HIGH COURT OF AUSTRALIA

KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

SHU-LING CHANG & ANOR APPELLANTS

AND

LAIDLEY SHIRE COUNCIL RESPONDENT

Chang v Laidley Shire Council
[2007] HCA 37
29 August 2007
B46/2006

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Queensland

Representation

D R Gore QC with T N Trotter for the appellants (instructed by Robert Milne Legal)

M D Hinson SC for the respondent (instructed by Connor O'Meara)

CATCHWORDS

Shu-Ling Chang v Laidley Shire Council

Local government – Subdivision of land – Section 5.4.2 of the *Integrated Planning Act* 1977 (Q) ("the Act") afforded a statutory entitlement to compensation to those affected by a change in planning scheme – Appellants applied to respondent Council for approval for reconfiguration of land – Planning provisions did not permit proposed reconfiguration – Earlier provisions would have permitted reconfiguration – Whether appellants entitled to compensation on account of diminution in value of land brought about by inability to reconfigure – Whether appellants had "accrued right" or "accrued entitlement" to compensation.

Statutes – Interpretation – Meaning and effect of s 3.2.1 of the Act – Section 3.2.1 prescribed the method for applying for development approval – Proposed development was refused on the basis that it was contrary to the draft regulatory provisions – Whether development application that was contrary to the draft regulatory provisions was a "properly made application" – Whether s 3.2.1 should be read down in conformity with the rule that statutes are not to be construed as interfering with vested interests unless that purpose is manifest – Whether a clear indication of the legislative purpose to abolish the right to compensation was required and was manifest.

Words and phrases – "accrued interest", "accrued right", "acquired right", "development application (superseded planning scheme)", "injurious affection", "properly made application", "retrospectivity".

Acts Interpretation Act 1954 (Q), s 20.
Integrated Planning Act 1997 (Q), Pts 2, 5A, ss 3.2.1, 5.4.2.
Local Government Act 1936 (Q), ss 33(10).
Integrated Planning and Other Legislation Amendment Act 2004 (Q).

1 KIRBY J. This appeal comes from the Court of Appeal of the Supreme Court of Queensland[1]. That Court refused leave to appeal from a decision of the Planning and Environment Court of Queensland[2]. The appeal concerns the interpretation of successive provisions of Queensland planning law affecting a parcel of land at Blenheim in South-East Queensland.

2 Under earlier provisions of the planning law, the land in question could, with the requisite approval of a development application, have been reconfigured (in the old language "subdivided"[3]) into lots of a modest size. After supervening changes to the planning law, reconfiguration as sought was prohibited. In these proceedings, the owners of the land have been seeking to recover what they claim is their entitlement to statutory compensation, accrued before that change took effect.

3 The owners' claim has been rejected (so far successfully) on the basis that, although the compensation sought was available for a time, it was removed by an amendment to the planning law which rendered the development application invalid. A valid development application was necessary to enliven the statutory entitlement to compensation. The owners argue that the supervening law, containing this amendment, did not apply to their case because, immediately before it came into operation, they had a vested entitlement to recover compensation for the loss of value of their interest occasioned by earlier changes to the planning law. They contend that the new procedural requirement for such applications did not clearly and explicitly govern their case. Conformably with statutory provisions[4] and common law principles[5], defensive of accrued entitlements (and protective against their extinguishment by amending laws not clearly stated as having that effect), the supervening law should be read so as not to apply.

4 In their reasons ("the joint reasons"), Hayne, Heydon and Crennan JJ have concluded that the appeal must be dismissed. They have done so by reference to the language of the planning law as in force at the time the relevant application was made[6]. Upon their Honours' approach, no question of retrospective

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1 *Chang v Laidley Shire Council* (2006) 146 LGERA 283.

2 *Chang v Laidley Shire Council* [2006] QPELR 91.

3 (2006) 146 LGERA 283 at 286 [2] per Jerrard JA.

4 *Acts Interpretation Act* 1954 (Q), s 20(2).

5 *Maxwell v Murphy* (1957) 96 CLR 261; *Attorney-General (Q) v AIRC* (2002) 213 CLR 485; *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1; *WAPC v Temwood Holdings Pty Ltd* (2004) 221 CLR 30.

6 Joint reasons at [99]-[110].

operation of the legislation truly arises[7]. Nor was there any accrued "right" in the owners that could attract either the statutory or common law principles protective of the continuance of vested rights[8]. Callinan J, too, agrees in this conclusion, although with misgivings which he has expressed[9].

5 Ultimately, I reach the same result. But I do not regard this as an "open and shut case"[10]. Cases of this kind (at least when they reach this Court) rarely are. In part, this is because this Court "has rejected a narrow view of the survival of accrued rights in the context of repealing [or amending] legislation"[11]. In particular, it has not confined the protection of the law to "rights" narrowly understood[12]. In part, this has been so because of the reasons of legal and constitutional principle that lie behind the general protection of accrued legal entitlements[13].

6 This appeal fails, in the end, because of the terms of the legislation governing the matter[14]. However, for me, this means the whole of the legislation, yielding from its detail the applicable purpose and policy of Parliament. The solution is not confined to what is meant by a supervening change to the requirements for "a properly made application" for the proposed development[15]. That consideration is but one factor in the analysis that leads to the stated outcome.

The facts and legislation

7 *The appellants' interest in the land*: Many of the background facts are set out in the joint reasons[16]. However, to understand fully the complaint made by

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7 Joint reasons at [113].

8 Joint reasons at [115]-[117].

9 Reasons of Callinan J at [120], [123]-[125].

10 cf *Dossett* (2003) 218 CLR 1 at 23 [76].

11 *Attorney-General (Q)* (2002) 213 CLR 485 at 522 [108].

12 See eg *Temwood* (2004) 221 CLR 30 at 45-46 [31] per McHugh J.

13 *Dossett* (2003) 218 CLR 1 at 25-26 [85].

14 cf *Attorney-General (Q)* (2002) 213 CLR 485 at 524 [112].

15 Joint reasons at [108].

16 Joint reasons at [87]-[89].

the owners, Shu-Ling Chang and Tai-Hsing Chen ("the appellants"), it is helpful to explain the way they presented their case.

8 The appellants' land, the subject of the proceedings, was within the local government area of the Laidley Shire Council ("the Council"). The Council is the respondent to this appeal. Under a previous (1977) planning scheme applicable to it, the land was included in a zone designated for development purposes "Rural A". In July 1992, an application was successfully made by the then owners for the land to be rezoned as "Rural Residential Zone". That rezoning was gazetted in December 1992. When, in 1996, the Laidley Shire Council Town Plan (the "1996 Plan") was adopted and given effect, the land was included in an area designated "Rural Residential A Zone"[17]. That was the relevant zoning of the land when the *Integrated Planning Act* 1997 (Q) ("the 1997 Act") was enacted and came into force.

9 *Injurious affection in 2003*: On 28 March 2003, in accordance with the 1997 Act, a new planning scheme for the Council's local government area was adopted. It replaced the 1996 Plan. Under the 1996 Plan, an application to reconfigure the appellants' single lot of land into 25 lots, which is the subject of these proceedings, was legally permissible. When, however, the 2003 planning scheme was adopted, it required that, for approval for the development which the appellants desired, lots should be larger than the minimum size which they were proposing. On the face of things, this meant that the land could not be reconfigured. To that extent, the introduction of the new planning scheme resulted in injurious affection to the appellants' interest in the land. The value of the appellants' interest was thereby reduced.

10 Yet when the new planning scheme was adopted in 2003, all was not lost for the owners. The 1997 Act, s 5.4.2, afforded owners of land, so affected, a special entitlement (a "privilege" or "liberty"[18]) to seek redress from the Council. They were entitled to do so within two years of the adoption of such a planning scheme[19]. Within that period, owners, such as the appellants, could make a "development application (superseded planning scheme)" ("DA(SPS)"). Such a DA(SPS) gave the "assessment manager" (relevantly, the local government authority[20] and here the Council) an option on how to proceed[21]. As the law then

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17 (2006) 146 LGERA 283 at 286-287 [3].

18 *Temwood* (2004) 221 CLR 30 at 45-46 [31].

19 1997 Act, Sched 10, definition of "development application (superseded planning scheme)".

20 *Chang* (2006) 146 LGERA 283 at 286 [2]. See 1997 Act, s 3.1.7, Sched 8A.

21 See 1997 Act, s 3.2.5(3).

stood, the Council could consent, in whole or in part, to the development sought, and thereby avoid any obligation to pay compensation to the land owner whose land was affected by the supervening scheme[22]. Or it could pay compensation to the owner, being "reasonable compensation", calculated as "the difference between the market values, appropriately adjusted having regard to [specified] matters"[23].

11 *Passage of IPOLA 2004*: The position reached was then further complicated by yet another supervening change affecting planning law in Queensland, namely the enactment, and commencement, of the *Integrated Planning and Other Legislation Amendment Act* 2004 (Q) ("IPOLA 2004")[24]. That Act came into force on 17 September 2004. The commencement date fell within the two year period that was available to the appellants, as owners of the subject land, to make a DA(SPS).

12 In the interval between March 2003 and September 2004, the appellants had lodged no DA(SPS) with the Council under the 1997 Act. In fact, the appellants did not make a DA(SPS) application until 3 December 2004. Then, for the first time, they applied for approval from the Council for the reconfiguration of their land from one lot into 25 lots.

13 IPOLA 2004 had amended the 1997 Act by introducing into Ch 2 of the 1997 Act a new Pt 5A. That Part provided for a completely different scheme of regional planning for the South-East Queensland ("SEQ") Region of the State. Specifically, IPOLA 2004 amended the 1997 Act to provide for a SEQ Regional Plan ("SEQRP"), a draft SEQRP and regulatory provisions for both[25].

14 *Commencement of DRP in 2004*: On 27 October 2004, Draft Regulatory Provisions ("DRP") ancillary to the draft SEQRP came into effect for the SEQ Region. The appellants' land, being within that Region, thus became subject to the DRP. By those provisions, the applicable zoning of the subject land was changed yet again. This time, in accordance with the DRP, the land was designated (with the surrounding area) as a "Regional Landscape and Rural Production Area". By s 4(2) of the DRP, reconfiguration of a lot of land in such a Regional Landscape and Rural Production Area was prohibited, relevantly, unless the lot sizes proposed were of a specified minimum size. The DRP provided that "reconfiguration of a lot may not occur if any resulting lot would

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22 1997 Act, s 3.5.11.

23 1997 Act, s 5.4.9.

24 Joint reasons at [99].

25 1997 Act, Ch 2 Pt 5A, divs 3-6, inserted by IPOLA 2004, s 8.

have an area less than … 100 hectares"[26]. Exceptions to this prohibition were permitted by s 4(3) of the DRP. However, none of the stated exceptions applied to the appellants' land. The reconfiguration sought by the appellants in their DA(SPS) envisaged 25 new lots, every one of which was considerably smaller than 100 hectares. The reconfiguration proposed was thus prohibited by the new and special SEQ Region zoning requirements.

15 What was happening in the appellants' camp that led to the delay in their making their DA(SPS) until December 2004, after the supervening changes described above had occurred, is not explained in the record. In legal terms, it does not matter. The issue presented to the courts below, and now to this Court, is: What effect, if any, did the supervening amendments made by IPOLA 2004 have on the appellants' earlier privilege to apply by way of DA(SPS) for approval by the Council, or to claim compensation for the diminution in the value of their land once reconfiguration was refused?

16 *Rejection of application not "properly made"*: On 21 January 2005, the Council advised the appellants that their DA(SPS), at the time it was made, was invalid. Specifically, by reason of the amendments introduced into the 1997 Act by IPOLA 2004, the DA(SPS) made by the appellants did not conform to the added (amended) provisions of s 3.2.1(7)(f) of the 1997 Act.

17 For the Council, by the time it received the appellants' application, that application (although it would earlier have been properly made) was no longer "properly made". This was because "the development" it proposed did not qualify with the now added requirement that such an application "would not be contrary to the regulatory provisions or the draft regulatory provisions". In fact, the application was specifically prohibited by the DRP, so that neither the development nor compensation was available.

18 Confronted by the Council's response to their application, the appellants' argument has been a simple one. According to the appellants, the outcome of the case depended upon a decision as to when the relevant legal analysis began. If it began literally, with the date of their application (and the requirement at that date for a "properly made application"), the appellants accepted that they would fail. However, the appellants submitted that the correct starting point for analysis required the decision-maker to look back in time. To acknowledge the entitlement that had already accrued to the appellants under the 1997 Act, before the commencement of IPOLA 2004. To recognise the two year leeway which the 1997 Act then afforded to them to apply by a DA(SPS). To view that entitlement of itself as an accrued "liberty" belonging to ("vested in") the appellants by law.

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26 As to the basis for such a regulation, see 1997 Act, s 2.5A.12(2)(d), inserted by IPOLA 2004, s 8.

To recognise that they had exercised that liberty within the time then provided by law. And therefore to overcome the asserted derogation from that liberty, relied on by the Council, on the basis of the supervening changes affecting the requirements for a "properly made application". Analysed in this way, the appellants argued that, because the 2004 changes did not expressly apply to their entitlement to make such a DA(SPS), their entitlement survived. The appellants could therefore enforce it.

19 *Analysis: correct starting point?*: As I shall show, the appellants are correct in the general approach they urged on this Court. The entirety of the legislation, and the history of its adoption, must be understood and applied. No narrow view should be taken to the protection of entitlements accruing under earlier legislation[27]. However, in the end, even starting where the appellants contended, the correct interpretation of the legislative scheme supports the conclusion reached by the courts below. That conclusion must therefore stand.

20 Before explaining why I come to this conclusion, it is proper to recount the appellants' arguments in their case. They are not without persuasive force. Most especially, there can be no doubting that, in practical terms, the supervening effect of IPOLA 2004 was to deprive the appellants of what would otherwise have been their entitlement to compensation if they had made a DA(SPS) within time. Did that entitlement become worthless because the appellants delayed in making their application? Was the change to the appellants' entitlements capable of being achieved in such an indirect manner?

The survival of a compensation entitlement

21 *Applicable statutory scheme*: State constitutions in Australia do not contain guarantees according land owners entitlements to "just terms" compensation in the event of compulsory acquisition of their property interests by or under State law[28]. Still less do they contain guarantees of compensation in the event of supervening injurious affection occasioned by successive changes to planning law[29]. Nevertheless, a provision for compensation, in specified

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27 *Kettering Pty Ltd v Noosa Shire Council* (2004) 78 ALJR 1022 at 1028-1029 [28]; 207 ALR 1 at 9.

28 *Durham Holdings Pty Limited v New South Wales* (2001) 205 CLR 399; cf Constitution, s 51(xxxi).

29 Injurious affection is explained in *Edwards v Minister of Transport* [1964] 2 QB 134 at 146-155 per Harman LJ. The history of injurious affection laws in Australia, the United Kingdom and North America is collected in Australian Law Reform Commission, *Lands Acquisition and Compensation*, Report No 14, (1980) at 151-164.

circumstances, has appeared in Queensland law at least since the *Local Government Act* 1936 (Q)[30], later mirrored in the *City of Brisbane Town Planning Act* 1964 (Q)[31]. These legislative schemes were, in turn, reflected in provisions enacted by the *Local Government (Planning and Environment) Act* 1990 (Q) ("the 1990 Act")[32].

22 By s 3.5(1) of the 1990 Act, an entitlement to compensation was conferred on the owner of an interest in premises within a planning scheme area where the interest was injuriously affected "by the coming into force of any provision contained in a planning scheme; or … by any provision or restriction imposed by the planning scheme". It was this type of entitlement that was considered by this Court in *Kettering Pty Ltd v Noosa Shire Council*[33], where it was described as a "very expansive right to compensation". Under the 1990 Act, the compensation right so provided was "triggered" by a single event, namely a diminution in the value of property caused by a provision in a supervening State planning scheme.

23 The 1990 Act was, in turn, repealed by the 1997 Act. By the 1997 Act, an entitlement to compensation was crystallised upon the happening of four events, as described in s 5.4.2:

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

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30 s 33(10)-(14).

31 ss 13-17.

32 s 3.5.

33 (2004) 78 ALJR 1022 at 1029 [28]; 207 ALR 1 at 9.

(ii) approves the application in part or subject to conditions or both in part and subject to conditions."

24 In the case of an "interest in land" a "change", as referred to in s 5.4.2(a), was defined in s 5.4.1 to mean "a change to the planning scheme or any planning scheme policy affecting the land".

25 The foregoing provisions maintained the basic scheme for statutory compensation expressed in the pre-existing law. The reduction in the value of the "interest" still triggered the entitlement to be paid "reasonable compensation". However, the scheme of the 1997 Act added procedural requirements relating to the making of a DA(SPS), its assessment and resolution. The provision permitting an applicant to make a DA(SPS) within two years was contained in the definition of such an "application", contained in Sched 10 to the 1997 Act.

26 This scheme, for which s 5.4.2 of the 1997 Act provided, envisaged that a body such as the Council was effectively given a choice. Either it could accept a liability to pay compensation for a loss of value of an interest occasioned by a supervening planning scheme, or it could avoid, or reduce, that liability by assessing the development application under the former scheme. In a sense, this option explains the appellation "DA(SPS)". In the event that the local government authority, as "assessment manager", chose to proceed under the earlier planning scheme, the land owner would suffer no relevant economic loss. The development application would then be assessed on its merits as if the supervening planning scheme did not exist.

27 If, however, the decision was made to assess the application under the supervening scheme, the land owner would be entitled to compensation if the application was then refused or constrained in some way in accordance with the new scheme, as by the imposition of new conditions or the provision of only partial approval. According to the appellants, the two year time limit, afforded for the making of a DA(SPS), permitted a measure of certainty in considering potential compensation claims of the type they brought. It allowed the new planning scheme a little time to operate and land owners time to obtain proper advice, including as to any true loss of value of their "interest".

28 *Impact on accrued entitlements and interests*: The appellants acknowledged that IPOLA 2004 introduced a major change to planning law for the SEQ Region. That change contemplated the development and implementation of the SEQRP, following advice by a SEQ Regional Coordination Committee[34]. In the meantime, it provided for the observance of

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34 1997 Act, Ch 2 Pt 5A, divs 2 and 3, inserted by IPOLA 2004, s 8. See particularly ss 2.5A.4, 2.5A(10) and 2.5A.13(2).

the DRP[35]. The appellants argued that the novel and radical amendments introduced in this way were not intended to abolish already established entitlements accrued under the 1997 Act. Had such abolition been intended, the appellants submitted, in what were otherwise detailed provisions, it would have been relatively easy to say so clearly and expressly.

29 The Council responded to this argument by submitting that IPOLA 2004 had expressed its legislative purpose clearly, sufficiently and expressly. It had done so by the provisions of s 3.2.1(7)(f) already noted. Moreover, it had gone on to make the purpose of the amendments to the 1997 Act even more clear by providing that the Council, as assessment manager, after receiving and considering an application for development approval, could accept one that was "not a properly made application"[36]. However, that provision, in turn, was not to apply to an application "if the development would be contrary to the regulatory provisions or the draft regulatory provisions"[37].

30 The DRP prohibited small lot size developments as proposed by the appellants' application. The DRP, in so providing, was authorised by s 2.5A.12, introduced by IPOLA 2004, s 8. Relevantly, the applicable provision of that paragraph states:

> "(1) The SEQ regional plan may include regulatory provisions.
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> (2) The regulatory provisions may –
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> (a) …
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> (b) …
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> (c) …
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> (d) otherwise regulate development by, for example, stating aspects of development that may not occur in stated localities".

31 It was Pt G of the draft SEQRP that contained the applicable DRP. Section 1 of that Part allocated all land in the SEQ Region to identified "Areas". The map of the region in the Council's area allocated the appellants' land to a

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35 1997 Act, s 2.5A.24, inserted by IPOLA 2004, s 8.

36 1997 Act, s 3.2.1(9), inserted by IPOLA 2004, s 10.

37 1997 Act, s 3.2.1(10)(b), inserted by IPOLA 2004, s 10.

"Regional Landscape and Rural Production Area". By Div 3 of the DRP, applicable to such an Area, "reconfiguration" was prohibited where any resulting lot would have an area of less than 100 hectares. All of the lots proposed in the appellants' application fell within that prohibition.

32 In this way, the Council submitted that the appellants' application was not "properly made" within s 3.2.1(7)(f) of the 1997 Act, as amended by IPOLA 2004. For their part, the appellants argued that they had acted pursuant to an already accrued entitlement under the pre-existing law which had not been destroyed, or relevantly diminished, by the supervening enactment of IPOLA 2004 nor by the DRP which took effect in October 2004 under the provisions of that Act.

The issues

33 Two issues thus arise in this appeal:

(1) *The correct approach*: What is the correct approach to the controversy presented by the arguments of the parties? Is it to be found wholly within the requirement of a "properly made application" to enliven a compensation "right"? If so, does the appellants' claim fail at the threshold because the development proposed in their application would be contrary to the DRP superimposed by IPOLA 2004? Or is this "too literalistic" an approach to the problem in hand? Is it first necessary to resolve the anterior question of whether, as a matter of law, the requirement inserted in s 3.2.1(7)(f) of the 1997 Act applied to an application, such as the appellants', arising out of an accrued, pre-existing entitlement to compensation, pursued within the then permitted time?

(2) *The correct analysis*: Once the first issue is resolved, it is then necessary to resolve the arguments in the appeal according to the correct approach. In the event that the correct approach requires no more than a consideration of s 3.2.1(7)(f), as it relates to the appellants' application at the time that it was made, there could be no real contest about the outcome of the appeal. The controversy is then indeed a very narrow one. At that time, the appellants' "application" breached one of the specified preconditions. It thus failed to enliven the powers of the Council (relevantly) to decide the outcome of the application and, in turn, to pay compensation to the appellants for the diminution in the value of their interest in the land. Upon this approach, as the joint reasons suggest, the resolution of this appeal is simple. If the broader approach, urged by the appellants, is adopted, it is not so simple. But, as I shall show, the broader approach eventually yields the same conclusion.

The correct approach

34 *The "credit" to legislatures*: The appellants were right in their submission that the proper approach to the problem of statutory construction presented by this appeal required the decision-maker to look beyond the requirements of s 3.2.1(7)(f) (and s 3.2.1(10)(b)) of the 1997 Act. True, these provisions are very important. However, they represent only one element in the accurate analysis of the legislation for the present purpose.

35 The essential reason why this is so is to be found in the detail of the appellants' submissions. If the construction which they urge for the legislation is correct, pars (7)(f) and (10)(b) in s 3.2.1 of the 1997 Act, introduced by IPOLA 2004, simply did not speak to their case. The amending Act was silent as to their entitlements to compensation because those entitlements had already accrued. These might not be vested legal "rights" in the strict Hohfeldian sense (to use the phrase adopted by McHugh J in *WAPC v Temwood Holdings Pty Ltd*[38]). But (depending on a more detailed analysis) they might still necessitate a strict interpretation of the supervening legislation, so as to protect the accrued "entitlements" of affected land owners, such as the appellants.

36 In any modern society, legislation is constantly changing. Such changes will often impinge on what are claimed to be the accrued "entitlements" of persons, derived from pre-existing law. The casebooks are full of such instances. Several of them were collected by the Privy Council in *Yew Bon Tew v Kenderaan Bas Mara*[39]. That was an appeal from a decision of the Federal Court of Malaysia. Lord Brightman, who delivered the judgment of their Lordships, began his reasons with cases from the nineteenth century[40]. He proceeded to cases in the last century, including the decision of this Court in *Maxwell v Murphy*[41], upon which the present appellants relied, as did the Privy Council in *Yew Bon Tew*[42].

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38 (2004) 221 CLR 30 at 45 [31]. This is a reference to the taxonomy of rights and duties that the philosopher W N Hohfeld set out in "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1913) 23 *Yale Law Journal* 16; cf *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 537 at 584; *Mathieson v Burton* (1971) 124 CLR 1 at 12-13; *Downs v Williams* (1971) 126 CLR 61 at 83.

39 [1983] 1 AC 553.

40 *Wright v Hale* (1860) 6 H & N 227 [158 ER 94]; *The Ydun* [1899] P 236.

41 (1957) 96 CLR 261.

42 [1983] 1 AC 553 at 560-562.

37 At the conclusion of his reasons[43], Lord Brightman qualified what he called "the generality of the proposition stated by Lord Denning MR [in *Mitchell v Harris Engineering Co Ltd*[44]]" that:

> "[t]he Statute of Limitations [1623 (21 Jac 1, c 16)] does not confer any right on the defendant. It only imposes a time limit on the plaintiff."

Lord Brightman explained[45]:

> "In the opinion of their Lordships an accrued entitlement on the part of a person to plead the lapse of a limitation period as an answer to the future institution of proceedings is just as much a 'right' as any other statutory or contractual protection against a future suit."

38 *Effect on "interests" and "entitlements"*: A review of the cases, in this and other courts, suggests that, in the present field of discourse, the presumption against retrospective abolition or qualification of existing interests is not one that has, traditionally, been given a narrow application.

39 The ultimate explanation for this approach is that given by Barwick CJ in *Geraldton Building Co Pty Ltd v May*[46]. In effect, it is the "credit" that courts give to elected legislatures, in countries such as Australia, that "by their enactments, they intend to do justice to all affected parties"[47]. This "credit" may be displaced by a closer examination of the legislation in question, read with an eye to the entire context, to the legislative history and to any extrinsic materials that may be used to throw light on the parliamentary "intention" or purpose. However, because the presupposition of "credit" is one concerned with the operation of the law, affecting the practical legal expectations of those subject to the law, no narrow view has been, or should be, taken of its operation.

40 This is why I have preferred in these reasons to use the word "entitlement" rather than "right". It indicates that what is involved may fall short of an

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43 [1983] 1 AC 553 at 564-565.

44 [1967] 2 QB 703 at 718.

45 [1983] 1 AC 553 at 565.

46 (1977) 136 CLR 379 at 387.

47 *Dossett* (2003) 218 CLR 1 at 17 [55]. See also *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 at 524-525 per Lord Mustill; *Government of United States v Montgomery* [2001] 1 WLR 196 at 205 per Lord Hoffmann; [2001] 1 All ER 815 at 825.

immediately enforceable legal right in the strict sense. For example, it might be a right subject to procedural steps that are treated as routine and straightforward. "Accrued entitlement", it should be noted, was the phrase that Lord Brightman used in *Yew Bon Tew*[48] to explain the broader types of "rights" protected against extinguishment by non-specific laws. The House of Lords has accepted[49], as did the Privy Council earlier[50], that inchoate rights, obligations and liabilities are protected by statutory provisions such as s 20 of the *Acts Interpretation Act* 1954 (Q) which the appellants invoked here. The same is true of the common law principle that preceded, and moulds itself to, such statutory provisions.

41 The foregoing is the approach that this Court adopted in *Maxwell v Murphy*[51]. Cases of this kind commonly provoke dissenting opinions[52]. This fact itself suggests that a non-mechanical approach to the protection of "entitlements", rather than of strict "rights", is at stake. The search is one for the overall effect and operation of the legislation.

42 In *Attorney-General (Q) v AIRC*[53] and in *Dossett v TKJ Nominees Pty Ltd*[54], there were substantial arguments for a construction of the legislation different from that which this Court unanimously accepted. Such arguments may not be appreciated, and given proper weight, if one latches onto a particular statutory word or phrase, read in isolation. The present appellants' submissions (and complaint) can thus only be appreciated if the scrutiny of the legislation commences at a point of time well before they lodged their DA(SPS).

43 *Advances in statutory interpretation*: The controversy now expressed is, in a sense, another reflection of the debate about statutory interpretation more

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48 [1983] 1 AC 553 at 565.

49 *Plewa v Chief Adjudication Officer* [1995] 1 AC 249 at 259 per Lord Woolf.

50 *Free Lanka Insurance Co Ltd v Ranasinghe* [1964] AC 541.

51 (1957) 96 CLR 261 at 267 per Dixon CJ, 279 per Williams J.

52 See eg the dissent of Fullagar J in *Maxwell v Murphy* (1957) 96 CLR 261 at 283-291; the reasons of Kitto J at first instance in *Continental Liqueurs Pty Ltd v G F Heublein and Bro Inc* (1960) 103 CLR 422 at 426-427, reversed in *G F Heublein and Bro Inc v Continental Liqueurs Pty Ltd* (1962) 109 CLR 153 at 159-160 and note the dissent of Brennan J in *Esber v The Commonwealth* (1992) 174 CLR 430 at 442-453.

53 (2002) 213 CLR 485 at 521-524 [104]-[111].

54 (2003) 218 CLR 1 at 19-23 [64]-[75].

generally. Traditionally, the English law and its derivatives (including in Australia) adopted a fairly strict, textual, literal, or "grammatical" approach to interpretation[55]. However, in more recent years, in part because of a growing understanding of how ideas and purposes are actually communicated by words, this Court[56], English courts[57] and other courts of high authority throughout the common law world have embraced a broader, contextual reading of statutory language and other texts having legal effects[58].

44 Specifically, this Court has accepted that it is an error of interpretive approach to take a word or phrase in legislation and to read that word or phrase divorced from its immediately surrounding provisions (and any other relevant *indicia* of meaning such as legislative history, stated purposes and admissible extrinsic materials) [59]. Once it was thought necessary that there should be an "ambiguity" in the word or phrase before that wider search was proper, or even permissible. Recent authority of this Court has rejected that requirement[60].

45 It follows that the appellants' arguments are not fully met by pointing to the language of s 3.2.1 of the 1997 Act, and pars (7)(f) and 10(b) inserted by IPOLA 2004. It remains to be decided whether the added expressions apply to the appellants' already accrued entitlements under the 1997 Act. Alternatively, should the provisions of s 3.2.1 be read down in conformity with the presumption

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55 A classical example of this approach in the constitutional setting is the *Engineers Case: Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

56 See eg *Potter v Minahan* (1908) 7 CLR 277 at 304-305; *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18; *Coco v The Queen* (1994) 179 CLR 427 at 437.

57 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563.

58 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 112-113; *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], 384 [78].

59 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397 applying *R v Brown* [1996] 1 AC 543 at 561 per Lord Hoffmann: "The significance of individual words is affected by other words and the syntax of the whole."

60 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

explained by Griffith CJ in *Clissold v Perry*[61], and repeatedly applied before and since in this and other courts? That is:

> "[i]t is a general rule to be followed in the construction of Statutes such as that with which we are now dealing, that they are not to be construed as interfering with vested interests unless that intention is manifest."

46 The word "interests" in this passage avoids the Hohfeldian nuances imported by talk of "rights". The appellants argue that they had vested "interests", permitting them within two years to lodge a DA(SPS). They assert that they pursued those "interests" within time and that s 3.2.1(7)(f) and s 3.2.1(10)(b), by their lack of specificity and particularity, did not deprive them of such "interests". A glance at earlier decisions, in analogous circumstances, shows that this argument is far from worthless. Interpretations no more bold than that urged by the appellants have sometimes been accepted by courts in similar cases. It is therefore necessary to grapple with the broader considerations urged by the appellants in order to reach the conclusion in this appeal that is required by a correct interpretation of the legislation, and all of it.

The appellants' arguments

47 *An accrued interest*: The legislative background to planning law in Queensland, preceding both the 1997 Act and IPOLA 2004, establishes the fact that, for decades (since at least 1936), provisions had existed in various forms entitling the owners of interests adversely affected by supervening changes in planning law to apply for redress. Such redress might involve a quasi-fictitious treatment of a development application, as if it had been brought under the pre-existing planning law. When that option was not adopted, in whole or in part, there lay an entitlement to reasonable compensation.

48 Such statutory provisions reflected the Queensland Parliament's attempt to balance the public interest in a principled development of planning law against the impact which changes in planning law inevitably have on the value of individual interests in land. The hypothesis behind the successive statutory provisions was that ratepayers generally should contribute to reasonable compensation of individuals who suffer loss as a direct result of supervening changes. In this way, the legislative provisions, carried into the 1997 Act, were designed to ensure overall fairness.

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61 (1904) 1 CLR 363 at 373. See generally, Gray, "Can environmental regulation constitute a taking of property at common law?", (2007) 24 *Environmental and Planning Law Journal* 161 at 165-166.

49 It was common ground that, had the appellants made their DA(SPS) before IPOLA 2004 altered the planning law applicable to the SEQ Region, they would, at the least, have been entitled to reasonable compensation for any planning decision of the Council refusing them development approval for reconfiguration of their land into lots of the size that they proposed. This was because, under the planning regime in force immediately before IPOLA 2004, the appellants' interests carried with them an entitlement to seek reconfiguration of the land in the manner desired, without any relevant prohibition. Moreover, the appellants had two years from the change of the earlier planning regime to make their DA(SPS), a time requirement to which they conformed.

50 The appellants' primary argument was, therefore, that although they had not lodged their DA(SPS) before IPOLA 2004 commenced, that statute (and the particular additional provisions governing the form of a "properly made application") should not be construed so as to impinge adversely on their accrued statutory "interests". Conformably with the rule protective of accrued "interests", the only way that such "interests" could be affected was by clear and express provisions in IPOLA 2004. The appellants argued that IPOLA 2004 contained no such clear and express provisions. The amendments which that Act introduced to s 3.2.1 of the 1997 Act (and more specifically the DRP) should therefore be read prospectively. They should not be read so as to effect a deprivation of "interest" that Parliament had not provided for in terms. Such a reading of the provisions of the 1997 Act, as amended by IPOLA 2004, would not be legally impossible.

51 *Lack of explicit repeal*: In particular, the appellants pointed out that nothing in IPOLA 2004 had expressly repealed the compensation provisions of the 1997 Act, in so far as those provisions concerned development applications as such, including by way of a DA(SPS) specific to land in the SEQ Region. Accordingly, their argument ran, no clear and express provision existed addressing the basis upon which the appellants had, within the allotted time, lodged their DA(SPS) for compensation.

52 Even if, put generally, it could be argued that the supervening DRP contemplated a development regime in the SEQ Region inconsistent with the pre-existing planning scheme, the appellants submitted that such changes said nothing at all about the alternative entitlement to reasonable compensation, which was their true interest at this stage of the proceedings. If, because of the supervening DRP, the Council was prohibited from giving approval for the *development* proposed by the appellants, there remained available, as the appellants demanded, an entitlement to "reasonable *compensation*" in accordance with the 1997 Act. As the review of legislation showed, that entitlement had a long history.

53 If the entitlement to compensation was to be abolished by Parliament, in respect of their interests, the appellants submitted that it had to be abolished

clearly, certainly once "interests" in recovering the compensation had crystallised. The appellants' interests crystallised before IPOLA 2004 was enacted and commenced operation. The appellants therefore argued that their entitlement to compensation had not been abolished indirectly by the introduction of the added requirements for a "properly made application". Any such supervening alterations should be read as affecting only future applications that did not impinge upon already crystallised "interests", such as theirs.

54 *Lack of openness*: To reinforce the foregoing arguments, the appellants relied on the absence of any clear identification of a legislative purpose to abolish their compensation right. Not only was such an abolition not clearly spelt out in the legislation itself (for example, by an express qualification to the right to "reasonable compensation" in s 5.4.2 of the 1997 Act). There was no statement to that effect in the Explanatory Memorandum published with IPOLA 2004. The Court was not provided with the Minister's Second Reading Speech. It can be reasonably inferred that there was nothing in it to support the abolition of entitlements or to suggest that it was specifically drawn to the notice of Parliament and the community. Moreover, there were transitional provisions for the introduction of IPOLA 2004. These were inserted in the 1997 Act as a new s 6.4.1 ("Effect of SEQ regional plan for assessing and deciding applications under transitional planning schemes")[62]. Nothing in the transitional provisions spelt out an abolition of accrued entitlements.

55 In these circumstances, the appellants argued, if a provision of particularity and specificity was necessary to deprive persons, such as themselves, of a vested "interest", such a provision was missing in IPOLA 2004. If the alterations to the requirements of a "properly made application" were, after October 2004, to be taken as applicable to the pursuit of the appellants' accrued entitlement, the consequence would be to render that entitlement worthless. It would still be open to the appellants to make their "application" within time by way of a DA(SPS). But, by a "trick of drafting", doing so would be no more than a charade. The "application" would be doomed to fail because the development proposed would be contrary to the DRP, rendering it impossible to make a "proper application". The only way to avoid this "trick of drafting" would be to read the altered provisions of s 3.2.1 of the 1997 Act as applicable prospectively and as not therefore relevant to claims for compensation still within time to be decided by the "assessment manager" or the courts.

56 *Rationale for openness*: In further support of the foregoing arguments, the appellants reminded the Court of the reasons that lay behind both the relevant common law principle and the statutory presumption stated in the *Acts*

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62 By IPOLA 2004, s 30.

Interpretation Act 1954 (Q), s 20[63]. Those reasons included avoidance of the abolition of accrued entitlements by oversight, accident or mistake, and insistence that[64]:

> "[t]hose who set out to abolish existing rights [should be] obliged to face the consequences of what they have done. In the modern processes of democratic government they are required to assume political accountability for their actions." (footnote omitted)

57 In the Court of Appeal, Jerrard JA acknowledged that, to the extent that it was foreshadowing a possible loss of rights, s 3.2.1(7)(f) of the 1997 Act "could have been made clearer"[65]. The appellants submitted that this was something of an understatement. To the extent that the amendments to s 3.2.1 of the 1997 Act had such an effect, they only achieved it in a "heavily disguised way". In the absence of any other explicit indications that this was the object of the Government and the purpose of Parliament, the appellants urged this Court to read the provisions so as to promote democratic accountability by insisting on explicit, not hidden, abolition of such entitlements.

58 By explaining the appellants' arguments in the way that I have, I trust that I have indicated why those arguments need to be answered. I must now explain why, ultimately, I do not accept the arguments and join in the conclusion that the appeal should be dismissed.

The entitlement to compensation was abolished

59 *Commencing with the legislative text*: The correct starting point for the analysis of any question such as the present is the statute itself. This is a common theme of recent decisions of this Court[66]. Common law principles, judicial *dicta* and earlier cases will only take the decision-maker so far. The ultimate conclusion to a problem such as this must be derived from a close study

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63 The section reads, relevantly, "[t]he repeal or amendment of an Act does not … affect a right, privilege or liability acquired, accrued or incurred under the Act": s 20(2)(c).

64 *Dossett* (2003) 218 CLR 1 at 26-27 [87]; cf *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 581-582 [104]-[106].

65 *Chang* (2006) 146 LGERA 283 at 291 [20].

66 The cases are collected in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 80 ALJR 1509 at 1528 [84]; 229 ALR 1 at 22-23.

of the legislation. This should not be confined to a single provision (such as the sub-paragraphs of s 3.2.1 of the 1997 Act added by IPOLA 2004). The whole scheme of the legislation has to be read in order to derive the meaning of particular provisions where they are said to impinge upon crystallised "interests" and already established "entitlements".

60 The criticisms which the Court of Appeal of Queensland, in an earlier case[67], made of the drafting style used in the 1990 Act, may also be made of the 1997 Act and IPOLA 2004. However, it remains the duty of the courts to derive the purpose of the legislation from the language in which that purpose is expressed[68]. Statutory interpretation is necessarily a text-based activity. Where the drafter has adopted a particular style, and the purpose is clear enough, the courts must give effect to the purpose whatever their feelings may be about the unfairness of the consequence of doing so.

61 When the entitlement to compensation for a reduced value of an interest in land was enacted in s 5.4.2 of the 1997 Act, it introduced for the first time a bifurcated requirement for the remedies provided. Not only was it necessary for the owner of the interest in land to establish "a change [that] reduces the value of the interest". It was also necessary to prove three other elements, each concerned with the DA(SPS) there mentioned. Thus, from the time of the introduction of the concepts in s 5.4.2 of the 1997 Act, particular features of the DA(SPS) became preconditions to the entitlement to compensation by a local government body such as the Council. The first of these features was that a DA(SPS) for a development permit relating to the land "has been made". On the face of things, this meant "has been made in accordance with the Act". Necessarily, this provision imported requirements applicable to any DA(SPS) under the Act, as provided from time to time.

62 When the scheme of s 5.4.2 of the 1997 Act is remembered, the introduction of new requirements into the preconditions for a "properly made application" under the Act is not as "heavily disguised" as the appellants argued. True, it would have been open to the Queensland Parliament to have altered expressly the formula for the entitlement to compensation in sub-par (a) of s 5.4.2 by qualifying that provision. But, in the logic of the legislative scheme, it was also open to Parliament to change the preconditions for a valid DA(SPS). In the event, Parliament elected for the second approach, rather than the first.

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67 *Ace Waste Pty Ltd v Brisbane City Council* [1999] 1 Qd R 233 at 236.

68 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Saraswati v The Queen* (1991) 172 CLR 1 at 22; *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 145 [81]-[82].

63 The use of the chosen drafting technique is open to many of the criticisms levelled at it by the appellants. On the face of the 1997 Act, it is less than entirely clear in its effect. It therefore attracts the more rigorous analysis that will follow. But the starting point is a realisation that, as a matter of technical drafting, it was open to parliamentary counsel to adopt the course chosen, however much it might be criticised for hiding, rather than candidly revealing, its intended effect upon the form of application.

64 *Internal evidence of legislative purpose*: When Parliament established, in s 5.4.2 of the 1997 Act, the making of a DA(SPS) as a criterion for the entitlement to be paid reasonable compensation, this necessarily imported any statutory requirements as to the validity of such an application.

65 Of its nature, an "application" is a document that makes a request. Such a request is made at a particular, identifiable moment. Legal consequences commonly attach to it. It is by no means unusual in legal practice for this to be so. An application for relief from a court, in the form of a writ of summons or statement of claim, will fix a moment by reference to which legal consequences will often flow. The application of a statute of limitations for the commencement of proceedings or of rules of court governing time to initiate process or take a step in process, are familiar cases in point. Because an "application" is a form of legal process that typically has legal consequences attached to it, identification of the time when the application is made is often critically important. Every lawyer, and many citizens, know this.

66 In the present case, the fact that the appellants' application by a DA(SPS) was delayed (for whatever reason) and finally lodged after IPOLA 2004 had introduced new requirements for "a properly made application" into the 1997 Act, makes it unsurprising that the new requirements should apply to it. It has long been recognised that the law appointing or regulating the manner in which rights and liabilities are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of the presumption against the alteration of "interests" or "entitlements"[69]. In *Republic of Costa Rica v Erlanger*[70], Mellish LJ remarked:

> "No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done."

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69 This is so, for example in India. See eg *Gurbachan Singh v Satpal Singh* AIR 1990 SC 209 at 219; Singh, *Principles of Statutory Interpretation*, 9th ed (2004) at 441-443 citing Maxwell, *Interpretation of Statutes*, 11th ed (1962) at 216.

70 (1876) 3 Ch D 62 at 69.

67 The appellants, however, complained that an injustice had been done to them. Yet it was because they had not lodged their "application" by way of a DA(SPS) before the supervening changes were introduced by IPOLA 2004, that they were not in a position to assert that all of the preconditions required by s 5.4.2 had been fulfilled. This was not, therefore, a case of "transactions past and closed"[71]. Nor was it one where "all matters that have taken place under [the previous law] before its repeal are valid and cannot be called in question"[72]. Nor were all of the relevant "transactions already completed under it"[73].

68 A procedural step designated by Parliament as essential to an entitlement to be paid reasonable compensation had not been taken by the appellants before the requirements of the procedure were changed. By long authority, courts are more ready to tolerate the application of supervening *procedural* changes with retrospective operation than they are changes to *substantive* entitlements and interests. Here, the requirement of a "properly made application" was partly procedural but also partly substantive.

69 The importance of the time of making the application by way of a DA(SPS) was made clear by the provisions of the 1997 Act, as in force before the amendments introduced by IPOLA 2004 took effect. Thus, s 5.4.2(c) provided, as a necessary precondition to an entitlement to be paid reasonable compensation:

> "the application is assessed having regard to the planning scheme and planning scheme policies in effect when the application was made".

70 Ordinarily, an application will attract to its consequences the law applicable at the time when it was made[74]. At the time the appellants' DA(SPS) was made, the supervening amendments to s 3.2.1(7)(f) and 3.2.1(10)(b) were already in force. Thus, the internal indications of the 1997 Act[75] support the Council's submission that the new requirements applied to all applications made

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71 *Surtees v Ellison* (1829) 9 B & C 750 at 752 per Lord Tenterden CJ [109 ER 278 at 279].

72 *R v Inhabitants of Denton* (1852) Dears 3 at 8 per Lord Campbell CJ [169 ER 612 at 614].

73 *Butcher v Henderson* (1868) LR 3 QB 335 at 338 per Blackburn J. The foregoing cases are cited by Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261 at 267.

74 See *Yew Bon Tew* [1983] 1 AC 553 at 558; *Plewa v Chief Adjudication Officer* [1995] 1 AC 249 at 256.

75 Section 5.3.1 of the 1997 Act expresses a common criterion in the Act. See eg ss 6.1.25, 6.1.26 and 6.1.28.

after the amendment took effect. By that time, the "draft regulatory provisions" were in force, rendering the very subject matter of the application, as filed, impermissible because expressly prohibited.

71 *Enactment of an important policy*: The foregoing conclusion is further reinforced by reference to other provisions of the 1997 Act and to the relevant purposes in IPOLA 2004. The latter Act provided, unusually, that "*draft* regulatory provisions" should have immediate effect, ie even before the final provisions contemplated by the SEQRP were adopted and brought into force.

72 Why should such unusual provisions find their way into State law? Why would the Parliament of Queensland have inserted into the 1997 Act provisions expressed in such an unusual way? What reasons of public policy explained the adoption of this significant new approach to planning law applicable to part only of the State of Queensland, and with its commencement even in advance of the final regional planning provisions?

73 The answers to these questions were not provided by any evidence contained in the record. Presumably, this was because the answers were well known to the Council and to the Planning and Environment Court of Queensland, a specialist Court that heard these proceedings at first instance. They may also have been known to the Court of Appeal of the State. Many of the reasons are doubtless found in the brochure containing the DRP applicable to the present case and supplied to this Court. Because this document was tendered only as a vehicle to establish the terms of the DRP and not for the factual statements otherwise contained within it, it would be wrong for this Court to treat as matters of established fact the contents of the brochure concerning the SEQRP; the reasons that lay behind its adoption; and the "regional vision" to which the plan (and specifically the DRP) was intended to contribute.

74 Nevertheless, it is within common knowledge that, since the 1980s, the South-East Region of the State of Queensland has grown faster than virtually any other population centre in the Commonwealth. This growth has obviously required the provision of a very large number of new dwellings, supporting infrastructure services and protection of the natural environment so as to preserve bushlands, beaches, bays, waterways and other features of the region chosen for special, integrated planning laws.

75 In the context of such a novel, comprehensive and important development for the planning law of the State, grafted by IPOLA 2004 onto the 1997 Act, it would be contrary to the canons of construction, now observed by this Court, to construe particular provisions in a way that would undermine the achievement of the apparent statutory objectives. Relevantly, for land in a "Regional Landscape and Rural Production Area" (such as the appellants' land), reconfiguration of a lot

could not occur if any resulting lot would have an area of less than 100 hectares[76]. For the important environmental purposes for which this supervening prohibition has been introduced, and advanced in its operation by unusual provisions given effect to such DRP, a construction of the 1997 Act that contradicted such a prohibition should not, on the face of things, be favoured.

76 The appellants, however, submitted that this was not their objective. They did not really seek planning approval inconsistent with the prohibition in the DRP. They merely asked for "reasonable compensation" for the injurious affection to their land by reason of supervening planning laws restricting their right to reconfigure the land[77].

77 *An integrated interpretation*: This argument required the appellants to confront a further textual problem in the construction of the Act which they urged on this Court. Before the introduction of the prohibition on reconfiguration contained in the DRP, the preconditions for the entitlement to be paid "reasonable compensation" included that set out in s 5.4.2 of the 1997 Act. This was that the application, in the form of a DA(SPS), might either be refused (by "the assessment manager, or, on appeal, the court") or approved ("in part or subject to conditions or both in part and subject to conditions"[78]). Thus, the assumption of the legislative scheme existing before IPOLA 2004 was that a Council (as "assessment manager") might reduce its liability to pay monetary compensation to applicants such as the appellants by electing to approve their application, in whole or part, as if the pre-existing planning scheme previously applicable to the Area, still operated.

78 Once the pre-existing Council planning areas were replaced, relevantly, by areas designated by reference to the DRP, this option was no longer available to a local authority such as the Council. In the DRP, the prohibition against the reconfiguration sought by the appellants was clear and absolute. There was no possibility that the Council could give approval "in part or subject to conditions or both in part and subject to conditions". It follows that one hypothesis within the preconditions for the payment of "reasonable compensation" had been removed in such a case. Moreover, it was removed without qualification and with virtually immediate application so as to achieve substantial objectives of public policy treated by the Parliament of Queensland as both exceptional and urgent.

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76 DRP Div 3, s 4(2)(c).

77 cf Gray, "Can environmental regulation constitute a taking of property at common law?", (2007) 24 *Environmental and Planning Law Journal* 161 at 163-165.

78 1997 Act, s 5.4.2(d)(i) and (ii).

79 Against this background of statutory analysis, addressed to the entirety of the legislation, its history and objects, the introduction in s 3.2.1(7)(f) and s 3.2.1(10)(b) of the 1997 Act of requirements, effectively forbidding development approvals that would be contrary to the DRP, is less surprising. Likewise, the effective abolition of what had earlier been a crystallised "interest" or "entitlement" to reasonable compensation is less surprising because such "interest" or "entitlement" no longer enlivened the earlier legislation. The significant option for action by the Council concerned (and, on appeal, the courts) was abolished. To preserve the entitlement to monetary compensation in the absence of the previous power to moderate its burden would demand substantial surgery upon the text of the legislation and carry into effect a significantly different legislative policy than that apparent in the supervening law.

80 *The statutory presumption*: Insofar as the provisions of the *Acts Interpretation Act*, s 20 add anything to the common law presumption against the retrospective effect of legislation on established interests, the operation of the statutory provision is excluded in this case because of the existence in the legislation, read as a whole, of a sufficient indication of a contrary intention or purpose.

81 *Dossett is distinguishable*: This leaves only the appellants' complaint about the "disguised" way by which the legislature abolished their entitlement to make an application, in the form of a DA(SPS), having any chance of success. Specifically, the appellants asked how, in the circumstances, the Government and the officials who proposed the termination of accrued "entitlements" were rendered accountable, in accordance with the principle of democratic answerability to a Parliament of a State of the Commonwealth.

82 The complaint about the opacity of the amending drafting device is a fair one. It would have required a particularly knowledgeable and diligent member of the Queensland Parliament to have appreciated the change that was being effected in such a manner to the "interests" of people such as the appellants. The prospects of a citizen appreciating the change were even slighter[79]. On the other hand, those who had specialised knowledge of this field of law would have been aware of the requirements for an entitlement to compensation. Had the appellants moved more quickly to assert their initial claim, they might have avoided the "unfairness" that supervened.

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79 Cf *Watson v Lee* (1979) 144 CLR 374 at 381 per Barwick CJ: "No inconvenience in government administration can, in my opinion, be allowed to displace adherence to the principle that a citizen should not be bound by a law the terms of which he has no means of knowing."

83 In the unanimous opinion of the House of Lords in *Plewa v Chief Adjudication Officer*[80], Lord Woolf, who gave the reasons of their Lordships, cited with approval an approach to this problem explained by Staughton LJ in *Secretary of State v Tunnicliffe*[81]:

> "Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather, it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

84 In the present case, the appellants have identified an unfairness flowing from the drafting technique that was used, in effect, to destroy their surviving entitlement to make a viable DA(SPS). However, that result flows from the language of the 1997 Act; the amendments introduced to it by IPOLA 2004; the impossibility thereafter of maintaining the pre-existing scheme for entitlement to reasonable compensation; the introduction by the DRP (with the authority of Parliament) of the absolute prohibition on the development proposed; and the large environmental and social purposes for the SEQ Region to which the alteration of the law gave effect. If these considerations, and the appellants' own delay in lodging their DA(SPS), are weighed in the balance, the degree of "unfairness" in the outcome, to adopt Staughton LJ's approach, is not one that would support the strained interpretation of the 1997 Act, as amended by IPOLA 2004, urged by the appellants.

85 It remains a misfortune that this consequence, if it was realised by the drafters at the time (as by inference it was), was not drawn explicitly to the notice of Parliament either in the text of the statutory amendments or in the supporting documents. And that it was not candidly acknowledged as an outcome to be accepted by Parliament, the people of Queensland and the affected persons as a price for the achievement of a major new planning regime for the SEQ Region. None of this occurred. Instead, the change was effected by stealth[82]. The parliamentary process did not operate as it is intended, so that those who were depriving people, such as the appellants, of their entitlements and expectations, shouldered the responsibility and assumed public accountability for the

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80 [1995] 1 AC 249 at 257.

81 [1991] 2 All ER 712 at 724; cf *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 at 524-525.

82 See also reasons of Callinan J at [125].

amendments which they enacted[83]. Although the appellants' delay contributed to their own misfortune, I have some sympathy for the predicament in which they now find themselves. Nevertheless, in the face of the legislative provisions, viewed in their entirety against the background of their history and purpose, there is nothing that this Court can do to breathe new life into the appellants' entitlement to seek compensation for the alteration of their interests.

Conclusion and orders

86 For these reasons, and not solely for a textual application of the expression "a properly made application" in s 3.2.1 of the 1997 Act, I agree that the appeal should be dismissed with costs.

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83 See *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131: "the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost"; approved in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30] per Gleeson CJ, and in my own reasons in *Daniels Corp* (2002) 213 CLR 543 at 582 [106].

87 HAYNE, HEYDON AND CRENNAN JJ. In 2004 the appellants applied to the respondent Council for approval for reconfiguration of their land, at Blenheim in South East Queensland, from one lot into 25 lots. The planning provisions that then applied did not permit the proposed reconfiguration; earlier provisions would have permitted it.

The issue

88 In this Court the appellants sought to frame the issue that arises as whether, in these circumstances, the appellants are entitled to compensation from the Council on account of the diminution in value of their land brought about by their being unable to subdivide it as once they could. In the courts below, however, the issue that was decided was more narrowly focused. The determinative issue in those courts was whether the development application the appellants had made to the respondent Council was what the applicable legislation[84] identified as a "properly made application"[85].

89 The Planning and Environmental Court of Queensland held[86] that it was not. The Court of Appeal of Queensland refused[87] the appellants leave to appeal. By special leave the appellants now appeal to this Court. Their appeal should be dismissed with costs.

The applicable legislation

90 The *Integrated Planning Act* 1997 (Q) ("the 1997 Act") entitles[88] an owner of an interest in land to be paid "reasonable compensation" by a local government[89] for the local government area where a development is proposed, if four conditions are met. Section 5.4.2 of the 1997 Act provides, and has provided at all times material to this matter, that:

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84 *Integrated Planning Act* 1997 (Q), ("the 1997 Act") as amended by the *Integrated Planning and Other Legislation Amendment Act* 2004 (Q) ("IPOLA 2004").

85 See s 3.2.1(7).

86 *Chang v Laidley Shire Council* [2006] QPELR 91.

87 *Chang v Laidley Shire Council* (2006) 146 LGERA 283.

88 s 5.4.2.

89 s 1.3.8(e).

"An owner of an interest in land is entitled to be paid reasonable compensation by a local government if—

(a) a change reduces the value of the interest; and

(b) a development application (superseded planning scheme) for a development permit relating to the land has been made; and

(c) the application is assessed having regard to the planning scheme and planning scheme policies in effect when the application was made; and

(d) the assessment manager, or, on appeal, the court—

(i) refuses the application; or

(ii) approves the application in part or subject to conditions or both in part and subject to conditions."

91 Two expressions used in s 5.4.2 require explanation. First, a "change", referred to in s 5.4.2(a), is defined[90] "for an interest in land, [as] a change to the planning scheme or any planning scheme policy affecting the land". Secondly, reference is made in s 5.4.2(b) to "a development application (superseded planning scheme)". That expression is defined in the dictionary of definitions contained in Sched 10 to the 1997 Act that is applied to the Act by s 1.3.1. The definition reveals that a development application (superseded planning scheme) is a particular species of the genus "development application". It is therefore an application which engages provisions of the legislation applying generally to all development applications.

92 The definition of a development application (superseded planning scheme) has two limbs. Both refer to a "superseded planning scheme". That is defined[91], for a planning scheme area, as the planning scheme, or any related planning scheme policies, in force immediately before:

"(a) the planning scheme or policies, under which a development application is made, were adopted; or

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90 s 5.4.1.

91 Sched 10 definition of "superseded planning scheme".

(b) the amendment, creating the superseded planning scheme, was adopted".

93 The first limb of the definition of a development application (superseded planning scheme) concerns developments that would not have required a development permit under a superseded planning scheme, but require a development permit under the planning scheme in force at the time the application is made. This limb of the definition has no application in the present matter.

94 The other limb of the definition (the limb which covers all other developments, and is presently relevant) identifies a development application (superseded planning scheme) as having three characteristics. It is an application:

"(i) in which the applicant asks the assessment manager to assess the application under a superseded planning scheme; and

(ii) made only to a local government as assessment manager; and

(iii) made within 2 years after the day the planning scheme or planning scheme policy creating the superseded planning scheme was adopted or the amendment creating the superseded planning scheme was adopted."

95 When these two terms "change" and "development application (superseded planning scheme)" are understood, it is then apparent that s 5.4.2 of the 1997 Act provides for compensation in cases where:

(1) there has been a change to the planning scheme that reduces the value of an interest in land (in this case the interest of the owners);

(2) the owners have made application for a development permit and have asked that the application be assessed under a superseded planning scheme (being one that was superseded no more than two years before the application was made);

(3) the application is not assessed under the superseded planning scheme but is assessed "having regard to the planning scheme and planning scheme policies in effect when the application was made"; and

(4) the application is refused in whole or in part, or approved subject to conditions.

96 That provision for compensation may be contrasted with the provision for compensation that it replaced: s 33(10) of the *Local Government Act* 1936 (Q). Under that earlier provision, a person who had an estate or interest in land included within a planning scheme and whose estate or interest was "injuriously affected" by the coming into operation of the scheme was entitled to compensation. Under s 5.4.2 of the 1997 Act, more than injurious affection must be demonstrated. In particular, the appellants rightly accepted that a right to compensation under s 5.4.2 can arise only if a development application (superseded planning scheme) has been accepted by a Council, assessed in a particular way, and then either refused or approved subject to conditions. It was not disputed that no right to compensation under s 5.4.2 can arise if the Council was entitled to and did refuse to accept the development application.

97 It follows that, contrary to the way in which much of the appellants' submissions were advanced in oral argument, the question for this Court, as it was for the courts below, is whether the development application which the appellants made to the respondent Council should have been received by the Council. That turns on whether the application was a "properly made application".

98 The determination of that question requires some further understanding of the relevant facts and legislative events.

The facts and legislative events

99 On 3 December 2004, the appellants submitted a development application (superseded planning scheme) to the respondent Council seeking reconfiguration of their land from one lot into 25 lots. Before the appellants submitted this application there had been two significant legislative events. First, the *Integrated Planning and Other Legislation Amendment Act* 2004 (Q) ("IPOLA 2004") had been enacted and the relevant amendments made by that Act had come into operation on 17 September 2004. Secondly, "draft regulatory provisions" made under the "draft SEQ regional plan" had come into effect on 27 October 2004. It is necessary to say more about both of these matters.

100 IPOLA 2004 amended the 1997 Act. Two aspects of those amendments are important. First, IPOLA 2004 introduced into the 1997 Act a new Part (Pt 5A) regulating regional planning in the "SEQ region". The "SEQ region" was defined by reference to local government areas and covered the south eastern corner of the State. It includes the local government area of the respondent Council, and thus includes the appellants' land.

101 The new Pt 5A, introduced by IPOLA 2004, provided (s 2.5A.13) for the preparation of a "draft SEQ regional plan". That plan, once prepared, was open

for public consideration and comment, but the 1997 Act, as amended by IPOLA 2004, provided (s 2.5A.24) that the proposed regulatory provisions contained in the draft (referred to as "draft regulatory provisions") "have effect until the SEQ regional plan comes into effect". The consequence of these provisions was that when the draft regulatory provisions came into effect, the reconfiguration of the appellants' land which they were later to propose was forbidden because each of the resulting lots would have an area less than the prescribed minimum area of 100 hectares[92].

102 Indeed, before the draft regulatory provisions came into effect, the planning provisions that had been adopted for the Council's local government area on 28 March 2003 ("the 2003 planning scheme") would not have permitted such a reconfiguration. Before IPOLA 2004, however, the appellants could have made a development application (superseded planning scheme) asking the Council to consider their proposed reconfiguration under the planning provisions immediately preceding the 2003 planning scheme (a scheme adopted in 1996).

103 The second important aspect of the amendments made to the 1997 Act by IPOLA 2004 lay in the amendments made to the provisions of the 1997 Act governing applications for development approval.

104 Part 2 of Ch 3 of the 1997 Act (ss 3.2.1 to 3.2.15) as it stood before IPOLA 2004 regulated what it described as the "Application stage". Other Parts regulated the "Information and referral stage", the "Notification stage" and the "Decision stage". The amendments to which attention must now be drawn amended a critical provision of Pt 2 of Ch 3: s 3.2.1. Section 3.2.1 prescribed the method of applying for development approval.

105 Both before and after IPOLA 2004, the section permitted[93] the person to whom the application was directed (the "assessment manager") to "refuse to receive an application that is not a properly made application". If that power of refusal was not exercised and, after consideration, the application was accepted, the application was "taken to be a properly made application"[94].

106 Sub-section (7) of s 3.2.1 identified what was "a properly made application". Before IPOLA 2004 there were five characteristics of a properly

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92 Draft SEQ regional plan, Pt G, draft regulatory provisions, s 4.

93 s 3.2.1(8).

94 s 3.2.1(9).

made application (which included such matters as being made in the approved form and being accompanied by the requisite fee). IPOLA 2004 added a sixth requirement: that "the development would not be contrary to the regulatory provisions or the draft regulatory provisions". Further, IPOLA 2004 added an additional qualification to the deeming provisions of s 3.2.1(9) (that if, after consideration, an application was accepted it "is taken to be a properly made application"). The further qualification made to this deeming provision was by amendment to s 3.2.1(10) so that it provided that sub-s (9) does not apply to an application "if the development would be contrary to the regulatory provisions or the draft regulatory provisions".

107 This being the state of the statute law when the appellants made their development application (superseded planning scheme), the respondent Council concluded that it could not accept the application because the development proposed would be contrary to the draft regulatory provisions. The Council refused to receive the application on the footing that it was not "a properly made application".

108 As indicated earlier in these reasons, it was this characterisation of the appellants' development application that lay at the heart of the proceedings they instituted in the Planning and Environment Court. Although other relief was sought (relief on bases not pursued in this appeal) the hinge about which the proceedings in that Court turned (in the respects that give rise to the live issue in this Court) was the claim for an order that the appellants' development application is a properly made application pursuant to s 3.2.1 of the 1997 Act.

109 If the law as it stood at the time the appellants made their development application (superseded planning scheme) were applied according to its terms, that issue had to be resolved against the appellants. When they lodged their application, the 1997 Act (as amended by IPOLA 2004) defined a properly made application in a way that excluded the appellants' application. It excluded the appellants' application because the development they sought (reconfiguration from one lot to 25 lots) was contrary to applicable draft regulatory provisions.

110 No doubt it was against this understanding of the operation of the relevant provisions that the appellants sought to define the relevant issue differently. The central contention of the appellants in the appeal to this Court was that they "had a potential right to statutory compensation under [the 1997 Act] ... of sufficient substance as to be preserved by s 20[95] of the *Acts Interpretation Act* 1954 (Qld)

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95 Section 20(2)(c) of the *Acts Interpretation Act* 1954 (Q) provided that the repeal or amendment of an Act "does not ... affect a right, privilege or liability acquired, accrued or incurred under the Act".

... at the time when [IPOLA 2004] and [the draft regulatory provisions] made under IPOLA 2004, came into effect". They contended that the application of s 20 of the *Acts Interpretation Act* was not displaced by a contrary intention appearing from IPOLA 2004. They sought to support their principal proposition by reference to the general rule of the common law stated in *Maxwell v Murphy*[96] that:

> "a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events".

Retrospectivity?

111 "Retrospectivity" is a word that is not always used with a constant meaning[97]. It is, therefore, important to identify the statutory provisions which are said to be being given "retrospective" effect and to identify precisely the respect or respects in which they are being given that effect.

112 In this case the only relevant legislative provisions that call for consideration are those provisions of IPOLA 2004 by which the requirements of a properly made application were altered by the insertion of s 3.2.1(7)(f) and s 3.2.1(10)(b). The provisions inserted by IPOLA 2004 did not apply to any development application that had been made before they came into effect. In no sense did the changes made by IPOLA 2004 provide that at some date *prior* to the enactment of IPOLA 2004 the law should be taken to have been that which it was not[98]. What those amendments did was to alter the law that was to apply to development applications made after the date on which those provisions of IPOLA 2004 came into force.

113 In that operation the relevant provisions of IPOLA 2004 did not operate in any different way from the way in which most legislation operates. As Jordan CJ

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96 (1957) 96 CLR 261 at 267 per Dixon CJ.

97 *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 309 [57] per McHugh and Gummow JJ; *Forge v Australian Securities and Investments Commission* (2006) 80 ALJR 1606 at 1633 [114] per Gummow, Hayne and Crennan JJ; 229 ALR 223 at 254; *Coleman v Shell Co of Australia* (1943) 45 SR (NSW) 27 at 30 per Jordan CJ.

98 *SCI Operations* (1998) 192 CLR 285 at 309 [57] per McHugh and Gummow JJ.

rightly said in *Coleman v Shell Co of Australia*[99], an Act "is not retrospective because it interferes with existing rights. Most Acts do. There is no presumption that interference with existing rights is not intended; but there is a presumption that an Act speaks only as to the future." The amendments made by IPOLA 2004 spoke only as to the future. They were engaged in respect of applications made after the amendments came into operation. As the authors of one text[100] have put it:

> "All legislation impinges on existing rights and obligations. *Conduct that could formerly be engaged in will have to be modified to fit in with the new law*." (emphasis added)

In this case, the appellants' development application being made after the amendments made by IPOLA 2004 had come into effect, their application fell to be determined in accordance with the legislative provisions that were then in force. No question of retrospective operation of the legislation arises.

An accrued right?

114 In so far as the appellants put their submissions by reference to the engagement of s 20 of the *Acts Interpretation Act* with respect to a "potential right to statutory compensation", it is necessary to begin by recognising that the "potential right" to which they referred was the statutory right to compensation created by s 5.4.2 of the 1997 Act. That right arises only upon satisfaction of certain conditions, the legislative definition of which did not change at any material time.

115 The appellants did not submit that any right to compensation had been acquired or had accrued under the 1997 Act as it stood before the amendments made by IPOLA 2004. No development application having been made before that time, that submission was not open to the appellants. The highest they put the point was that they had a "potential right" to compensation. Framed in that way, the questions of characterising the right as "acquired" or "accrued", that are necessarily presented by s 20 of the *Acts Interpretation Act*, are obscured[101]. Instead the appellants emphasised the need to examine amending legislation with

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99 (1943) 45 SR (NSW) 27 at 30-31.

100 Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at 308 [10.3].

101 *Attorney-General (Q) v Australian Industrial Relations Commission* (2002) 213 CLR 485 at 502 [39]-[40] per Gaudron, McHugh, Gummow and Hayne JJ.

care in order that the presumption of preservation of rights of the kind with which s 20 is concerned (rights acquired or accrued under the principal Act) is given full weight.

116 In this regard, the appellants placed a deal of emphasis on what was said to be the reflection of this general approach to statutory construction found in this Court's decision in *Western Australian Planning Commission v Temwood Holdings Pty Ltd*[102] and the earlier decision of the Queensland Court of Appeal in *Resort Management Services Ltd v Noosa Shire Council*[103]. Both decisions concerned compensation provisions that were cast in terms radically different from those now under consideration. Neither decision offers any direct guidance to the resolution of the issues tendered in this appeal. Accepting, for present purposes, that each of the two decisions may be understood as reflecting the need to give provisions like s 20 of the *Acts Interpretation Act* proper effect, neither is a decision that diminishes the need to identify a right that has been acquired or has accrued under the relevant legislation before it was amended.

117 Terms like "right", "interest", "title", "power" or "privilege" when used in the context of a general interpretation provision like s 20 are to be understood by reference to the statute that has been amended or repealed. They are terms that are not used "solely in any technical sense derived exclusively from property law or analytical jurisprudence"[104]. But on no view of the 1997 Act, as it stood before the amendments made by IPOLA 2004, could it be said that the appellants enjoyed a "right" to compensation under s 5.4.2. The statutory right to compensation for which that section provided depended on a particular form of development application having been made and its having been dealt with in a particular way. The appellants had made no development application before IPOLA 2004 came into force and the relevant draft regulatory provisions precluding their proposed development came into force. It follows that no development application (superseded planning scheme) had been dealt with in the manner prescribed by s 5.4.2 as a condition for the allowance of compensation.

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102 (2004) 221 CLR 30.

103 [1997] 2 Qd R 291.

104 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at 68 [96] per Gummow and Hayne JJ.

Conclusion and orders

118 The courts below were right to hold that the development application (superseded planning scheme) submitted by the appellants to the respondent Council was not a "properly made application". Neither the arguments about retrospectivity nor the arguments about s 20 of the *Acts Interpretation Act* point to a different conclusion.

119 The appeal should be dismissed with costs.

120 CALLINAN J. It is with regret that I find myself obliged to agree, subject to what I set out below, with the reasoning and conclusion of Hayne, Heydon and Crennan JJ, regret, I hasten to say, not because of any perceived deficiency in the reasoning of their Honours, but because the relevant statutory language, whether unintentionally, or deliberately and cynically, necessarily does take away the appellant's valuable proprietary and statutory rights, suddenly and without compensation.

121 I refer to the appellants' right to subdivide their land as a proprietary one at common law, because that is the language of Kitto, Menzies and Owen JJ in *Lloyd v Robinson*[105] with respect to freehold land. That proprietary character was not lost because the appellants, before October 2004, might need to seek the approval of the respondent to undertake a subdivision, as, on the rezoning of the land to Rural Residential "A" in 1992, subdivisional approval, subject to reasonable and relevant considerations only, was a virtual certainty. That this is so is confirmed by a letter sent by the respondent to the appellants on 18 May 2000 which relevantly reads as follows:

> "I advise that as the property is currently zoned Rural Residential 'A', subdivision is possible creating allotments ranging from 4,000m^2 to 7,900m^2 provided that an overall average of 6,000m^2 is maintained.
>
> However … whilst the Planning Scheme provides for subdivision of the subject land, the provision of infrastructure and developer contributions may impact any decision to further develop the land.
>
> As part of any development approval, [the] Council's Planning Scheme requires that a reticulated water supply be provided including external mains and headworks charges, bitumen access and internal road network including kerb and channel, contributions to bus shelters and parks and recreation.
>
> However, the final conditions which would be imposed could only be determined upon lodgement of a development application.
>
> …
>
> [signed]
>
> MANAGER PLANNING SERVICES"

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105 (1962) 107 CLR 142 at 154.

122 By definition, a subdivision is a reconfiguration of the land[106]. Both zoning and an approval to subdivide run with the land[107].

123 Although the States are unfortunately not constitutionally bound to provide just terms on the compulsory acquisition of property[108], by long practice and convention, sensitivity to the disparity between State and subject, and historical respect for property and like rights[109], rarely do they fail so to provide.

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106 s 1.3.5 *Integrated Planning Act* 1997 (Qld):

"In this Act –

…

reconfiguring a lot means –

(a) creating lots by subdividing another lot; …"

107 s 3.5.28 *Integrated Planning Act* 1997 (Qld):

"(1) The development approval attaches to the land, the subject of the application, and binds the owner, the owner's successors in title and any occupier of the land."

See also *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 81 ALJR 352 at 385 [159], 386 [163] per Callinan J; 231 ALR 663 at 705, 706.

108 In 1988, as one of 4 proposals, the others of which were far less agreeable, and none of which could be dealt with separately rather than compositely, the following Constitutional changes were rejected in a referendum held pursuant to s 128 of the Constitution:

> "Question 4
>
> A Proposed Law: To alter the Constitution to extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any government."

109 See Coke, *The Third Part of the Institutes of the Laws of England*, (1809) ch 73 at 161:

> "a man's house is his castle ... for where shall a man be safe, if it be not in his house?"

The principle may however have more ancient origins, with some scholars pointing to a passage in the *Pandectae* (*lib. ii. tit. iv. De in Jus vocando*), one part of the *Corpus Juris Civilis* as the basis.

(Footnote continues on next page)

Indeed, since at least 1936 planning legislation has so provided in respect of the sorts of events which have happened here[110]. It is on the basis of such rights, and the expectation of compensation for their destruction or impairment, that transactions take place, plans are made, money expended, and people order their lives. To destroy legislatively such a valuable right, here to subdivide, in some apprehended public interest is one thing, but to exonerate the public from paying the deprived landowner is entirely another, and unacceptable thing. What the public acquires or enjoys the public should pay for.

124 It seems to me that to take away completely, by a few strokes of the legislative pen, the appellants' right to seek to have, and undoubtedly in substance to have, their land subdivided, is to do much the same as was done by the Commonwealth Parliament by the *Seafarers Rehabilitation and Compensation Act* 1992 (Cth) considered by this Court in *Smith v ANL Ltd*[111]. Mr Smith however had the right to just terms as mandated by s 51(xxxi) of the Constitution. The appellants here unhappily do not. Increasingly prescriptive, restrictive, intrusive and even wrong-headed planning and heritage[112] legislation and instruments, which go far beyond what a modern law of nuisance, taking account of denser populations, closer settlements, burgeoning industries, and other contemporary conditions could possibly insist upon, should not, as I fear they oppressively are, be used as a cloak to reduce, or extinguish valuable rights of, or attaching to, property.

125 "Cloak" is an especially apt term here because, instead plainly and openly, of legislatively declaring that the various changes to zoning and uses within the designated area or region, will not attract compensation, that result is achieved by the device, clumsy and obscurantist, of a "properly made application" and the fiction of an application which is not to be treated as an application in fact and in law. If it were at all possible sensibly and properly to read the legislation as conferring a right to compensation upon the appellants I would be glad to do so. I cannot do that, but I can surely at least commend to the legislature the

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See also the Fifth Amendment to the US Constitution:

> "nor shall *private property* be taken for *public use* without just compensation".

110 s 33(10) *Local Government Act* 1936 (Qld).

111 (2000) 204 CLR 493.

112 See for example the oppressive and entirely unjustified heritage listings considered and rejected in *Advance Bank Australia Ltd v Queensland Heritage Council* [1994] QPLR 229 and *Reelaw v Queensland Heritage Council (No 2)* [2004] QPEC 79.

restoration to the appellants, and others similarly affected, of the right to compensation to which historically and morally they are entitled.

126 I would join in the orders proposed by Hayne, Heydon and Crennan JJ.