



Natural Justice for Developers

November | 2009

Introduction

Where a developer is not afforded an opportunity to be heard before a Ministerial call in decision is made, the decision may be unlawful and of no effect.

The Integrated Planning Act 1997 (IPA) provides the Minister for Infrastructure and Planning with extensive powers to call in, reassess and re-decide a development application without any right for an applicant to appeal the Minister's decision.¹

On 24 November 2009, the Supreme Court of Queensland reviewed the exercise of the Minister's power in the matter of *Landel Pty Ltd v The Honourable Stirling Hinchliffe MP, the Minister for Infrastructure and Planning*.²

The Facts

The developer, Landel, was granted a Development Permit for a Material Change of Use from the Mackay Regional Council to develop a Homemaker Centre. A commercial competitor had lodged an adverse submission with the Council to the development application prior to the Council deciding it. The submitter also provided detailed submissions to the Minister at the same time, urging the Minister to call in the development application and refuse it. Following the Council's approval, the submitter appealed to the Planning and Environment Court against the Council's decision.

On 26 October 2009, the last day upon which he had power to do so, the Minister called in the development application by Notice to the Council. The Notice specifically referred to the submissions of the submitter given some months previously. Although these submissions had been discussed with the Council before the issue of the Notice, they had never been referred to Landel. In fact, prior to receiving the Ministerial Call in Notice, Landel had no knowledge of the intended action by the Minister or the adverse allegations made by the submitter.

The Decision

Firstly, the Court considered the effect of the call-in decision on Landel, whose Development Permit was effectively quashed. His Honour Justice Fryberg determined that Landel had also lost the right to prove the value of its application to the Planning and Environment Court in the existing submitter appeals, which were also rendered ineffective by the call-in.

It is settled law that when a statute confers on a public official the power to do something which affects a person's rights, interests or expectations, the rules of natural justice regulates the exercise of that power. Without a clear legislative intention to the contrary, a statutory power must be exercised with procedural fairness to parties whose interests might be adversely affected by its exercise.³

The Supreme Court considered this principle in light of the statutory scheme of IPA. His Honour concluded that it had not been demonstrated that the provisions of IPA excluded an applicant's right to procedural fairness in relation to a call-in decision.

His Honour found that as the Minister had an obligation to do so and had not provided Landel with an opportunity to be heard prior to the call-in decision being made, the Minister was in breach of his duty to provide procedural fairness. ***His Honour granted declarations that the Minister's Notice of Call-in of 26 October 2009 was therefore unlawful*** and of no effect, with costs awarded to Landel and the Council.

Moya Steele, Partner of MacDonnells Law Planning and Environment Team and Instructing Solicitor for Landel in the application said, "*Applicants invest significant resources to achieve local government and concurrence agency approval for development. The effects of a Ministerial call-in are substantial and particularly remove the applicant from a position whereby a valid approval can be held, with appeal rights, to one where there is no legal right for an applicant after re-assessment by a Minister to challenge that decision. To exclude the knowledge and right of input of the applicant, particularly where the Minister receives adverse submissions from a commercial competitor, before the Minister exercises his discretion to call in an application is, put simply, unfair.*"

¹ Chapter 3, Part 6 of IPA

² (24 November 2009: Fryberg J)

³ *Annetts v McCann* (1990) 170 CLR 596 at 598



“The judgement should now provide some comfort that an appropriate level of procedural fairness, prior to a call-in power being exercised, will be given.”

MacDonnells Law - Planning and Environment Team

Often the complexity of IPA and its lengthy process overshadows the existence of a wider range of remedies which may be available to developers to overcome the hurdles and red tape.

Participants in the development approval process must be alive to the possibility that actions by assessing authorities may inadvertently be unlawful and can be set aside if prompt legal advice is obtained.

MacDonnells Law - Planning and Environment Team can provide a valuable legal perspective to the consultancy team for the management of complex or contentious development applications to ensure a full range of developer remedies and actions are available as required.

Should you require any further information please do not hesitate to contact MacDonnells Law.

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