2 was Industry which expressly included "warehouse". The adopted charge for the proposed development was calculated on the basis of 792m² of GFA. The adopted charge for the water supply, sewerage and transport networks for the development category of Industry applicable to the Urban charge area - Charlton Wellcamp Enterprise Area was $50.55. The adopted charge of $13,614.48 was therefore calculated at the rate of $17.19 per m² of GFA on the basis that only one of those three networks (transport) was applicable. Similarly to Appeal 178 of 2017, the ground on which the respondents appealed to the P & E Court in respect of the transport infrastructure charge in the ICN the subject of Appeal 675 of 2017 was *Wednesbury* unreasonableness, but was a challenge to the GFA methodology that was precluded by s 478(3)(a) of the SPA. For the same reasons that the primary judge should have dismissed Appeal 178 of 2017, the same outcome applies to Appeal 675 of 2017.

[112] The orders made by the primary judge allowing Appeals 178 and 675 of 2017 should be set aside and those appeals to the P & E Court should be dismissed.

Reconfiguration of lot appeal

[113] Appeal 186 of 2018 concerned the transport infrastructure charge of $68,000 that was imposed under the ICN that was issued in respect of the application to

subdivide an existing lot that comprised vacant industrial land and a quarry into two lots, one of which was to be used for office buildings.

[114] Section 3.2(b) of the Charges Resolution relevantly provides that the adopted charges for reconfiguring the lot for non-residential purposes for each lot created is "the adopted charge in the Development Category 'Industry' calculated in accordance with Section 3.3 using a plot ratio of 0.4 and capped at a maximum gross floor area of 2,000m^2 per lot". That was the method used by the Council that resulted in a charge of $34,000 for each of the two lots.

[115] 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 development. 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). This was another challenge by the respondents to the methodology for the calculation of the adopted charge that was precluded by s 478(3)(a) of the SPA. The order dismissing Appeal 186 of 2017 should be set aside and instead that appeal to the P & E Court should be dismissed.

Orders

[116] In view of the parties' mixed success on the appeal to this Court, there should be an opportunity for the parties to make written submissions on the appropriate costs orders.

[117] 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.

2. Appeal against orders 1 and 2 made by the primary judge on 21 June 2019 is dismissed.

3. Appeal against orders 4 and 5 made by the primary judge on 21 June 2019 is allowed.

4. Set aside orders 4 and 5 made by the primary judge on 21 June 2019.

5. Appeals 178, 179, 181, 182, 185, 186 and 675 of 2017 to the Planning and Environment Court concerning traffic trunk infrastructure charges are dismissed.

6. The appellant's submissions on costs must be made in writing within 14 days of the date on which these reasons are published.

7. The respondents' submissions on costs must be made in writing within 14 days after the appellant's submissions on costs are served on the respondents.