PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Cornerstone Properties Ltd v Caloundra City Council & Anor* [2004] QPEC 044
PARTIES:	**CORNERSTONE PROPERTIES LTD (Applicant)** **v** **CALOUNDRA CITY COUNCIL (First Respondent)** **and** **STATE OF QUEENSLAND (Second Respondent)**
FILE NO/S:	MD180/04
DIVISION:	
PROCEEDING:	Application
ORIGINATING COURT:	Planning and Environment Court, Maroochydore
DELIVERED ON:	14 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	24, 25 June, Further written submissions made on 28 June, further hearing on 25 August 2004 and further written submissions made on 27 and 31 August 2004
JUDGE:	Rackemann DCJ
ORDER:	
CATCHWORDS:	LOCAL GOVERNMENT AND TOWN PLANNING – applicant sought declaration that application for a development permit for operational work did not require referral to the Chief Executive of the Department of Natural Resources and Mines and Energy – whether proposed development would interfere with water from a watercourse LOCAL GOVERNMENT AND TOWN PLANNING – applicant sought declaration that development application properly made without written consent of the Chief Executive of the Department of natural Resources and Mines and Energy – whether the land to which the application applies includes land owned by the State – whether the proposed development involves interfering with a resource of the State in respect of which written consent is required. WORDS AND PHRASES – definitions – "bed and banks" – "watercourse" – "floodwater" – "interfere" *Water Act* 2000

Integrated Planning Act
Cases cited:

Beames v Leader [2000] 1 Qd R 347
Cornerstone Properties v. Caloundra City Council & Anor [2003] QPEC 042
Craig v South Australia (1994) 184 CLR 163
Dixon v Ipswich City Council (1993) QPLR 276
Dunn & Anor v. Howard & Anor [2001] QPC 30
Ward v R (1980) 29 ALR 175
Gartner v Kidman (1962) 108 CLR 12
Knezovic v Shire of Swan-Guildford (1968) 118 CLR 468
Macag Holding v Torrens Catchment Water Management Board [2000] SASC 115
Kingdon v The Hutt River Board (1905) 25 NZLR
Randel v Brisbane City Council [1990] 2 Qd R 440
Pay v Miller (1979) 3 BPR 97170

COUNSEL: Mr Hughes SC for the applicant
Mr E. Morzone for the first respondent
Mr Freeburn SC and Ms Brien for the second respondent

SOLICITORS: McDonnells for the applicant
Corrs Chambers Westgarth for the first respondent
CW Lohe, Crown Solicitor, for the second respondent

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Introduction

[1] These proceedings for declaratory relief relate to works proposed to be carried out for the development of a supermarket on land situated at Bunya Street, Maleny, and more particularly described as Lots 1 and 2 on RP 26375.

[2] The proposed development is controversial and has attracted a deal of public attention. The merits of the development proposal however, are not in issue in the current proceedings. Rather, the current proceedings relate to the approval process.

[3] The primary dispute is between the applicant and the second respondent and arises by reason of the second respondent's contention, in recent times, that part of the proposed development and associated works (including vegetation clearing) intrude into a watercourse as defined in the *Water Act 2000* (*WA*). This would, if true, have a number of consequences including that a permit would be required under s 266 of the *WA* to clear native vegetation and that a current development application for a development permit for operational works, which would intrude into what the State contends is the banks of the watercourse and, it is said, interfere with water in the watercourse, would not be properly made without the written consent of the Chief Executive of the Department of Natural Resources, Mines and Energy (DNR) and would require referral pursuant to the provisions of the *Integrated Planning Act* 1998 (*IPA*).

[4] The current development application has become stalled as a consequence of the dispute.

[5] The dispute arises against the background of a development approval process which has already been substantially progressed.

Background

[6] The subject land is bounded to the west and to the north by Obi Obi Creek. Its southern boundary is to Bunya Street. Its eastern boundary is to the site of the Maleny Hotel. The opposite side of Obi Obi Creek to the west is developed with a constructed rock wall. Immediately upstream is a bridge which permits Bunya Road to pass over the creek.

[7] The subject land was previously contained in one lot on one Certificate of Title, (namely Volume 1085 Folio 167) which described the boundary, in part, as commencing "on the right bank of Obi Obi Creek". In 1923 the site was subdivided into two allotments, the descriptions of which were later amended to Lots 1 and 2 on RP 26375. Lot 1 (the western allotment) was surveyed when the allotments were created however Lot 2 was left as the balance of the original parcel. The registered plan shows the location of the creek adjacent to Lot 1 in a position as generally now contended for by the applicant (subject to some relatively minor variations). That is not conclusive[1] since the true boundary is determined in accordance with the provisions of the *WA*[2].

[8] The subject land is contained within the Local Business zone under the Transitional Planning Scheme. Within that zone development for the proposed use is permitted (rather than permissible or prohibited) subject to the making of an application to

[1] See *Beames v Leader* [2000] 1 Qd R 347 at 358, *Dunn & Anor v. Howard & Anor* [2001] QDC 30 at paras. 5, 15

allow for the setting of conditions. Pursuant to the provisions of the *IPA*, such an application is processed as a Code assessable application. While the Council can impose conditions, it cannot refuse the application.[3]

[9] Having identified a site which was apparently of sufficient size and appropriately zoned for the intended purpose, the applicant lodged a development application, in August 2002, for a development permit for the material change of use and for a preliminary approval for the carrying out of building work. That application ultimately led to an appeal to this court against some of the conditions imposed by the Council. The State was a party to that appeal. Judgment was given in 2003, by Robertson DCJ, allowing the appeal and approving the development subject to altered conditions[4].

[10] The conditions required development to be carried out generally in accordance with certain plans, including a site plan and a landscape concept plan, which was to form the basis of a future landscaping plan to be submitted as part of a subsequent development application for operational works.

[11] As had been made clear during the hearing before Robertson DCJ and as is recorded in the reasons for judgment, the development contemplates the loss or removal of existing vegetation (both native and exotic), including some large trees on the subject land and their replacement with new plantings in accordance with the landscape concept which, His Honour found will in time, "considerably improve the site's contribution to the visual amenity of the town".

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[2] See *Randel v Brisbane City Council* [1990] 2 Qd R 440 at 448-451
[3] See s 6.1.30(4)
[4] See *Cornerstone Properties Ltd v. Caloundra City Council & State of Queensland* [2003] QPEC 042

[12] In the course of processing that application, the first respondent made a request for further information, dated 17 September 2002, which amongst other things, asked for an identification survey of the site, including the actual creek bank and advice from DNR that "the proposed new creek boundary is acceptable". The applicant's surveyors prepared a site plan which showed the boundary of the creek plotted from the original field notes on RP 26375, at least in respect of Lot 1. The boundary for Lot 2 was shown as a straight line between two original creek dimensions shown on RP 26375 and was adopted, at the time, as a conservative position.

[13] That plan was sent to the Senior Surveyor of the DNR at Nambour under cover of a letter dated 26 September 2002 stating, in part, that "we propose that our site extends to the creek boundary as plotted from the original field notes for Lot 1 and the adoption of a 'straight line' boundary between the two original creek dimensions shown on RP 26375" and requesting advice as to whether the boundaries were acceptable. A response was received by letter dated 1 October 2002 under the hand of the senior surveyor advising that the site plan "is generally correct in respect of Lot 1" and that "your plot of Lot 2 appears to be correct". It went on to advise that "provided the new development is inside Obi Obi Creek boundary as it stands today the site plan appears acceptable."

[14] Subsequently the applicant's surveyors prepared a full cadastral plan of survey of the site. The boundary of Obi Obi Creek as shown on that survey, generally follows what had been shown previously, at least in respect of Lot 1, subject to relatively minor variations which could be expected[5].

[5] Particularly given the different surveys and the sometimes ambulatory nature of watercourse boundaries

[15] Having obtained a development permit for the material change of use and preliminary approval for building works, the applicant made application, on or about 25 November 2003, for a Riverine Protection permit under s 266 of the WA to permit the clearing of exotic vegetation and environmental weeds. The application was accompanied by, amongst other things, an existing site plan which showed the "approx. top creek bank" together with the top and bottom of other "banks" within the site itself.

[16] In January 2004 the applicant, via its landscape architect, applied to the Council for a permit to remove trees on the site under the Council's Tree Protection Local Law. The application was accompanied by a tree survey. By letter dated 30 March 2004 the Council advised that approval had been granted to remove the trees and shrubs as generally identified on the tree survey subject to conditions. The approval specifically contemplated the removal (subject to the recovery of useful timber after felling) of a Bunya Pine tree and a Silky Oak tree.

[17] On or about 14 April 2004 the applicant's contractors began to clear vegetation in apparent conformity with Council's approval. The clearing did involve that for which a Riverine Protection permit had been sought. The clearing caused some public controversy and, on the evening of 14 April 2004, Mr Brogan, a water management officer with the DNR, was instructed to undertake a field inspection the next day to define the boundary of the creek adjacent to the proposed construction site.

[18] During his inspection Mr Brogan inserted a number of pegs to mark where he regarded the boundary to be. The position of the pegs has subsequently been

transposed onto a plan and a boundary line has been inferred between those points. That line encroaches substantially into the proposed development area including the area of clearing. As it happens, the boundary seems to pass through the Bunya Pine tree and the Silky Oak tree. It is that boundary for which the second respondent contends.

[19] A compliance notice, dated 14 April 2004, was issued pursuant to s.780 of the WA calling on Cornerstone Property Ltd and Excavations Pty Ltd to cease destroying vegetation in Obi Obi Creek, adjacent to Lots 1 and 2 on RP 26375.

[20] By letter dated 17 May 2004 the applicant was informed by the DNR that the application for a Riverine Protection permit had been granted with conditions. The conditions, of which there were many, included a condition that destruction or damage of native vegetation within the bed and banks of the watercourse is prohibited.

[21] On or about 25 November 2003 the applicant had also applied to the Council for a development permit for the intended operational works. The application was subject to an information request in December 2003 which was responded to in February 2004. The Council subsequently extended the decision making period. There has been no decision made on the application. The delay in the Council dealing with the application has apparently arisen because of the issue, raised by the DNR, as to its jurisdiction.

[22] From 15 April 2004, the Council officer responsible for processing the application made attempts to ascertain from the DNR what obligation there might be to refer the

application to the Department. Ultimately, by facsimile of 7 May 2004 the Department advised that:

> "The department wishes to assist the Council as far as possible, however, as the issues raised in your fax call into question the limits of the department's jurisdiction under the *Water Act* 2000, it would be preferable if you could refer the application to NRM&E so that it may be properly considered and a response provided to Council."

[23] By letter dated 10 May 2004, the Council advised the applicant that "as a result of advice received from the Department of Natural Resources, Mines and Energy in relation to the operational works application, I need to advise that the application will require referral to the Department as outlined below". The applicant disputes that the application requires referral pursuant to the *IPA*.

The Relief Sought

[24] On the present hearing, the applicant proceeded with four paragraphs of the relief sought in the originating application namely:

> "1. A declaration, under s 4.1.21(1)(c) of the *Integrated Planning Act* 1997 ('*IPA*'), that the works proposed be undertaken by the applicant on the subject land to develop it in accordance with the judgment of this court given by his Honour Judge Robertson on 27 August 2003 ('the judgment'), including the clearing of vegetation on the subject land, are lawful and do not constitute the destruction of vegetation, or excavation, in a 'water course' requiring a permit under s 266 of the *Water Act* 2000;
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> 6. A declaration, under s 4.1.21(1)(c) of *IPA*, that the applicant's application for a development permit for operational works submitted to the first respondent on 25 November 2003 is a properly made application without the consent of the Chief Executive of the Department;
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> 7. A declaration, under s 4.1.21(1)(c) of *IPA*, that the applicant's application for a development permit for operational works submitted to the first respondent on 25 November 2003 does not need to be referred to the Department under item 18 of Schedule 2 of the *Integrated Planning Regulation* 1998 or otherwise, as it does not involve operational work that

> allows taking, or interfering with, water under s 206 of the *Water Act* 2000, nor is it otherwise referable;
>
> 8. Any such further declarations, or orders and directions as this honourable court deems meet, to facilitate development of the subject land as approved by the court."

[25] While the application for each specific declaration nominates s 4.1.21(1)(c) as the source of jurisdiction, Senior Counsel for the applicant made it clear, on the hearing of the application, that he did not wish to be confined to subparagraph (c) and leave was granted for the application to be amended to rely also on subparagraph (a).

[26] While the declaration sought in paragraph 7 refers to item 18 of Schedule 2, it would appear, as was pointed out by the second respondent, that the correct reference should be to item 17.

The Attitude of the Respondents

[27] The second respondent disputes the court's jurisdiction to entertain the relief sought, or at least part thereof and also disputes the substance of the applicant's contentions.

[28] Counsel for the first respondent made helpful submissions as to jurisdiction, but did not take an adversarial position with respect to the matters of substance.

Jurisdiction

[29] The court's jurisdiction to grant declaratory relief is governed by s 4.1.21, subsection 1 of IPA which provides, in part, that:

> "Any person may bring proceedings in the court for a declaration about:

(a) a matter done, to be done or that should have been done for this Act other than a matter for Chapter 3, Part 6, Division 2; and
(b) the construction of this Act and planning instruments under this Act; and
(c) the lawfulness of land use or development; and …"

[30] The second respondent contended that, in substance, the prayer for declaratory relief is for a determination as to the boundary of the estate or interest in land held by the applicant. Any other relief is, it was submitted, subsidiary to the real boundary dispute. On this basis it was submitted that the declarations are not about a matter in respect of which the Planning & Environment Court has been vested with jurisdiction. That position became somewhat more qualified in further submissions following the initial hearing, to which I will refer.

[31] The declaration sought in paragraph 7 relates to whether the outstanding application for operational works requires referral to the DNR. On the face of it, that is a matter which falls within the jurisdiction of this court as relating to a matter to be done or that should have been done for the *IPA* in respect of the outstanding development application. Indeed, the second respondent's further submissions of 28 June conceded that "Declaration 7 requires an assessment as to whether referral is required to a concurrence agency. To that extent s 4.1.21(a) is applicable". Senior counsel conceded, in subsequent oral submissions, that for the purpose of making that declaration, the court could deal with the watercourse issue.

[32] The *IPA* contemplates that certain development applications will be required to be referred to a referral agency under Part 3 of Chapter 3. The expression "referral agency" is defined, in Schedule 10 of the Act, to mean a concurrence agency or an advice agency. Those expressions are, in turn, defined by reference to an entity

prescribed under a regulation. Section 3.1.8 of the Act provides that if an application is referred to a referral agency under Part 3, that agency has, for assessing and deciding the application, the jurisdiction prescribed under a regulation.

[33] The issue as to whether referral is required by reason of item 17 of Schedule 2 raises questions as to whether the operational work "allows taking or interfering with" water and, if so, whether the taking or interfering is with water from a watercourse so as to be assessable development under item 3B of Schedule 8 of the *IPA*. Neither of those questions directly calls for a determination as to title, although by reason of the *WA*, the State owns the bed and banks of a watercourse. They are questions which must be determined for the purposes of identifying whether the facts are such as to fall within the provisions which trigger the referral provisions of the *IPA* with respect to an outstanding development application. They are questions which an applicant and the assessment manager would have to address and the court has jurisdiction to determine those questions in these proceedings under s 4.1.21(1)(a) of the IPA.

[34] The declaration sought in paragraph 6 relates to whether the current outstanding application is a "properly made application" for the purposes of s 3.2.1 of the IPA.

[35] Again, the determination as to whether an application is a "properly made application" would seem to be a matter which falls within the jurisdiction of this court under s 4.1.21(1)(a).

[36] There are two bases upon which the application was said to require consent. One is by reason of s 3.2.1(5A) of the *IPA* and s 967 of the *WA*. Section 3.2.1(5A) provides as follows:

> "(5A) If the development involves taking, or interfering with, a resource of the State, another Act may require the application to be supported by:
> (a) Evidence of an allocation of the resource; or
> (b) The written consent of the Chief Executive, of the department in which the other Act is administered, to the application being made."

[37] Section 967 of the *WA* provides, in part, as follows:

> "(1) subsection (2) and (3) apply if:
> (a) The person is required to hold a water entitlement under this Act to take or interfere with water; and
> (b) A development permit under the *Integrated Planning Act* 1997 is required for works associated with the taking or interfering.
>
> (2) The person must not take or interfere with the water until the person has obtained a development permit.
>
> (3) The application for the development permit must be accompanied by the Chief Executive's written consent to the application being made."

[38] A "water entitlement" is defined to be a water allocation, interim water allocation or water licence and s 206 of the *WA* provides for the owner of a parcel of land or the owners of contiguous parcels of land to apply for a water licence to, amongst other things, interfere with the flow of water on, under or adjoining any of the land. In general, however, a person is not required to hold a water entitlement to take or interfere with overland flow water (s 20(6) of the *WA*) which is defined to include floodwater flowing over land, otherwise than in a watercourse or lake (Schedule 4 of the *WA*)[6]. In its further submissions of 27 August, the second respondent

[6] See definition in Schedule 4 of *WA*

confirmed that "The State is not concerning itself with floodwater which is part of s 20(6))".

[39] The determination as to whether s 3.2.1(5A) applies therefore involves a determination as to whether the facts fall within the relevant sections of the *WA* including whether any water which is interfered with is in a watercourse or is floodwater which is within s 20(6). The second respondent confirmed, in its further submissions of 27 August, that "The State is not concerning itself with floodwater which is part of s.20(6)."

[40] The second respondent in its further submissions of 28 June conceded, quite rightly in my view, that the question as to whether s 3.2.1(5A) applies is a matter which falls within the jurisdiction of the court pursuant to s 4.1.21(1)(a).

[41] I note that the applicant contended that there was no "interference" even accepting the State's case on the extent of the watercourse. The second respondent, on the other hand, contended that, even on the applicant's case on the extent of the watercourse, the proposal involves interference with, at the least, the flow of water adjoining the land. To the extent that it is relevant to decide whether s 3.2.1(5A) of *IPA* and s 967 of *WA* required the Chief Executive's written consent however, I consider that the Court has jurisdiction to determine the extent of the watercourse for the purposes of the declaration sought in paragraph 6.

[42] The other basis upon which the application, in order to be properly made, was said to require the written consent of the Chief Executive of the DNR is by reason of s 3.2.1(3)(a)(ii) of the IPA which requires an application be accompanied by the written consent of the owner of the land to the making of the application. By reason

of s 21(1) of the *WA*, the bed and banks of all watercourses and lakes forming all or part of the boundary of land are, and always have been the property of the State. I was informed that the Chief Executive of DNR or his/her delegate thereof provides owners consent for the State. It is in this respect that the second respondent's objection to jurisdiction comes into sharpest focus, since the question of ownership is directly relevant to the declaration which is sought.

[43] The declaration sought is in respect of the status of an existing application and, in particular, whether it is "properly made" under the provisions of the IPA. As counsel for the first respondent submitted, the jurisdiction of the court encompasses authority to decide questions of law as well as fact which are involved in the matters that it has to determine[7]. A matter which properly confronts an applicant, the assessment manager and the Court from time to time is whether an application has been properly made. That the determination of that issue may involve questions of ownership arises by virtue of s 3.2.1(3)(a)(ii) of the *IPA* and does not take the matter outside the jurisdiction of this court.

[44] The declaration sought in paragraph 1 of the originating application raises a different consideration. What is sought is a declaration that the proposed works, including the clearing of vegetation, is "lawful" and, in particular, "do not constitute the destruction of vegetation or excavation, in a 'watercourse' requiring a permit under s 266 of the Water Act 2000". While sought to be brought pursuant to s.4.1.21(1)(c) of the IPA, the declaration focuses upon the lawfulness of the works in terms of the *WA* rather than the *IPA.*

[7] See *Craig v South Australia* (1994) 184 CLR 163 at 179

[45] The destruction of vegetation without a required permit constitutes an offence under s 814 of the *WA*. The applicant was served with a compliance notice dated 14 April 2004 under s 780 of the *WA*, to cease destroying vegetation in Obi Obi Creek. An appeal has been instituted to the Magistrates Court against an internal review decision made on 18 June 2004 confirming the issue of the compliance notice but amending its contents. This calls into question whether the expression "lawfulness of land use or development" in s 4.1.21(1)(c) ought be construed as referring to lawfulness for the purposes of *IPA* or whether it can extend to questions of lawfulness for the purposes of another Act.

[46] Given the amendment which was permitted with respect to the form of the declaration sought, it is also necessary to consider whether the declaration might fall under s 4.1.21(1)(a) as a matter done, or to be done or that should have been done "for this Act". In that respect, the Court's attention was drawn to an amendment which inserted the word "for" instead of "under". The purpose of that amendment, as stated in the explanatory memorandum, was to clarify that matters done under another Act "for the purposes of IPA" may be the subject of a declaration.

[47] Counsel for the first respondent reminded me of this court's decision in *Dixon v Ipswich City Council* (1993) QPLR 276 where, in the context of the now repealed *Local Government (Planning and Environment) Act* 1990 (*P & E Act*), an applicant sought declarations that it was lawful to build a dwelling house on land in accordance with a certain building approval subject to conditions noted on the approved plans, but without reference to further conditions purportedly imposed by way of a subsequent letter from the Council. It was submitted on behalf of the applicant in that case that, at the least, the construction of a dwelling was, if not a

use of land, then "an act, matter or thing to be undertaken in respect of the use of land" so as to bring the declaration within the jurisdiction of the court as provided for in the legislation of the day. In rejecting that submission, the court, having observed the potential width of the words in the section, concluded that the concept of the "*use of land*" should be construed within the context of the *P & E Act* and not extended to matters of relevance to the *Building Act*.

[48] The reference to the "lawfulness of land use or development" when used in s 4.1.21 should, in my view, be construed as referring to lawfulness in the context of the *IPA* rather than in respect of some other Act, such as the *WA*. Accordingly, I do not consider that the declaration sought falls within the court's jurisdiction pursuant to subparagraph (c) of s 4.1.21(1).

[49] I also do not consider that the declaration falls within subparagraph (a). While the declaration may relate to a further approval which might be required for the development to proceed, that falls short of establishing that it is a matter "for" the *IPA*.

[50] While, as senior counsel for the applicant pointed out, there are links between the *IPA* and the *WA*, there does not appear to be a relevant link in this regard. As the second respondent's further submissions of 27 August state, "as Chapter 2, Part 8 of the WA has not been rolled into the IPA, its requirement to meet Chapter 2, Part 8 of the WA stands separately to IPA".

[51] Accordingly, I consider that the court has jurisdiction with respect to the declarations sought in paragraphs 6 and 7 of the originating application but not in respect of the declaration sought in paragraph 1.

The Substantive Issues

Introduction

[52] The central factual controversy between the parties relates to the extent of the watercourse of Obi Obi Creek and in particular, its bank adjacent to the subject site.

[53] Given the important consequences which may follow from such a determination, it is desirable that the extent of a watercourse be readily discernible with certainty and accuracy. The identification of the boundary of a watercourse is however, not always a straight forward exercise. Watercourses can exhibit widely varying characteristics including as to topography and hydrology and boundaries are sometimes ambulatory by reason of erosion and accretion.

[54] In *Ward v R* (1980) 29 ALR 175 at 180 Stephen J said, in a different context:

> "It is not merely because rivers change their courses or because their waters rise and fall that they provide awkward boundary markers: they necessarily of themselves provide no boundary line but only a boundary zone. Only by a combination of appropriate terms of definition, wholly lacking in the present case, and the application of conventional rules can a precise dividing line readily be made to emerge."

[55] The question of what is the boundary of a watercourse is a question of fact to be decided having regard to the relevant statutory provisions and the relevant facts and circumstances pertaining to each individual case[8].

The Statutory Provisions

[56] The *Water Act* defines watercourse in part, as follows:

> "'Watercourse' –
> 1. 'Watercourse' means a river, creek or stream in which water flows permanently or intermittently -
> (a) In a natural channel, whether artificially improved or not…
> (b) In an artificial channel that has changed the course of the watercourse
> …
>
> 2. 'Watercourse' includes the bed and banks and any other element of a river, creek or stream confining or containing water."

[57] The expression "bed and banks" is defined as follows:

> "'Bed and banks', for a watercourse or lake, means land over which the water of the watercourse or lake normally flows or that is normally covered by water, whether permanently or intermittently; but does not include land adjoining or adjacent to the bed or banks that is from time to time covered by floodwater."

[58] The word "floodwater" is defined as follows:

> "'Floodwater' means water overflowing, or that has overflowed, from a watercourse or lake onto or over riparian land that is not submerged when the watercourse or lake flows between or is contained within its bed and banks."

[59] The word "water" is defined to mean:

> (a) water in a watercourse, lake or spring; or
> (b) underground water; or
> (c) overland flow water; or
> (d) water that has been collected in a dam.

[60] The expression "overland flow water" is defined, in part, as follows:

> "1. "Overland flow water" means water, including floodwater, flowing over land, otherwise than in a watercourse or lake –
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> (a) after having fallen as rain or in any other way; or
> (b) after rising to the surface naturally from underground."

[61] Those definitions involve a degree of circularity since, in order to determine what is meant by 'watercourse' one is referred to the meaning of the expression "bed and

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[8] See *Pay v Miller* (1979) 3 BPR 97170, *Ward v R (supra)* per Stephen J at 197

banks" which, in turn, refers to "floodwater" the definition of which refers back to "watercourse". Nevertheless, a number of points emerge.

[62] Firstly, a watercourse may involve the flow of water either permanently or intermittently. That is unsurprising since, for example, it has always been recognised that water need not flow continuously within a watercourse, there being many watercourses which are sometimes dry[9].

[63] Secondly, the water must flow in a "channel". This again, is unsurprising. The flow of water in watercourses has always been distinguished from the flow in drainage depressions[10] or other overland flow.

[64] Thirdly, the watercourse is not simply composed of the flow of water itself but includes the bed and banks and any other element of the river, creek or stream confining or containing water. So much is confirmed by the second paragraph of the definition of "watercourse". That too may be unsurprising, although whether a watercourse refers to the stream of water or the physical feature of the land has been controversial in other contexts [11] .

[65] Fourthly the bed and banks are defined by reference to land over which water "normally flows" or that is "normally covered" by water. There is no definition of what constitutes a "normal flow". In this context, it should be given its ordinary meaning as referring to the usual or regular flow under ordinary conditions.

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[9] See, *Gartner v Kidman* (1962) 108 CLR 12 at 26. Although it has also been recognised that a flow of water along an otherwise dry channel for a few hours following a rain event does not necessarily constitute a watercourse - see eg *Macag Holdings v Torrens Catchment Water Management Board* [2000] SASC 115 at para 19

[10] See, e.g. *Knezovic v Shire of Swan-Guildford* (1968) 118 CLR 468

[11] See *Ward v R (supra)* per Stephen J at 191-192

[66] It is, of course, quite normal, in a sense, for a watercourse to flood. The duration and extent of flooding varies according to a range of matters such as the severity and duration of the rainfall event and the characteristics of the watercourse and the catchment. It is quite usual for planning and development decisions to be made having regard to a range of likely flood events. The second part of the definition of "bed and banks" however, makes it clear that the normal flow or normal cover of "water", for the purposes of the definition, does not include the flow of "floodwater" from time to time over land adjoining or adjacent to the bed or banks.

[67] Fifthly, the watercourse includes not only the bed and banks but "any other element of a river, creek or stream confining or containing water". Senior counsel for the second respondent contended for a broad interpretation of the words "any other element...confining or containing water" and referred to the following passage from the second reading speech of the Minister who introduced the legislation which amended the now repealed *Water Resources Act*:

> "Until a short time ago the body of opinion available to the Water Resources Commission favoured the proposition that the Crown controls the water flowing at any time in rivers, creeks and streams up to the point where the water leaves the feature and flows outwards over the adjacent land; in other words, up to the point where the watercourse commences to flood adjoining land. However, more recent opinion is that the Crown's control is limited to water that is usually to be observed flowing in the watercourse.
>
> Loss of control of the water that flows during freshets would have a devastatingly adverse impact on the distribution of water to users along rivers, creeks or streams and on the conservation of water in major, publicly funded storages that provide water for rural, urban, industrial and commercial purposes. The Water Resources Bill corrects the anomaly by clarifying the Crown's right to the use and control of water. In so doing, the provision clarifies water management without affecting in any way the rights of riparian landowners or the ownership of land."

[68] It was suggested that the amendment was prompted by the decision in *Randel v Brisbane City Council (No 2)* [1990] 2 Qd R 440, although that is not clear. While

that passage is not as clear as it could be, the first paragraph suggests that the concern was to ensure that the Crown control extended "to the point where the water leaves the feature and flows outwards over adjoining land" rather than being "limited to water that is usually to be observed flowing in the watercourse". That will be achieved if the watercourse includes the channel within which the water flows before flooding onto adjacent land, since the State will have control of higher than normal flows, including "freshets", to the extent that they also remain within the channel before flowing "outwards over the adjacent land."

[69] Neither the second paragraph of the definition of "watercourse", read in the context of the rest of the definition and the Act as a whole, nor the passage from the second reading speech extracted above, suggests that a "watercourse" extends to any and every embankment or other topographic feature on riparian land adjoining the channel of a watercourse to which flood waters might rise from time to time. The second respondent did not submit to the contrary (and confirmed as much at the further hearing on 25 August).

[70] While the definition of "water" extends to underground water, overland flow water and water collected in a dam, it seems to me that, in this context, the reference to water in paragraph 2 of the definition of "watercourse" is a reference to water in a watercourse. Further, the "other element" referred to in that paragraph must be an "other element" of a "river, creek or stream" rather than an element of adjoining riparian land.

[71] As senior counsel for the respondent accepted during the further hearing on 25 August, the primary factual enquiry remains whether the land in the area of dispute

between the parties is within the high bank of a watercourse or whether it is riparian land beyond the watercourse that is from time to time covered by floodwater.

The Findings re Watercourse

[72] For the factual enquiry, the court had the benefit of both expert and non-expert evidence and, importantly in a case such as this, a site inspection to better understand the evidence.

[73] The applicant's case was that the watercourse is constituted by a clearly-defined channel which runs around the northern and western boundaries of the subject property and which usually contains the flow of water. The contention was that the watercourse extends to the point where water breaks out of that channel in times of flood.

[74] The second respondent's case, on the other hand, was that the bank of that channel represents only a "low bank" within a broader watercourse which extends to a "high bank" further into the area where development is proposed. In this respect, it was submitted that "if a stream flows within what might be called low banks during dry weather and between high banks in wet weather, or during rain events, that area is State land. Only when the river floods is the water then on non-State land". This, it was suggested, must be correct because, amongst other things, "it is difficult to imagine any sensible control being able to be exercised if the State's jurisdiction over the watercourse ended at the 'low bank' or ended once a dry spell ended". Further, it was submitted that it would do considerable violence to s 19 of the Act "to limit the watercourse to the zone where the water flows only during dry weather". Further, it was submitted that no effective weir could be built across a watercourse if it could not extend beyond the "low bank" and there would be little

scope for the operation of provisions of the WA which provide for riparian rights of access to water and rights of grazing[12].

[75] The case for the second respondent seemed to proceed on the basis that the matter involved some point of principle as to whether the legislation directed attention to the "low bank" or the "high bank" for the purposes of identifying a watercourse. I am not convinced that this case turns on the resolution of any such point of principle.

[76] While the definitions contained in the WA are not as specific or helpful as they could be on this subject[13], I have no difficulty in principle with the proposition that a watercourse, as defined, may extend to the "high bank" of a channel even though, within that channel, there are lower banks to a narrower channel which confines or contains the low flow of water during a dry spell. The issue in this case is whether the watercourse on the subject site is, upon a factual enquiry, of that kind or whether the area in dispute, between the boundaries contended for by the applicant and the second respondent respectively, represents an area of riparian land adjacent to the watercourse which is, from time to time, inundated by floodwater.

[77] In terms of a physical feature, the bed and banks of the watercourse, as contended for by the applicant, represents an identifiable and well defined continuous channel with a discernable bed and bank running around the western and northern part of the site.

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[12] See s 20 for example

[13] Compare, e.g. the definition of "Waterway" in Planning Policy No. 19.22 in the 1987 Town Plan for the City of Brisbane which referred to "any element of a river, creek or stream including the bed and extending to the high floodway bank, as well as associated wetland areas, as generally illustrated in the diagram below" which diagram showed a 'low bank' and a 'high bank'.

[78] The area between that bank and the boundary contended for by the second respondent (the so-called “high bank”) is more variable and less defined. There are parts of that area, particularly on the western side, where one can observe a relatively flat area of land extending from the so called “low bank” to the base of a modest embankment further into the site. It is in that area where the argument as to whether the embankment is a ‘high bank’ of the watercourse, or simply an embankment on riparian land adjoining the watercourse, comes into sharpest focus. This feature of the topography however, is variable and localised.

[79] The topography changes as one progresses downstream towards the northern boundary of the site. I am satisfied, as a matter of fact, that the so-called ‘high bank’ does not extend along the northern boundary of the site. As can be seen from the contours, but more fully appreciated on site, there is instead, at the northern end of the property and particularly towards the downstream end, a series of undulations progressing into the site from the boundary as contended for by the applicant.

[80] It should also be noted that the topography at the south western (upstream) end also changes, but has not been as closely examined because of the thick vegetation.

[81] In relation to hydrology, the court had the assistance of evidence from two experts namely, Mr Collins, who was called by the applicant and Mr Harding, who was called by the second respondent, as well as numerous affidavits which the second respondent obtained from residents of the area.

[82] I have considered the evidence of the residents. Many of the affidavits evidence that during “normal periods of flow” the level of the creek is “quite low” but rises during significant rainfall events, particulars of which are given in some of the

affidavits. In a general sense, that evidence is consistent with that of Mr Collins and Mr Harding whose evidence, as one might expect, gives a more detailed understanding of the flow of water within and beyond the watercourse in a range of rainfall events. To the extent that there is any conflict however, I prefer the evidence of the hydrologists.

[83] There was, ultimately, a substantial degree of agreement between the experts. By discussing matters and sharing information Mr Collins and Mr Harding were able not only to reach agreement on most matters but also to provide a more complete description of the function of the watercourse than would likely have been possible otherwise. I have relied on their evidence in relation to hydrology. It should be noted however that, on issues such as the existence of "banks" and the boundary of the watercourse I have made my findings on the basis of a consideration of the whole of the evidence.

[84] What emerged from the evidence of the engineers was that the so called "low bank" contains or confines much more than simply the low flow of the creek during dry spells. Indeed when it was put to Mr Harding that the so called "low bank" contained not only the low flows but also the normal flows, he responded by acknowledging that "I think in the layman's terms of normal flows, yes, it would be there."

[85] The watercourse in this case is permanent rather than ephemeral. It has a base flow, being the level of water during a dry spell (but not a period of extended drought). In any significant rain event, the base flow will be exceeded and the water level rise. In the case of Obi Obi Creek, although the flow of water is relatively fast and levels

can rise and fall reasonably quickly, the so called 'low bank" is capable of containing and confining flow levels significantly in excess of the base flow level.

[86] While acknowledging some imprecision in their analysis, the engineers were agreed that it would be reasonable to expect, in the course of an average year[14], the so called "low bank" to be overtopped on only about five occasions and then only for periods of one to two hours. Accordingly, in an average year, the flow of water in the watercourse could be expected to be contained within the boundaries contended for by the applicant for in excess of 99% of the time[15].

[87] I am also satisfied, on the expert evidence, that while in the summer months there is a higher probability of occurrence of the events which over-top the bank in an average year, those events are not restricted to a given season and can occur at other times. Even if they could all be expected to occur in one three-month period of the year however, the flow of water would still be confined within the so called "low bank" for in excess of 99% of the time during that season[16].

[88] The facts in this case differ from those in *Kingdon v The Hutt River Board* (1905) 25 NZLR 145 upon which reliance was placed in the submissions of the second respondent after I referred the parties to it. In that case it was observed that:

> "Many rivers and streams in New Zealand are frequently dry for many months at a time, and then by rainfall became raging torrents".

and

> "A 'fresh' in a New Zealand river, when the water is confined within the banks of a river, is nothing more than what may be termed the ordinary condition of the river during the rainy season, and the evidence in the present case is that during the rainy season the water in the river, flowing a

[14] There are, as one would expect, variations from year to year
[15] Assuming the water only breaks that bank for up to 10 hours in an average year of 8,760 hours the water would be contained for 99.88% of the year
[16] Assuming the water breaks the bank for up to 10 hours out of the 2,160 comprising a 90-day period the water would be contained for 99.54% of the period

> much greater quantity than in the dry season, frequently reaches the banks on either side".
>
> …
>
> "But in the ordinary rainy season the water is confined within the bank, and as it frequently extends from bank to bank during such season, and reaches the bank on the claimant's land, we are of the opinion that the shingle from bank to bank is what may properly be called the 'bed' of the river, although the water of the river does not in the dry weather ordinarily flow over such shingle".

[89] In this case I find, on the evidence, unlike in *Kingdon's* case, the ordinary condition of the creek does not extend beyond the so called 'low bank". There is not a seasonal flooding to a seasonal flood bank[17]. This underscores the point made earlier, that findings in relation to the boundary of a watercourse must ultimately descend to an examination of the facts of the particular case.

[90] Within the discipline of the engineers, the events which, on average, overtop the so-called 'low bank' on five occasions per year, would be analysed as for any other flood events, although I do not consider that the expression "floodwater" in the WA is used in a technical sense. As Mr Collins explained however, these events relate to specific rainfall bursts which lead to individual events and are quite different from the longer duration continuous flows. At one point, Mr Collins referred to these events as "small flash floods" which, in my view, is an apt description.

[91] It seems to me that the concept of land that is "from time to time" covered by floodwater would encompass land covered, from time to time, by small flash floods. There is no qualification to the expression "floodwater" which would confine its scope to particularly great or very rare flood events.

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[17] See for example *Ward v R (supra)* per Barwick CJ at 177

[92] On those occasions where, in an average year, these flash-flood events overtop the so called “low bank”, the water begins to encroach towards the undulations on the northern downstream side of the property and into the flat area between the so called “low bank” and the so called “high bank” on the western side. There are, of course, a range of more intensive flood events which occur less frequently. The flood levels progressively encroach into the site for the higher average return interval events. Insofar as the contentious embankment on the western part of the site is concerned, while the second respondent’s watercourse boundary does not conform to the flood lines or contour lines, it seems that the so called ‘high bank” would be exceeded in flood events with an average return interval of more than two years.

[93] In addition to matters of topography and hydrology, the second respondent urged the Court to take into account certain other matters contained in the affidavit of Dr Hall, a resident and retired biologist. His affidavit, as with much of the second respondent’s case, focuses upon that part of the watercourse on the western side of the property. His affidavit contains reference to some matters which go more to the merits of the proposal than the issues to be determined in these proceedings. It also contains some observations about where water levels have risen to and at what frequency, however I prefer the evidence of the hydrologists on such matters. Other matters to which he refers include the following:

(i) He has observed burrows of freshwater crayfish on the edge of the creek where it exists on his property, suggesting to him that Obi Obi Creek has fluctuating water levels. I have no difficulty in accepting that the water level in the creek fluctuates, as it does within the so called “low bank”;

(ii) The area between the boundary of the watercourse as contended for by the applicant and the high bank contended for by the second respondent is an area of unconsolidated alluvium stabilised by roots of grass and weeds and, deeper down, by the roots of trees that are growing on the "permanent bank". In short, the soil type and vegetation, he says, is different in the area of alluvium as compared to the balance of the site. While matters of geology can be of relevance, the affidavit does not explain why those matters should lead, in this case, to a conclusion that the area of alluvium (and associated vegetation) should be considered to be within the watercourse. It might also be consistent with the area being part of riparian land adjacent to the watercourse which, by reason of its proximity to the watercourse, more frequently comes under the influence of floodwater from time to time;

(iii) There are platypus burrows in the "shallow bank". While the presence of platypus burrows dictates a careful consideration of impact from a merits point of view[18], it does not establish that the watercourse extends to the so called "high bank".

[94] I turn now to the evidence of Mr Brogan, a Resource Management officer, who was responsible for the on-site identification of the watercourse on behalf of the DNR. The boundary line of the watercourse as contended for by the second respondent is, as has already been noted, derived from an exercise of creating lines between the location of pegs inserted on-site by Mr Brogan. In attending the site in order to

[18] And, I note, that potential impacts have been the subject of a report by a noted expert in the field, Dr Frank Carrick which was referenced in the letter from DNR dated 17 May 2004 advising of the grant of the Riverine Protection permit.

identify the extent of the watercourse, he was focused upon identifying a channel within which water flowed permanently or intermittently.

[95] In relation to the identification of a channel, Mr Brogan gave evidence that he, like other officers junior to him within the DNR, accepted the proposition that the "high bank" is the boundary of a watercourse. It would seem that in attempting to identify the channel on the subject site, Mr Brogan was looking for a "high bank" running along the boundary. That is not an easy task on the subject site. While, as has already been observed, there is an identifiable embankment within the site along at least part of its western side, that feature is both variable and localised. It does not extend, for example, around the northern end of the property which, particularly at the downstream end, consists more of a series of undulations sloping up from the watercourse as defined by the applicant. There are also difficulties in other parts of the western side of the property, particularly towards the upstream end which, as Mr Brogan acknowledged, was very difficult for him to inspect because of the vegetation.

[96] These difficulties are perhaps reflected in the fact that the boundary derived from Mr Brogan's pegging exercise bears no close relationship to the contour lines except, perhaps, in that part of the western boundary where the embankment is most easily identifiable. While there can be minor variations in land form which are not necessarily shown on a contour plan, I am not satisfied that such variations account for the extent of discord between the boundary as mapped on the basis of Mr Brogan's pegging exercise and the contours. Indeed, Mr Brogan who, at the time of his inspection, was aware that a survey of the property had been prepared but did not think that he needed to ask for it to assist with his identification, was quite

surprised at the degree of discord, at least at the upstream end of the property. At the downstream end of the property the boundary contended for by him has undulations above and below it.

[97] On the question of the flow of water permanently or intermittently in the channel as purportedly identified by him, Mr Brogan did not have the benefit of any advice on the relevant hydrology. Mr Brogan observed evidence of debris apparently left by the flow of water in the area between the so-called "low bank" and "high bank". He concluded that water must flow "intermittently" in that area. Assuming, without accepting, that the expression "intermittently" in the definition of watercourse extends to a variation in flow height rather than the interrupted flow of water in an ephemeral watercourse, the presence of debris does not dictate whether the cause was flood water on riparian land or flow within a watercourse.

[98] When regard is had to the flood line maps, there is significant discord between the boundary as contended for by the second respondent and the flood lines. Indeed, the boundary contended for by the State traverses a range from the 1-year ARI to the 50-year ARI flood lines. In that part of the western side of the boundary where the so called "high bank" is most discernible, there is a reasonable degree of correlation with the 2-year ARI flood level, however at the upstream end the boundary tapers up to the 50-year ARI level whereas towards the downstream end it varies from below the 1-year ARI to above the 5-year ARI. While, as Mr Harding said, there can be a variation between flood lines and the top of a creek bank, he conceded that he would expect the plot of the bank to accord either with a particular flood event or at least to respect the contour lines of a detailed survey. It is

significantly discordant with both and I am satisfied, on the whole of the evidence, that it is unreliable.

[99] Some point was also sought to be made of the fact that the height to which the rock wall is constructed on the opposite side of Obi Obi Creek to the west is higher than the so called "low bank" on the subject side. The height of the artificial construction on that side does not seem to me to be of great assistance in the identification of the bank on the subject side of the Creek which does not have a similar feature. I note that the topography in the area of dispute on the subject site above the so-called "low bank" is not replicated on the opposite side of the creek either to the west or the north.

[100] Reference was also made to where fencing had or would be erected, as a matter of land management, on the subject land. I do not find that matter to be particularly weighty.

[101] The watercourse as contended for by the applicant comprises, as a matter of fact, the only channel within which water flows around the western and northern boundaries of the site. That channel is, as it happens, continuous and defined. The land form inland from that channel or part of the channel is variable and does not, on the evidence, constitute another channel of the watercourse. In part, particularly on the western side, there is a further embankment within the subject site, however, in other places, particularly on the northern side, towards the downstream end there is a series of undulations of unknown origin[19]. The defined channel to which the applicant points is, as a matter of fact, much more than a low-flow channel which

[19] The origin of these undulations was the subject of some speculation in the evidence but was not established.

confines the base flow during dry periods. It contains the flow of water for more than 99% of the time in an average year. Although its bank on the subject side of the watercourse is over-topped, for very short durations, on a handful of occasions during the year by small flash-flood events and, less frequently, by a range of other flood events with differing average return intervals[20], I find that the normal flow of water is contained within the defined channel which the applicant contends constitutes the watercourse. While the riparian land immediately adjacent to the watercourse exhibits evidence of having been influenced by floodwater from time to time, it remains, I find, riparian land adjacent to the watercourse rather than being a part of the watercourse.

[102] I find, that the Obi Obi Creek watercourse and the banks thereof are as contended for by the applicant and surveyed by the applicant's surveyor.

Is the State an Owner?

[103] Pursuant to s 21 of the *WA*, the bed and banks of all watercourses forming all or part of the boundary of land are, and always have been, the property of the State.

[104] The second respondent's written submissions relied on the proposition that "It is plain that Cornerstone proposes to carry out work down on the level of the low bank" but I have found that the watercourse does not extend above the so called "low bank".

[105] An overlay of the proposed development suggests however that minor parts might extend across the top of the bank of the watercourse, even as I have found it to be.

[20] Many of which, it may be noted, also extend beyond the so called "high bank".

Senior counsel for the applicant indicated that minor changes would be made[21] to the application to ensure that development does not encroach with the watercourse as I have found it to be. The second respondent did not seek to make any issue about that at the time, a matter confirmed by senior counsel for the second respondent on the further hearing on 25 August. Subject to such a change, the State is not an owner of the land the subject of the application.

Interference with Water in the Area to be Developed

[106] The applicant submits that the development will not interfere with water either in the watercourse or as part of floodwater. The second respondent contends that, even on my determination as to the extent of floodwater, there will be interference, at least with the flow of water adjacent to the subject site.

[107] The fact that development is proposed in an area which will be inundated from time to time has not escaped attention in the design and approval phase to date. The development is intended to utilise piers so as to allow floodwater to flow underneath the building. The potential impact of the development upon flood flows was the subject of examination at the time of the previous appeal to this court, by Mr Collins and by another well-known expert in hydrology, Dr Johnson, who had been engaged by the Council. As the reasons of Robertson DCJ note, both agreed that, subject to detailed design, the appellant's engineering solution was satisfactory.

[108] There will, of course, be an interaction between the development and floodwater. The piers will have a localised effect, although there is to be compensatory earthworks to ensure that there is no significant impact. Mr Harding referred to

[21] See s 3.2.9 of *IPA*

spoil piles causing some obstruction. Having reviewed the material of Mr Collins and Dr Johnson, Mr Harding accepted that the development will not cause any significant increase in flood risk or flood hazard.

[109] While there will be an interaction between the development and the flow of water in particular events, there will, I am satisfied, be no significant adverse impact. Whether there is, in those circumstances, an absence of interference, as the applicant would contend or an interference, albeit minor (as Mr Harding accepted) and without significant effect, depends upon the scope of the expression "interfere" in the particular statutory context. The word is not defined in the *WA* and ordinarily means to obstruct, hinder or get in the way[22].

[110] In the context of the *IPA*, the question of whether a development interferes with a resource of the State is one which must be considered at the time the application is made since, s 3.2.1(5A) can result in a requirement, relevantly, for the written consent of the Chief Executive of the department administering the *WA*. It is a matter which is also relevant to the information and referral stage, since it bears upon the identification of referral agencies for the application. The application stage and the referral of the application to relevant agencies occurs in the Integrated Development Assessment System (IDAS) contained in Chapter 3 of the *IPA* prior to assessment of the impacts of the proposal. It is only after the application is made and referred to the relevant agencies, that those agencies assess the application, respond and the subsequent stages of IDAS, including the decision stage, are completed.

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[22] See The Australian Concise Oxford Dictionary 3rd Ed.

[111] While, in this case, it can be said, with some confidence, that there will not be a significant adverse impact, that is not something which an assessment manager would generally know at the point at which an application is received and a view must be formed as to whether it is properly made. It is also not something which is likely, in most cases, to have been investigated by the time the appropriate referral agency has to be identified.

[112] I accept that something might affect without interfering. It seems to me however that, in context, the concept of "interfering" should not be limited to a circumstance where an obstruction or hindrance is demonstrated to have a significant overall adverse impact. Whether an interference results in an impact which is significantly adverse is obviously something which would be examined in determining whether or not written consent would be granted or in formulating the referral response as the case may be.

[113] Further, while I appreciate that the degree of interference in this case is minor, I was not directed to any provision which relieves against the requirements of the provisions in the case of "minor" interferences. Senior counsel for the applicant suggested that the "minor" extent of any interference might found the basis of an application under s 4.1.5A of *IPA*, but no such application has, as yet, been made.

[114] In my view, the works would create some minor interference, in the area beyond the watercourse.

[115] The area of interference is significant to the referral issue because, as noted earlier, Item 17 of Schedule 2 to the Integrated Planning Regulation refers to assessable development under Schedule 8 of IPA which in item 3B(a) speaks, relevantly, of

interfering with water from a watercourse. Where the interference occurs is also relevant to the issue of consent having regard to a combined reading of s 3.2.1(5A) of *IPA* together with ss 967, 20(6) and the definition of "Water Entitlement" in Schedule 4 of the WA.

[116] Section 206 relevantly provides as follows:

> "(1) An owner of a parcel of land, or the owners of contiguous parcels of land, may apply for a water licence for the parcel or parcels and any other land of the owner or owners contiguous to the parcel or parcels –
>
> (a) for taking water and using the water on any of the land; or
> (b) to interfere with the flow of water on, under or adjoining any of the land."

[117] The expression "the land" in subparagraph (b) is a reference to the land owned by the applicant for the licence. The licence would permit the owner of land to interfere with the flow of water <u>on</u> the land as well as the flow of water under or adjoining the land. On the basis of my findings there is to be an interference, albeit without significant adverse effect, on the flow of floodwater on the land. By reason of s 20(6) however, no water entitlement is required to take or interfere with overland flow water which, in turn, is defined to include floodwater flowing over land otherwise than in a watercourse or lake. In those circumstances, on the basis of my earlier findings, s 967(1)(a) of the *WA* is not triggered and the written consent of the Chief Executive is not required on that account.

[118] The second respondent, particularly in its further submission of 27 August, contended that it is quite possible for works on adjoining land to interfere with water in a watercourse and that the works contemplated here need not extend beyond the boundary of the applicant's land in order to enliven the right to obtain a

licence under s 206, the need for the Chief Executive's consent under s.3.2.1(5A) and presumably also the need for referral on the basis of interfering with water from a watercourse.

[119] While I have no difficulty, in principle, with those propositions, their applicability to the subject case requires an examination of the evidence.

[120] The issue of interference within the watercourse was not pursued by senior counsel for the second respondent in the cross-examination of Mr Collins or the evidence-in-chief of Mr Harding[23]. In written submission of 28 June, the second respondent made reference to part of the evidence-in-chief of Mr Collins. In that part, however, Mr Collins spoke of "localised minor decreases" in water levels around the vicinity of the piers (which are clear of the watercourse as I have found it to be) in times of flood flow.

[121] I am conscious that, in paragraph 53 of his report, Mr Harding expressed a view that the works would "modify" the flow on the site and adjacent to the site. In that passage of his report (which he admitted in cross-examination should probably be reworded) however, he was referring to what he saw as the interference (in terms of presenting some obstruction) of some piles of spoil in the area below the 'high bank' (which, consistently with the position of the DNR, he was taking to be part of the watercourse). His evidence does not lead to the conclusion that there will be interference beyond minor interference above the so called "low bank", in what I have found to be flood events.

[23] In the second respondent's further submissions of 28 June, it was said that the State would seek the right to adduce further evidence in relation to matters relevant to the degree of interference if the court was minded to embark upon the exercise of assessing whether the interference was significant (an issue dealt with above). At the further hearing on 25 August I indicated that the State should decide whether to re-open its case or not, but no application to re-open was made.

[122] On the evidence, I am satisfied that such interference as may arise from the works is limited to minor interference with floodwater flowing over the subject land and does not extend to an interference with the flow of water in the watercourse adjoining the land. Accordingly, the provisions upon which the second respondent relies are not triggered in the circumstances of this case.

Conclusion

[123] For the reasons set out above:

1. The declaration sought in paragraph 1 of the application is beyond the jurisdiction of the Court but, if it were not, then I would have granted the declaration given my findings otherwise.
2. As to the declaration sought in paragraph 6, the Court has jurisdiction to make the declaration and I am satisfied that the development application, to be properly made, does not require the consent of the State as owner of the land or the consent of the Chief Executive of DNR pursuant to s 3.2.1(5A) of *IPA*.
3. As to declaration 7, I am satisfied that the Court has jurisdiction to make the declaration, that the development application does not require referral and that the declaration should be made.
4. The form of declarations ought be expressed to be subject to the making of the change to the development application which the applicant foreshadowed.

[124] I will invite submissions on the appropriate terms of order.