PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Benfer v Sunshine Coast Regional Council* [2019] QPEC 6
PARTIES:	**RODNEY DAVID BENFER** (appellant) v **SUNSHINE COAST REGIONAL COUNCIL** (respondent) AND **SUNSHINE COAST REGIONAL COUNCIL** (applicant) v **RODNEY DAVID BENFER** (respondent)
FILE NO/S:	3967 of 2017 and 3339 of 2018
DIVISION:	Planning and Environment
PROCEEDING:	Appeal and Originating Application
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	14 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	10 September 2018 and 30 January 2019
JUDGE:	Kefford DCJ
ORDER:	**I order:** **(a) Appeal No. 3967 of 2017 is allowed and the enforcement notice the subject of the appeal is set aside; and** **(b) Application No. 3339 of 2018 is dismissed.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPEAL – APPEAL AGAINST ENFORCEMENT NOTICE – where the Council gave the appellant an enforcement notice alleging the commission of a development offence under s 163 of the *Planning Act 2016* – where the nature of the alleged offence was the importation of approximately 10 000 cubic metres of fill without a development approval – where the land is located within an Flood and Inundation Area under the planning scheme – where the enforcement notice did not refer

to the type of development alleged to have been carried out, namely operational works – where the enforcement notice did not refer to provisions of the planning scheme triggering the need for a development permit – where the enforcement notice did not specify the dates, times or period of times on which the alleged development offence was committed – where the enforcement notice gave approximately three months to remove 10 000 cubic metres of fill and reinstate the land to natural ground level – whether the enforcement notice failed to comply with the obligation to state the nature of the alleged offence – whether it was unreasonable to require the appellant to remove the fill – whether the timeframes for the removal of the fill were too short having regard to the volume of fill

PLANNING AND ENVIRONMENT – APPLICATION FOR ENFORCEMENT ORDERS – where the Council applies for enforcement orders requiring the removal of 10 000 cubic metres of fill – where the Council alleges the commission of a development offence under the *Sustainable Planning Act 2009* and a development offence under the *Planning Act 2016* – whether the Court has jurisdiction to make an enforcement order about an offence under the *Sustainable Planning Act 2009* – whether the alleged development offences have been committed – whether, in the exercise of the court's discretion, the enforcement order should be made

LEGISLATION: *Acts Interpretation Act 1954* (Qld), s 20, s 20C

Local Government Electoral (Transparency and Accountability in Local Government) and Other Legislation Amendment Act 2017 (Qld), s 78

Planning Act 2016 (Qld), s 29, s 44, s 46, s 88, s 161, s 163, s 167, s 168, s 180, s 229, s 310, s 311, s 312

Planning and Environment Court Act 2016 (Qld), s 43, s 45, s 47

Sustainable Planning Act 2009 (Qld), s 7, s 10, s 342, s 578, s 601

CASES: *ADCO Constructions Pty Ltd v Goudappel & Anor* [2014] HCA 18; (2014) 254 CLR 1, applied

Bentley v BGP Properties Pty Ltd (2005) 139 LGERA 449, cited

Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336, cited

Jakel Pty Ltd & Ors v Brisbane City Council & Anor [2018] QPEC 21; [2018] QPELR 763, cited

John L Pty Ltd v Attorney-General (NSW) [1987] HCA 42; (1987) 163 CLR 508, cited

Marshall v Averay [2006] QDC 356; [2007] QPELR 137, approved

New South Wales v Corbett & Anor [2007] HCA 32; (2007) 230 CLR 606, distinguished

R v Jacobs (1993) 2 Qd R 541, applied

R v Juraszko [1967] Qd R 128, applied

R v PAZ [2017] QCA 263; [2018] 3 Qd R 50, cited

S v The Queen [1989] HCA 66; (1989) 168 CLR 266, applied

SAS Trustee Corporation v Miles [2018] HCA 55; (2018) 361 ALR 206, applied

Sztal v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 347 ALR 405, applied

COUNSEL: H M Stephanos for the Council

SOLICITORS: Mr Benfer was self-represented
Sunshine Coast Regional Council Legal Services for the Council

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Introduction

[1] Mr Benfer owns land located at 181 Toolborough Road, Yandina. The land has an area of 9.773 hectares. It is in the local government area of Sunshine Coast Regional Council ("*the Council*").

[2] On 12 September 2017, the Council gave an enforcement notice to Mr Benfer with respect to alleged unlawful importation of approximately 10 000 cubic metres of fill.

[3] Appeal No 3967 of 2017 is an appeal by Mr Benfer against the decision of the Council to give the enforcement notice.

[4] Originating Application No. 3339 of 2018 seeks enforcement orders requiring removal of approximately 10 000 cubic metres of fill and reinstatement of the land to as close as practicable to natural ground level or such other satisfactory level as determined by Mr Benfer based upon the reports by qualified and relevant persons.

[5] Both proceedings were ultimately heard together on 30 January 2019.

Background to the proceedings

The show cause notice and the enforcement notice

[6] On 11 July 2017, the Council gave Mr Benfer a show cause notice pursuant to s 167 of the *Planning Act 2016* (Qld).

[7] The show cause notice indicated that the Council had recently investigated complaints about a large quantity of fill material imported onto 181 Toolborough Road, Yandina Creek.

[8] In a section titled "*Applicable Reasons for Show Cause Notice*", the show cause notice said:

> "Council reasonably believes that an enforcement notice should be given to you because you have committed or are committing an offence pursuant to *Section 162 of the Planning Act 2016*.
>
> '*A person must not carry out assessable development, unless all necessary development permits are in effect for the development."*
>
> The facts and circumstances forming the basis of Council's belief are as follows:
>
> 1. The above property is captured by the Sunshine Coast Planning Scheme 2014 (SCPS 2014) as being subject to the Flood Hazard Overlay.
> 2. It has been estimated from observations taken from Councils GIS aerial mapping program that approximately 10,000 cubic metres of fill material have been imported to the above property.
> 3. The placement of the fill material is located within a Flood & Inundation Area.
> 4. Operational works for the purpose of filling undertaken on land within a Flood & Inundation Area (as identified on a Flood Hazard Overlay Map) involves any physical alteration to a waterway or floodway, including vegetation clearing or filling cumulatively

exceeding 50 cubic metres is assessable development and requires a development approval.

5. A check of council records indicates there is no current development approval issued for the importation of fill material, and therefore Council considers the filling to be unlawful.

…"

[9] By letter dated 23 August 2017, Mr Benfer responded to the show cause notice. He indicated that he was unaware of the requirement to obtain a development permit but said he would like to take whatever steps were necessary to get a development permit in place.

[10] On 12 September 2017, the Council gave Mr Benfer an enforcement notice pursuant to s 168 of the *Planning Act 2016*.

[11] In a section titled "*Applicable Reasons for Enforcement Notice*", the enforcement notice said:

> "Sunshine Coast Council received your representations dated 23 August 2017 in response to the show cause notice issued to you on 11 July 2017. Sunshine Coast Council has considered these representations and reasonably believes that an enforcement notice should be given to you because you have committed a development offence pursuant to Section 163 *Carrying Out Assessable Development Without Permit*.
>
> The maximum penalty for such offence is 4500 penalty units, which amounts to $567,675.
>
> The facts and circumstances forming the basis for Sunshine Coast Council's belief are as follows:
>
> 1. Approximately 10,000 cubic metres of fill material have been imported to the above property without the necessary Development Approval being in effect.
> 2. The placement of this fill material is located within a Flood & Inundation Area as identified in the Sunshine Coast Planning Scheme 2016."

[12] In a section titled "*Actions Required by Enforcement Notice*", the enforcement notice said:

> "You are required to comply with the enforcement notice by undertaking the actions stated below:
>
> 1. **Until further notice**, immediately cease all importation of filling material to the above property, AND
> 2. **By** 20 October 2017, remove from the above property **all** filling material from the **yellow** zone as indicated on the attached aerial map (Appendix 1) and have this material taken and placed/disposed at a legitimate and approved location.
> 3. **By** 20 November 2017, remove from the above material **all** filling material from the **green** zone as indicated on the attached aerial map (Appendix 1) and have this material taken and placed/disposed at a legitimate and approved location.
> 4. **By** 20 December 2017, remove from the above material **all** filling material from the **red** zone as indicated on the attached aerial map

(Appendix 1) and have this material taken and placed/disposed at a legitimate and approved location.

5. By the close of business on the **20 December 2017** all filling material from the yellow, green & red zones as indicated on the attached aerial map (approximately 10,000 cubic metres) must be entirely removed from the above property.
6. **You must** reinstate the yellow, green & red zones identified in the attached Appendix 1 so as each site is as close as practicable to the existing natural ground level.
7. **You must** notify Councils Development Audit & Response Unit in writing of the location where all filling material is being transported and discarded; prior to its removal from the above property.
8. **You must** provide Councils Development Audit & Response Unit with copies of all receipts attained for the disposal of this imported filling material."

The initial hearing of the appeal against the enforcement notice

[13] Mr Benfer lodged his appeal against the decision to give an enforcement notice on 18 October 2017.[1]

[14] The relief sought by Mr Benfer in his Notice of Appeal is that the enforcement notice be set aside or otherwise permanently stayed. In the Notice of Appeal, Mr Benfer advanced three grounds on which he says the relief should be granted, namely:

(a) the enforcement notice does not comply with s 168(3)(a) of the *Planning Act 2016* because it fails to state the nature of the alleged offence;

(b) it is unreasonable to require Mr Benfer to remove approximately 10 000 cubic metres of fill from the land; and

(c) in the alternative, if it was reasonable for the Council to require Mr Benfer to remove the fill from the land, the prescribed timeframes for its removal are too short having regard to the volume of fill on the land.

[15] The appeal first came on for hearing on 10 September 2018. On that day, each of the parties read the material on which they sought to rely. The hearing then proceeded to submissions. The Council provided a written outline that it said contained details of the background and the Council's position in respect of the grounds of appeal.

[16] In its Outline of Submissions dated 10 September 2018, the Council submitted that the enforcement notice provided sufficient particulars in that it identified:

(a) the specific provision for which the offence was alleged, namely s 163 of the *Planning Act 2016*;

(b) the description of the offence in words that maintained the wording of the relevant statutory provision, namely "*carrying out assessable development without permit*";

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1 The appeal was commenced out of time. However, by order dated 3 November 2011, the court extended the time for commencing the appeal to 18 October 2017.

(c) particulars of the offence that identified that:

(i) the offence related to the importation of 10 000 cubic metres of fill onto the land;

(ii) the fill material had been imported without the necessary development approval being in effect; and

(iii) the placement of the fill material was within a Flood and Inundation Area as identified in the planning scheme.

[17] The Council submitted that the reference to the Flood and Inundation Area was sufficient to draw Mr Benfer's attention to the relevant aspect of the planning scheme that makes the works assessable development, namely the mapping of the land as including a Flood and Inundation Area on a Flood Hazard Overlay Map under Sunshine Coast Planning Scheme 2014.

[18] Having read the Outline, during oral submissions by Ms Stephanos, Counsel for the Council, I made enquiries about:

(a) the timeframe that the Council relies upon for the offence and the significance of the timeframe in light of the repeal of the *Sustainable Planning Act 2009* (Qld) and the commencement of the *Planning Act 2016* on 3 July 2017;

(b) whether the evidence before the court included all relevant planning scheme provisions for the timeframe ultimately relied upon by the Council; and

(c) the relief sought by the Council, including the Council's position regarding an appropriate timeframe for the removal of the fill.

[19] Ms Stephanos indicated that the Council sought to rely on filling it says occurred between April 2014 and July 2017.

[20] The Council then applied to reopen its case. It also applied for an adjournment so that it might put on further evidence about the planning scheme provisions in effect from April 2014.

[21] Mr Benfer did not oppose the Council's application to re-open its case. I allowed the application and the hearing was adjourned to 14 December 2018.[2]

[22] On 14 September 2018, the Council filed its Originating Application.

The Council's position with respect to the commission of development offences

[23] The Council no longer contends that the importation of approximately 10 000 cubic metres of fill onto the land constitutes an offence under s 163 of the *Planning Act 2016*. Rather, the Council now alleges that by carrying on works from May 2014 until September 2017, Mr Benfer committed:

(a) a development offence under s 578 of the *Sustainable Planning Act 2009* (Qld) for the operational work carried out between May 2014 and 2 July 2017; and

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2 Prior to that date, I further adjourned the hearing to 30 January 2019 at the request of Mr Benfer. The further adjournment was not opposed by the Council.

(b) a development offence under s 163 of the *Planning Act 2016* for the operational work carried out between 3 July 2017 and September 2017.

The applicable statutory regime prior to 3 July 2017

[24] Section 578 of the *Sustainable Planning Act 2009* states:

> "**578 Carrying out assessable development without permit**
>
> (1) A person must not carry out assessable development unless there is an effective development permits for the development.
>
> Maximum penalty—4,500 penalty units
>
> (2) Subsection (1)—
>
> (a) applies subject to subdivision 2; and
>
> (b) does not apply to development carried out under section 342(3).
>
> (3) Despite subsection (1), the maximum penalty is 17000 penalty units if the assessable development is on a Queensland heritage place or local heritage place.
>
> (4) Subsection (5) applies to a development permit for assessable development that is building work if, under section 245A(3) or (5), the permit does not authorise the carrying out of a part of the building work.
>
> (5) For subsection (1), the development permit is not an effective development permit for the part."

[25] Chapter 7, part 3 division 1 subdivision 2 of the *Sustainable Planning Act 2009* contains exemptions. Section 342(3) of the *Sustainable Planning Act 2009* permits the use of security for a lapsed development approval to finish the development despite the lapse of the approval.

[26] Assessable development is defined in Schedule 3 of the *Sustainable Planning Act 2009* as follows:

> "***assessable development***—
>
> 1 Generally, assessable development means development prescribed under section 232(1)(c) to be assessable development.
>
> 2 The term also includes development declared under a State planning regulatory provision to be assessable development.
>
> 3 For a planning scheme area, the term also includes other development not prescribed under a regulation to be assessable development, but declared to be assessable development under any of the following that applies to the area—
>
> (a) the planning scheme for the area;
>
> (b) a temporary local planning instrument;
>
> (c) a preliminary approval to which section 242 applies.

[27] Development is defined in s 7 of the *Sustainable Planning Act 2009* as follows:

> "**7 Meaning of development**
>
> Development is any of the following—
>
> (a) carrying out building work;
>
> (b) carrying out plumbing or drainage work;
>
> (c) carrying out operational work;
>
> (d) reconfiguring a lot;
>
> (e) making a material change of use of premises."

[28] Each of those forms of development are defined in s 10 of the *Sustainable Planning Act 2009*. The definitions relevantly include:

> "***building work***—
>
> 1 *Building work* means—
>
> (a) building, repairing, altering, underpinning (whether by vertical or lateral support), moving or demolishing a building or other structure; or
>
> (b) work regulated under the building assessment provisions, other than IDAS; or
>
> (c) excavating or **filling**—
>
> (i) **for, or incidental to, the activities mentioned in subparagraph (a); or**
>
> (ii) **that may adversely affect the stability of a building or other structure, whether on the land on which the building or other structure is situated or on adjoining land**; or
>
> (d) supporting (whether vertically or laterally) land for activities mentioned in paragraph (a); and
>
> …
>
> ***operational work***—
>
> 1 *Operational work* means—
>
> (a) extracting gravel, rock, sand or soil from the place where it occurs naturally; or
>
> (b) conducting a forest practice; or
>
> (c) **excavating or filling that materially affects premises or their use**; or
>
> (d) placing an advertising device on premises; or
>
> (e) undertaking work in, on, over or under premises that materially affects premises or their use; or
>
> (f) clearing vegetation, including vegetation to which the Vegetation Management Act applies; or
>
> (g) undertaking operations of any kind and all things constructed or installed that allow taking or interfering with water, other than using a water truck to pump water, under the *Water Act 2000*; or

(h) undertaking—

(i) tidal works; or

(ii) work in a coastal management district; or

(i) constructing or raising waterway barrier works; or

(j) performing work in a declared fish habitat area; or

(k) removing, destroying or damaging a marine plant; or

(l) undertaking roadworks on a local government road.

2 ***Operational work* does not include**—

(a) **for item 1(a) to (f)** and (j), **any element of work that is**—

(i) **building work**; or

(ii) drainage work; or

(iii) plumbing work; or

(b) clearing vegetation on—

(i) a forest reserve under the *Nature Conservation Act 1992*; or

(ii) a protected area under the *Nature Conservation Act 1992*, section 28; or

(iii) an area declared as a State forest or timber reserve under the *Forestry Act 1959*; or

(iv) a forest entitlement area under the *Land Act 1994*.

…"

(emphasis added)

[29] These provisions were repealed on 3 July 2017 when the *Planning Act 2016* commenced.

The applicable statutory regime from 3 July 2017

[30] The development offence in s 163 of the *Planning Act 2016* was created when chapter 5, part 2 of the *Planning Act 2016* took effect on 3 July 2017.

[31] Section 163 of the *Planning Act 2016* states:

"**163 Carrying out assessable development without permit**

(1) A person must not carry out assessable development, unless all necessary development permits are in effect for the development.

Maximum penalty—

(a) if the assessable development is on a Queensland heritage place or local heritage place—17,000 penalty units; or

(b) otherwise—4,500 penalty units.

(2) However, subsection (1) does not apply to development carried out—

(a) under section 29(10)(a); or

(b) in accordance with an exemption certificate under section 46; or

(c) under section 88(3)."

[32] Section 29(10)(a) of the *Planning Act 2016* relates to an agreement to carry out development under a superseded planning scheme.

[33] Section 46 of the *Planning Act 2016* provides for an exemption certificate to be issued for assessable development in three circumstances. One circumstance is where the effects of the development would be minor or inconsequential considering the circumstances under which the development was categorised as assessable development.

[34] Section 88(3) of the *Planning Act 2016* permits the use of security for a lapsed development approval to finish the development despite the lapse of the approval.

[35] In addition to those specific exemptions, pursuant to s 161 of the *Planning Act 2016*, the offence in s 163 is subject to any exemption under that chapter 5 part 2 or chapter 7 part 1 of the *Planning Act 2016*.

[36] The importation of fill onto the land is only a development offence under s 163 of the *Planning Act 2016* to the extent it was "*carried out*" after 3 July 2017. The Council accepted this.

[37] Assessable development is defined in s 44(3) of the *Planning Act 2016* as "*development for which a development approval is required*".

[38] Development is defined in Schedule 2 of the *Planning Act 2016* as:

"(a) carrying out—

(i) building work; or

(ii) plumbing or drainage work; or

(iii) operational work; or

(b) reconfiguring a lot; or

(c) making a material change of use of premises."

[39] Each of those forms of development are defined in Schedule 2. Relevantly:

"***building work***—

(a) means—

(i) building, repairing, altering, underpinning (whether by vertical or lateral support), moving or demolishing a building or other structure; or

Example—

building a retaining wall

(ii) works regulated under the building assessment provisions; or

(iii) excavating or **filling for, or incidental to, the activities stated in subparagraph (i)**; or

(iv) excavating or **filling that may adversely affect the stability of a building or other structure, whether on the premises**

> **on which the building or other structure is situated or on adjacent premises**; or
>
> (v) supporting (vertically or laterally) premises for activities stated in subparagraph (i); and
>
> …
>
> ***operational work*** means **work**, **other than building work** or plumbing or drainage work, in, on, over or under premises **that materially affects premises or the use of premises**"
>
> (emphasis added)

[40] Pursuant to s 44(5) of the *Planning Act 2016*, a categorising instrument may categorise development as assessable development.

The evidence about the works and their impact

[41] The Council alleges that Mr Benfer was carrying on operational works involving the importation of 10 299 cubic metres of fill onto his land between May 2014 and September 2017.

[42] The Council's allegations are not premised on each delivery of fill. Rather, it says the offence is constituted by Mr Benfer's course of conduct during the period between May 2014 and September 2017.

[43] In that respect the Council notes that in *Bentley v BGP Properties Pty Ltd*[3], Smart AJ in the New South Wales Court of Appeal said:

> "**Environmental offences are notoriously difficult of proof**. While the damage caused to a particular area is often all too evident, the prosecuting authority by its officers, is not present when the actual damage is caused …
>
> …I would adhere to the statements of principle that for continuing offences and facts so related that they amount to one activity and that **where an offence is defined in the terms of a course of conduct or state of affairs, the prosecution can rely on a series of closely related acts (or omissions) and is not confined to relying on one act. Nor would I question that the acts or omissions relied upon by the prosecution may take place continuously or intermittently over a period of time**. These principles are of appreciable importance in relation to environmental offences. Damage of consequence may be caused by several acts in combination, whereas damage caused by one act may be inconsequential…".

[44] The Council relies on five pieces of evidence to establish the alleged quantum of fill and the period over which it was imported.

[45] First, the Council relies on a LiDAR recording of spatial data of the land obtained during March and April 2014 and a recording taken by an unmanned aerial vehicle survey carried out on 24 April 2018. The comparison between the data from those recordings shows a change in surface levels of the land.

[46] Mr Cleinwerck, a qualified surveyor retained by the Council, opined that the comparison revealed a net increase in the volume of fill on the land of 10 299 cubic metres between those dates.

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3 (2005) 139 LGERA 449, [55]-[56] (emphasis added).

[47] The Council does not have any details of the volumes of fill introduced prior to 3 July 2017 or after that date.

[48] Second, the Council relies on a series of aerial photographs of the land. The photos taken on 11 August 2013 and 3 November 2013 provide an appreciation of the state of the land prior to the LiDAR recording in March and April 2014.

[49] The photos taken on 5 May 2014, 17 June 2014, 1 September 2014, 22 April 2015, 25 May 2016, 22 September 2016, 17 February 2017 and 31 May 2017 show what appears to be periodic introduction of piles of fill that are then, over time, progressively spread across the land.

[50] Similarly, the photo taken on 25 July 2017, when compared to that taken on 31 May 2017, indicates that further fill was introduced at some time between 31 May 2017 and 25 July 2017. However, there is no evidence about the extent of that fill or evidence about whether it was introduced before or after 3 July 2017.

[51] The photo taken on 9 September 2017 indicates that there are new mounds of fill at the north-eastern corner. The aerial extent of the fill appears also to have expanded, indicates that there was continuing works spreading the fill across the land.

[52] From the aerial photo of 8 December 2017, it would seem the works had ceased by that date. Grass was starting to grow on part of the filled areas.

[53] Third, the Council relies on photos of the land taken by Council's officers on 14 June 2017 and 18 August 2017 and exhibited to an affidavit of Mr Kemp. The Council says a comparison between those photos demonstrates that further amounts of fill were imported onto the land between those dates.

[54] Fourth, the Council relied on emails received by the Council on 13 June 2017 about daily dumping, and on 9 August 2017 raising concerns about fill being delivered by up to 20 trucks per day, causing dust and noise issues.

[55] The Council did not rely on those emails for the truth of their contents, given they did not call evidence from the person who sent the email. However, the Council submits that, having regard to the emails, it is reasonable to infer that the works were continuing at the time when the complaints were made. The Council submits a person would only be driven to lodge a complaint with the Council if the offending conduct had not ceased.

[56] Fifth, the Council relied on an affidavit from Mr Burke. It attaches a surplus soil recipient register which records that contractors for the Council delivered a total of 98 cubic metres of fill to the land between 25 May 2016 and 24 June 2016.

[57] With respect to the impact of the works, the Council relied on evidence from Mr Rowlands, an engineer retained by the Council. He opines that the land is subject to regional flooding as well as flooding from a local catchment with an approximate size of 33 hectares.

[58] Mr Rowlands explains that impacts on flooding characteristics from filling may be either direct or cumulative. He says direct impacts occur when the filling either restricts the available flowpath for flood waters or displaces the volume available for storage of floodwaters to such an extent that direct measurable impacts can be expected to occur on adjacent land. Cumulative impacts refer to the situation where

filling at a particular location in isolation may not cause direct impacts but if the same approach was adopted at other sites within the floodplain then cumulatively the combined effect of similar works on multiple sites could be expected to cause significant impacts on land within the floodplain.

[59] With respect to regional flooding impacts, Mr Rowlands opines that the alleged filling occurred on the edge of the flood extent for the 1% Annual Exceedance Probability ("*AEP*") event and that the depth in this location was relatively shallow. He notes that the flood gradient at the land is very flat, meaning that flood levels do not change rapidly as you progress downstream from the land. He considered that to be consistent with the wide flood extent at this location. It is indicative of low velocities.

[60] Mr Rowlands opines that the combination of shallow flood depths, low velocities, a wide floodplain and the location of the filling at the edge of the flood extent indicate a low likelihood that the filling would lead to direct flood impacts on adjacent land. He explains that the filling is small relative to the total available flood storage volume at this location. The low velocities and location of the filling mean that reductions in the flood conveyance are unlikely to be significant.

[61] Mr Rowlands also says that the filling activities have significantly reduced flood storage volume available on the land. He says that if this same relative reduction in flood storage was applied to other rural properties within the floodplain, it is highly likely that the outcome would be increased flood levels throughout the floodplain because of cumulative flood impacts.

[62] With respect to local flooding, Mr Rowlands opines that the filling did not interfere with the flowpath of the local catchment through the land, apart from a culvert crossing near the public road at the northern end of the land.

[63] Mr Rowlands concludes that the earthworks on the land are unlikely to lead to direct flood impacts on adjacent land in either a regional or local flood event.

[64] Finally, the Council relied on evidence from Mr McDonald, a registered civil engineer with experience in earthworks and haulage operations on the Sunshine Coast.

[65] Mr McDonald explained that in his experience a single 20 or 30 tonne excavator on a typical site can load around 1 000 to 2 000 cubic metres of fill per day. A standard truck and trailer can hold around 20 cubic metres of loose fill, which equates to around 16 cubic metres of solid fill. (The excavation and loading process loosens the fill material.) He says that to maintain an efficient loading from a work site, around 60 to 120 truckloads would typically leave a site per day.

[66] Mr McDonald opines that for 10 299 cubic metres of fill, an excavator would need to be on the premises for between 6 and 11 days. He says 644 truckloads (being a truck and trailer) would be required to remove 10 299 cubic metres of fill from the land.

[67] In light of those matters, Mr McDonald regards six months to be a "*very comfortable period*" for removal of the fill. He explains that such a timeframe also makes allowances for matters such as some inactivity due to wet weather, truck breakdown or unavailability, the location of the land (and the time it may take for a truck to do a round trip to dispatch the fill), the condition of the local road network and the

concerns raised by local residents about annoyance caused by large numbers of truck movements.

[68] None of the Council's witnesses were required for cross-examination by Mr Benfer. However, Mr Benfer himself gave evidence.

[69] During his evidence, Mr Benfer addressed the content of the photos exhibited to Mr Kemp's affidavit. He said that the fill depicted in the photos taken on 14 June 2017 and 18 August 2017 was not delivered to the site after 3 July 2017. The Council's contractors delivered it between 25 May 2016 and 24 June 2016. Mr Benfer explained that he used his bobcat to move the fill from where the contractors placed it. He did this to address his neighbour's concerns about it obstructing sightlines from his driveway.

[70] Mr Benfer also gave evidence that he had no fill delivered to his property after 3 July 2017. However, during cross-examination the following exchange occurred:

> "When did the last fill delivery of soil come to your land?---Well, I can't answer that question. The day Troy Kemp showed up.
>
> The day Troy Kemp showed up. Okay, and do you say you can't recall that date?---No.
>
> But the last delivery of soil happened when he showed up?---Yes.
>
> Yes. Mr Kemp put on an affidavit, that he attended your property on the 7th of August 2017?---Mmm.
>
> So do you accept that you – the last delivery of soil happened on that date? That was your evidence, that it happened when Mr Kemp showed up. That was the last delivery of soil, and he showed up on the 7th of August 2017?---Seventh of August?
>
> Yes?---Well that would be correct, if that's the day he delivered the show cause notice.
>
> So it's correct that the last delivery of spill happened at that time?---Mmm.
>
> …
>
> MS STEPHANOS: When those last deliveries occurred, how many trucks were delivering the fill?---In number of loads, or the number of trucks?
>
> Number of trucks?---One truck.
>
> One truck. One truck, on the 7th of August, or about that date?---But I don't know how many loads he delivered.
>
> What's the difference between trucks and loads?---Well, as they had a load, they'd bring it in, deliver it and they might only bring in one load per day, sometimes they might bring in five.
>
> So they might've brought in five loads per day, which would require five trucks; is that correct?---No, the same truck.
>
> HER HONOUR: Same truck goes back and forth.
>
> MS STEPHANOS: Forth.
>
> HER HONOUR: It's the rego that she's - - -
>
> MS STEPHANOS: I understand.
>
> HER HONOUR: I think Mr Benfer's getting at, which is why, I suspect, he clarified the question "are you talking trucks or loads" and there was only

one truck going back and forth, is what I took him to be – the purpose of his question.

MS STEPHANOS: I understand. I wish I was as quick as your Honour.

So five loads per day means the same truck delivered more than one load per day. They – the same truck returned to your property to deliver five loads of fill. Is that your evidence?---Sometimes it might be five, as I said, you know, sometimes it might be 10.

It's five, six, or 10?---But it wasn't every day. It varied from day to day.

And I suggest to you that that was occurring, up until you stopped having fill delivered, when Mr Kemp attended your property; is that correct?---That's correct, yes.

So you were having five, six, sometimes 10, a day, up to the point in time when Mr Kemp attended your property and handed you the show cause notice; is that correct?---Not every day, no.

Not every day, but at that time, that was occurring?---Well, I – I haven't got any record of that any more, as to how many particular loads were delivered prior to him coming to my property.

Would you accept that, up until that time, approximately five, sometimes six, were still coming to the property? Not necessarily every day, but when he attended in August, it was still – there were still deliveries continuing, at that time?---Yes, yes. Yes.

Yes, and a number of - - -

HER HONOUR: I don't understand what you mean by the up until that day, I'm – so - - -

MS STEPHANOS: So up until Mr Kemp attended on the 7th of - - -

HER HONOUR: But from what period, until that day? Like, up until from when he owned the property, or up until from a particular date, or – the timeframe - - -

MS STEPHANOS: Just in the month of August, when Mr Kemp attended on the 7th of August, around – between the end of July and early August, were – those trucks were still delivering – that - - -?---That was – would be correct.

That would be correct?---Yeah. If that's the correct date. I don't know the exact date that the show cause notice was delivered.

Do – you heard the evidence that complaints were made about deliveries of trucks, to your soil?---Yes, I saw it in the affidavit, yes.

Yes, and do you accept that the persons making the complaint, would have reason to make the complaint, based on the deliveries of trucks going past their – to your property?---Well I guess so, but - - -

Because there was a number of trucks; is that correct?---Yeah, because there's a number of trucks, yes. But if they made a complaint after that particular day, that's incorrect.

Yes. Yep.

HER HONOUR: What was that last – sorry, I missed what you said. If they made a complaint - - -?---If they made a complaint after that particular day, it's incorrect.

After the day of the show cause notice?---Yes.

> Is that what you were referring to - - -?---Yes.
>
> - - - when you say that particular date?---Yes.
>
> I think you have Mr Kemp's affidavit. I was just trying to see if it had the – does Mr Kemp's affidavit say the date that he delivered the show cause notice?
>
> MS STEPHANOS: Yes. It does, your Honour.
>
> HER HONOUR: It does. Okay. Thank you.
>
> MS STEPHANOS: It was the 7th of August 2017."

What was assessable development?

[71] During the alleged period of offending prior to 3 July 2017, two planning schemes applied. The Maroochy Plan 2000 was in effect prior to the commencement of the works and up to 21 May 2014. The Sunshine Coast Planning Scheme 2014 superseded it. It remains in effect.

[72] Under the Maroochy Plan 2000, the land was mapped as within the Sustainable Cane Lands Planning Area. It was also included in a Flood Prone and Drainage Constraint Area on Regulatory Map 1.5 and, as such, was a Special Management Area under that planning scheme.

[73] Pursuant to Table 5.2 in Maroochy Plan 2000, operational work being filling of more than 50 cubic metres was assessable development. Pursuant to Table 6.2, any filling exceeding 50 cubic metres in the Flood Prone and Drainage Constraint Area was assessable development, whether it was building work or operational work.

[74] From 21 May 2014, the Sunshine Coast Planning Scheme 2014 applied. It sets the level of assessment by reference to:

(a) the zone or local plan area in which the land is located;

(b) the type of development to be undertaken, such as building work or operational work; and

(c) any changes to the level of assessment made by virtue of inclusion of the land on an overlay.

[75] Under the Sunshine Coast Planning Scheme 2014, the land was mapped as within the Rural Zone and was largely within a Flood and Inundation Area on the Flood Hazard Overlay Map.

[76] Table 5.8.1 - Operational work identified the level of assessment for operational work. It contained the following potentially relevant entries:

OPERATIONAL WORK – ALL ZONES	
Development	**Level of assessment**
Operational work involving *filling or excavation* (other than the placement of topsoil) associated with a material change of use or reconfiguring a lot.	**Exempt development** if: (a) involving cumulative *filling or excavation* of not more than $50m^3$ of material; **OR** (b) in an identified drainage deficient area; and

	(c) involving filling undertaken in accordance with a current drainage deficient area flood information certificate issued by the *Council*; **OR** (d) on *Council* owned or controlled land and undertaken by or on behalf of the *Council*; and (e) the associated change of use is accepted development.
	Self assessable development if the associated change of use is self assessable development.
	Code assessable if not otherwise specified.
Operational work involving *filling or excavation* (other than the placement of topsoil) not associated with a material change of use or reconfiguring a lot.	**Exempt development** if: (a) involving cumulative *filling or excavation* of not more than $50m^3$ of material; **OR** (b) in an identified drainage deficient area; and (c) involving filling undertaken in accordance with a current drainage deficient area flood information certificate issued by the *Council*; **OR** (d) on *Council* owned or controlled land and undertaken by or on behalf of the *Council*; **OR** (e) on a lot having an area greater than $5,000m^2$; (f) the lot is included in the Rural zone or Rural residential zone; and (g) cumulatively involving not more than $150m^3$ of material.
	Code assessable if not otherwise specified.

[77] Table 5.10.1 - Overlays identified where an overlay changed the level of assessment from that stated in a zone or local plan. It contained the following potentially relevant entries for development of land identified on the Flood Hazard Overlay:

Development subject to overlay	**Level of assessment**
Flood hazard overlay	
Operational work if:- (a) within a flood and inundation area as identified on a Flood Hazard Overlay Map; and (b) involving:- (i) any physical alteration to a *waterway* or floodway, including *vegetation clearing*; or (ii) filling cumulatively exceeding $50m^3$.	**Code assessable** if: (a) involving *filling or excavation*; and (b) provisionally made exempt development by the table of assessment in Section 5.8 (Level of assessment – operational work); other than:- (c) where on *Council* owned or controlled land; and (d) undertaken by or on behalf of the *Council*.
	No change if not otherwise specified above.

Building work not associated with a material change of use, other than *minor building work*, if within a flood and inundation area as identified on a Flood Hazard Overlay Map.	**No change**

[78] The Council's evidence did not include a copy of the table of assessment for building work in the Rural zone.

[79] The Sunshine Coast Planning Scheme 2014 defined "*filling or excavation*" as:

> "The removal or importation of material to or from a lot or the relocation of material within a lot that will change the ground level of the lot."

[80] From those provisions of the Sunshine Coast Planning Scheme 2014 placed before the court, it is not evident whether import of fill that constituted building work was assessable development. However, the import of fill onto the land that constituted operational work was assessable development if it did not involve the placement of topsoil and it involved cumulative filling of more than 50 cubic metres.[4]

[81] From 3 July 2017, the relevant categorising instrument was the Sunshine Coast Planning Scheme 2014. While that planning scheme was amended, no relevant changes were made, other than to change the terminology to be consistent with the *Planning Act 2016*.[5]

The appeal against the enforcement notice

[82] As I noted at paragraph [13] above, Mr Benfer lodged his appeal against the decision to give an enforcement notice on 18 October 2017. It is an appeal under s 229 of the *Planning Act 2016*.

[83] The appeal is by way of hearing anew.[6] The Council has the onus. It is for the Council to establish that the appeal should be dismissed.[7]

[84] In deciding the appeal, the court may confirm the decision appealed against, change it, or set it aside and either make a decision replacing it or return the matter to the Council with directions considered appropriate.[8]

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4 Although the "development subject to overlay" column in the table of assessment for the Flood hazard overlay does not refer to filling that involves topsoil, the relevant entry only changes the level of assessment for filling that cumulatively exceeds 50 cubic metres if it is otherwise made exempt in Section 5.8. The type of filling made exempt under section 5.8 is, relevantly, filling (other than the placement of topsoil) on a lot having an area greater than 5,000 square metres in the Rural zone that cumulatively involves not more than 150 cubic metres of material. All other filling (other than the placement of topsoil) is code assessable. The level of assessment is only changed for filling to which the exempt cell in the table applies. The change effectively reduces the extent of fill that can be involved from 150 cubic metres to 50 cubic metres. The placement of topsoil remains unregulated.

5 For example, the reference to level of assessment was changed to category of development and category of assessment.

6 *Planning and Environment Court Act 2016*, s 43.

7 *Planning and Environment Court Act 2016*, s 45.

8 *Planning and Environment Court Act 2016*, s 47.

[85] The relief sought by Mr Benfer in his Notice of Appeal is that the enforcement notice be set aside or otherwise permanently stayed. In the Notice of Appeal, Mr Benfer advanced three grounds on which he says the relief should be granted, namely:

(a) the enforcement notice does not comply with s 168(3)(a) of the *Planning Act 2016* because it fails to state the nature of the alleged offence;

(b) it is unreasonable to require Mr Benfer to remove approximately 10 000 cubic metres of fill from the land; and

(c) in the alternative, if it was reasonable for the Council to require Mr Benfer to remove the fill from the land, the prescribed timeframes for its removal are too short having regard to the volume of fill on the land.

[86] The Council concedes that the enforcement notice should be changed to allow a reasonable time for removal of the fill. It submits that the timeframe should be enlarged to six months. It otherwise resists the setting aside of the enforcement notice and contends that the enforcement notice was valid.

Did the enforcement notice comply with s 168 of the *Planning Act 2016*?

[87] Section 168 of the *Planning Act 2016* states:

> "(1) **If an enforcement authority reasonably believes a person has committed**, or is committing, **a development offence**, **the authority may give an enforcement notice** to—
>
> (a) the person; and
>
> (b) if the offence involves premises and the person is not the owner of the premises—the owner of the premises.
>
> (2) An ***enforcement notice*** is a notice that requires a person to do either or both of the following—
>
> (a) to refrain from committing a development offence;
>
> (b) to remedy the effect of a development offence in a stated way.
>
> *Examples of what an enforcement notice may require—*
>
> The notice may require a person do any or all of the following on or before a stated time or within a stated period—
>
> - to stop carrying out development
> - to demolish or remove development
> - to restore, as far as practicable, premises to the condition the premises were in immediately before development was started
> - to do, or not to do, another act to ensure development complies with a development permit
> - if the enforcement authority reasonably believes works are dangerous, to repair or rectify the works, to secure the works, or to fence the works off to protect people
> - to stop a stated use of premises
> - to apply for a development permit
> - to give the enforcement authority a compliance program that shows how compliance with the enforcement notice will be achieved.

(3) **The notice must state**—

(a) **the nature of the alleged offence**; and

(b) if the notice requires the person not to do an act—

(i) the period for which the requirement applies; or

(ii) that the requirement applies until further notice; and

(c) if the notice requires the person to do an act—

(i) the details of the act; and

(ii) the period within which the act must be done; and

(d) that the person has an appeal right against the giving of the notice.

(4) **The notice may require** demolition or **removal of all or part of works if the enforcement authority reasonably believes it is not possible or practical to take steps**—

(a) to make the development accepted development; or

(b) **to make the works comply with a development approval**; or

(c) if the works are dangerous—to remove the danger.

(5) A person must not contravene an enforcement notice.

Maximum penalty—4,500 penalty units.

(6) An enforcement notice that requires development on premises to stop being carried out may be given by fixing the notice to the premises in a way that a person entering the premises would normally see the notice.

(7) A person must not deal with an enforcement notice stated in subsection (6) in a way that is reasonably likely to prevent the recipient seeing the notice.

Maximum penalty—4,500 penalty units."

(emphasis added)

[88] Mr Benfer alleges that the enforcement notice does not comply with s 168(3)(a) of the *Planning Act 2016* because it fails to state the nature of the alleged offence in circumstances where it does not identify:

(a) the type of development which Mr Benfer is alleged to have carried out without a development permit;

(b) the specific provisions of the planning scheme which make the development assessable development for which a development permit is required; and

(c) the dates, times or periods of time on which the alleged development offence was committed.

[89] It is apparent from the face of the enforcement notice that:

(a) the only indication of the type of development that Mr Benfer is alleged to have carried out is the statement that he imported 10 000 cubic metres of fill;

(b) the only provision of the planning scheme referred to was the Flood and Inundation Area in the Sunshine Coast Planning Scheme 2016; and

(c) there was no reference to the dates, times or periods of time during which the development offence was alleged to have been committed.

[90] In understanding the level of particularity with which the nature of the alleged offence should be identified, there are three relevant matters of context.[9]

[91] First, identification of the nature of the alleged offence is the foundation on which the enforcement notice provision is built. The power to give an enforcement notice is triggered upon an enforcement authority forming a reasonable belief that a person has committed, or is committing, a development offence.

[92] The development offence also informs the legitimacy of the actions that the enforcement notice requires the recipient to take. In order to appreciate whether the actions required could be properly considered to be requirements to refrain from committing a development offence or remedy the effect of a development in a particular way, it is necessary to have an appreciation of the nature of the alleged development offence in question.

[93] Similarly, in order for an enforcement authority to form a belief on whether it is possible or practical to take steps to make the works "*accepted development*" or to make the works comply with a development approval, the enforcement authority must have a detailed appreciation of the nature of the alleged offence.

[94] Second, under s 229 of the *Planning Act 2016*, a recipient of an enforcement notice can appeal against the decision to give it. This indicates that one purpose of the requirement in s 168(3)(a) is to allow the recipient to understand the basis of the decision to issue the enforcement notice. One could readily anticipate that a basis of appeal may be that the offence was not committed. As such, the purpose of the requirement in s 168(3)(a) will not be fulfilled unless the enforcement notice gives the recipient sufficient indication of what is alleged against him or her on the occasion when he or she is said to have committed the offence. The notice should enable the recipient to know the nature of the alleged offence that he or she is called on to meet.[10] It should identify the essential factual ingredients of the offence alleged.[11]

[95] The third relevant contextual matter is that non-compliance with the enforcement notice can result in the imposition of penalties. Under s 168(5) of the *Planning Act 2016*, it is an offence to contravene an enforcement notice. This indicates that the enforcement notice should set out the nature of the alleged offence, and the details of the actions required with respect to it, with sufficient certainty and particularity so that a person of ordinary intelligence and experience can ascertain from the document exactly what is required.

[96] The Council accepts that an offence should be identified with precision. It accepts an accused is entitled to be apprised of the precise case that is the basis of the charge against them. However, it submits that the enforcement notice contains sufficient

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9 *Sztal v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 347 ALR 405, [14], references omitted. See also Kiefel CJ, Bell and Nettle JJ in *SAS Trustee Corporation v Miles* [2018] HCA 55; (2018) 361 ALR 206, [20].

10 cf. *R v Juraszko* [1967] Qd R 128, 135; *S v The Queen* [1989] HCA 66; (1989) 168 CLR 266.

11 *Marshall v Averay* [2006] QDC 356; [2007] QPELR 137, 141 [17].

particulars regarding the nature of the offence and complies with s 168(3)(a) of the *Planning Act 2016*.

[97] Mr Benfer's appeal does not allege that the enforcement notice was deficient due to the absence of its reference to s 578 of the *Sustainable Planning Act 2009*. This is unsurprising given that, at the time he filed his appeal, there was no suggestion that he had committed an offence under s 578 of the *Sustainable Planning Act 2009*. Even on the first day of hearing of his appeal, the Council adopted a position, as evidenced in its Outline of Submissions, that the enforcement notice contained sufficient particulars as it identified the specific provision creating the alleged offence, being s 163 of the *Planning Act 2016*.

[98] When the hearing resumed on 30 January 2019, it was the Council's position that, in addition to the reference to s 163 of the *Planning Act 2016*, the enforcement notice should have referred to the offence under s 578 of the *Sustainable Planning Act 2009.*

[99] Despite this concession, the Council maintains that the enforcement notice should not be set aside. It submits that the absence of a reference to a development offence under the *Sustainable Planning Act 2009* is not fatal to the enforcement notice in this case for four reasons.

[100] First, the Council was authorised to give an enforcement notice under s 168 of the *Planning Act 2016* in respect of the development offence committed under both the *Sustainable Planning Act 2009* and the *Planning Act 2016*.

[101] I accept this to be so. Section 310 of the *Planning Act 2016* confers authority to issue an enforcement notice under the *Planning Act 2016* for a development offence under the *Sustainable Planning Act 2009*. It states:

> "**310 Show cause notices and enforcement notices**
>
> An enforcement authority may give a show cause notice under section 167, or an enforcement notice under section 168, as if a reference to a development offence in the section included a reference to a development offence under the old Act."

[102] Second, the Council submits that as s 168(3)(a) of the *Planning Act 2016* only requires the nature of the alleged offence to be identified, and not the legislative provision relied upon in respect of the alleged offence, the enforcement notice was sufficient. The enforcement notice identified the offence as "*Carrying out assessable development without permit*". That description of the offence is consistent with the offence as it appears in both s 163 of the *Planning Act 2016* and s 578 of the *Sustainable Planning Act 2009*.

[103] In support of this submission, the Council referred me to the High Court's decision in *New South Wales v Corbett & Anor*.[12] It relied on the case as authority for the proposition that it was the nature of the offence that was critical, not the reference to the section of the repealed legislation.

[104] That case related to the validity of a search warrant issued under the *Search Warrants Act 1985* (NSW). Section 5(1)(b) of that Act provided for the making of an application for a search warrant where there are reasonable grounds for believing that there is in or on any premises "*a thing connected with a particular firearms offence*."

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12 [2007] HCA 32; (2007) 230 CLR 606.

The application was alleged to be invalid because it contained a reference to a particular firearms offence by reference to a section in legislation that had been repealed and replaced by new firearms legislation.

[105] Relevantly, with respect to the incorrect reference to the legislation, Callinan and Crennan JJ (with whom Gleeson CJ and Gummow J agreed) said:[13]

> "**[105]** Section 5(1)(b) should be construed by reference to the principle that the applicant is required to state reasonable grounds for believing in a particular offence so as to ensure that the issuing justice knows the specific object of the search warrant and accordingly limits its scope. Strict compliance, in the sense described in *Rockett*, is achieved when that purpose is fulfilled. To invalidate the warrant here because of the incorrect reference in the application would not serve that purpose.
>
> **[106]** Here, the application state an intelligible offence, namely "possession of a firearm", an offence which had been well known in New South Wales for decades. Prior to the Act, successive firearms legislation contained provisions for obtaining search warrants in respect of firearms. The reasonable belief, which the applicant was required by statute to have, and state, was a reasonable belief that there was "a thing" (here, "unspecified firearms") connected with "a particular firearms offence" (here, "possession of firearm). It was the nature of the offence which was critical, not the reference to the section of repealed legislation which had been replaced with cognate legislation. The nature of the offence had to be stated sufficiently to enable the issuing justice to understand the object of the search and to appreciate the boundaries of the authorisation to enter, search and seize.
>
> **[107]** Here there could be no mistake about the object of the search or about the boundaries of the search warrant. Given the construction of s5(1)(b) stated above, the Court of Appeal erred in its approach. The reference to the repealed Act in the application form was mere surplusage, which did not detract from the statement of the nature of the offence or render the description of the object of the search unintelligible or ambiguous. Accordingly, the applicant complied with the statutory requirements and the warrant is not invalidated by the description of the offence in the application form."

[106] As I have noted above, the identification of the nature of the alleged offence is central to the power conferred by s 168 of the *Planning Act 2016*. That is different to the provision considered in *New South Wales v Corbett & Anor*,[14] where the purpose of the provision was the identification of the object of the search warrant, not the identification of the offence itself.

[107] Here, I do not accept that the failure to refer to s 578 of the *Sustainable Planning Act 2009* was immaterial for three reasons.

[108] First, as I have already explained, the identification of the relevant development offence is central to the operation of s 168 of the *Planning Act 2016*.

[109] Second, although the description "*Carrying out assessable development without permit*" is consistent with both s 578 of the *Sustainable Planning Act 2009* and s 163 of the *Planning Act 2016*, the offences are different. They apply over different periods. The former only applies to carrying out assessable development without a

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13 [2007] HCA 32; (2007) 230 CLR 606, [105] – [107], footnotes omitted.

14 [2007] HCA 32; (2007) 230 CLR 606.

permit before 3 July 2017 and the latter from that date. They also contain different exceptions.

[110] Third, the absence of the reference to s 578 of the *Sustainable Planning Act 2009* is a material omission because the enforcement notice made no reference to the dates, times or periods of time during which the development offence was alleged to have been committed. In the absence of a reference to any period prior to 3 July 2017, Mr Benfer had no notice that the Council was alleging offending against the *Sustainable Planning Act 2009*. (In fact, having regard to the Outline of Submissions at the first hearing, at the time of issuing the enforcement notice, the Council was not alleging the commission of the offence under the *Sustainable Planning Act 2009*).

[111] The Council's third argument is that the conduct relied upon to allege the offence is precisely the same under both the *Sustainable Planning Act 2009* and the *Planning Act 2016*. It says there did not need to be new, or additional, facts or particulars given in the enforcement notice about the Mr Benfer's conduct in order to identify the nature of the offence. I disagree.

[112] Although there are similarities in the facts that must be established to demonstrate an offence under each of the provisions, they are not identical. The key difference relates to the timing of the import of the fill.

[113] Ordinarily, time is not an essential factual allegation with respect to the commission of an offence. However, there are instances where it will be material. As Derrington J observed in *R v Jacobs*[15]:

> "… Subject to the qualification discussed below, time is not and never was an element of an offence charged except where it has some essential relation to the charge, such as where a limitation is operative or where the very existence of an offence or defence at a certain time is relevant. The particulars in the indictment as to time have the purpose only of giving to an accused person "every fair opportunity to prepare his defence to what is charged and particularised against him"."

[114] Here, in the absence of a reference to both provisions, the enforcement notice needed to refer to the import of more than 50 cubic metres of fill (other than topsoil) both prior to 3 July 2017 and after that date.

[115] The Council's fourth argument is that Mr Benfer has not suffered any prejudice arising from the absence of the reference to s 578 of the *Sustainable Planning Act 2009*. It says the relief sought in respect of the both offences is the same: the Council simply desires the removal of all fill unlawfully imported onto the land. The Council is not pursuing a different remedy for each offence.

[116] I reject this submission. It is difficult to appreciate how there is no prejudice arising from a failure to comply with the requirement to identify the nature of the alleged offence when the identification of the offence is central to the powers conferred by the provision. While there may be exceptional cases in which no prejudice might be demonstrated, in this case the absence of a date range coupled with the absence of a reference to both of the offences left Mr Benfer in a position where he had no knowledge of one of the offences that he was required to remedy. At the very least, this inhibited his ability to file an appeal that challenged the allegations.

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15 (1993) 2 Qd R 541, 542.

[117] In this case, the prejudice is not addressed by now pointing to the evidence about the nature and extent of the works, or to admissions made by Mr Benfer that he imported the fill. Those admissions were made prior to any notice from the Council that it now alleged he committed an offence under the *Sustainable Planning Act 2009*.

[118] This is not a case where, on the hearing anew, the Council conceded that the enforcement notice should be set aside and requested it to be changed to correct the deficiencies to insert allegations about offending under the *Sustainable Planning Act 2009*. The Council does not concede that the deficiencies justify the enforcement notice being set aside. It has chosen to defend the proceedings on the basis that the only change required to the enforcement notice is the timeframe within which the remedial works should occur.

[119] I am not satisfied that the absence of reference to s 578 of the *Sustainable Planning Act 2009* coupled with the absence of reference to the dates, times or periods of time during which the development offence was alleged to have been committed do not warrant setting aside the enforcement notice.

[120] Further, and in any event, I am not satisfied that the enforcement notice otherwise sufficiently particularised the nature of the offence for the purpose of s 168(3)(a) of the *Planning Act 2016*.

[121] In this case, allegations that are material to the alleged offence under s 578 of the *Sustainable Planning Act 2009* include:

(a) more than 50 cubic metres of fill (other than topsoil) was imported onto the land between May 2014 and 2 July 2017;

(b) the import of fill was operational work;

(c) the operational work was assessable development; and

(d) there was no effective development permit for the development.

[122] With respect to the alleged offence under s 163 of the *Planning Act 2016*, allegations that are material include:

(a) more than 50 cubic metres of fill (other than topsoil) was imported onto the land between 3 July 2017 and September 2017;

(b) the import of fill was operational work;

(c) the operational work was assessable development; and

(d) there was no effective development permit for the development.

[123] Leaving aside the absence of reference to the period of the alleged offending, the enforcement notice contained no reference to the allegation now made that the filling constituted operational work that was assessable development.

[124] This is a material allegation given not all importation of fill constitutes operational work. As would be apparent from the definitions set out in paragraphs [28] and [39] above, under both the *Sustainable Planning Act 2009* and the *Planning Act 2016*, filling may constitute either building work or operational work. Further, with respect

to any operational work involving the import of fill after the commencement of the Sunshine Coast Planning Scheme 2014 on 21 May 2014, that fill only required a development approval if it did not involve the placement of topsoil. As such, this was also an allegation that was essential to the nature of each alleged offence.

[125] For those reasons, I am not satisfied that the enforcement notice sufficiently identified the nature of the alleged offence as required under s 168(3)(a) of the *Planning Act 2016*.

Was it unreasonable to require Mr Benfer to remove the fill?

[126] The second ground of appeal is that it is unreasonable to require the Appellant to remove approximately 10 000 cubic metres of fill from the land in circumstances where:

(a) Mr Benfer has indicated his willingness to take every step necessary to obtain a development permit to authorise the carrying out of the operational works;

(b) the operational works, being the placement of the fill, serve to improve the amenity and productive capacity of the subject land by providing flood mitigation; and

(c) the operational works do not increase the risk of flooding to the subject land or to any neighbouring property.

[127] The Council submits that this ground of appeal lacks merit and should fail.

[128] With respect to the risk of flooding, the Council submits that contrary to Mr Benfer's allegation:

> "… the affidavit evidence of Mr Rowlands reveals that the works have significantly reduced available flood storage volume on the land and the cumulative impacts of such filling is "*highly likely to result in significant increases in flood levels throughout the floodplain*.""

[129] The Council's submission is not reflective of the totality of Mr Rowland's evidence. The selective quote is disappointing. The filling Mr Rowlands says will likely result in significant increases in flood levels is not that undertaken by Mr Benfer, rather it is filling of a similar nature on other rural properties in the floodplain.

[130] Having regard to the totality of Mr Rowland's evidence, the effect of which I have summarised in paragraphs [57] to [63] above, I am satisfied that the import of fill by Mr Benfer does not increase the risk of flooding to the subject land or to any neighbouring property.

[131] The Council submits that Mr Benfer has not produced any evidence in support of his allegations about improved amenity and productive capacity of the subject land. That is not so.

[132] In his affidavit filed 30 October 2017, Mr Benfer deposes to being a fourth generation farmer of dairy, cattle and sugarcane in the Sunshine Coast area. He explains that he uses his land for grazing purposes. According to Mr Benfer, the fill was for flood minimisation, to alleviate cattle foot-rot and to ensure all-weather access. Mr Benfer's evidence in this regard was unchallenged and I accept it.

[133] Further, the evidence of Mr Rowlands supports the evidence of Mr Benfer that the works minimise the extent to which the land floods. This, self-evidently, would improve its amenity.

[134] The Council submits that if Mr Benfer's willingness to lodge a development application was genuine, he would have taken steps to do so. There is some force to this submission. However, the force of the submission is, in my view, tempered by two other considerations.

[135] First, as is apparent from the grounds in the notice of appeal, Mr Benfer did not understand the nature of the offence that he was required to remedy. He did not know the type of development he was alleged to have carried out, nor the basis on which it was said to be assessable.

[136] Second, Mr Benfer does not have the onus in the appeal. Having elected not to defend the appeal on the basis that the enforcement notice should be changed, other than with respect to timeframe for the removal of the fill, it is for the Council to establish that the enforcement notice should not be set aside.

[137] As the notice of appeal raised the prospect of a development application to authorise the works, it was incumbent on the Council to persuade the court, in accordance with s 168(4) of the *Planning Act 2016*, that it is not possible or practical to take steps to make the works comply with a development approval.

[138] The Planning Bill 2015 Explanatory Notes explains the rationale behind this limitation. It says:

> "*Subclause (4) is a limitation on a notice requiring the demolition or removal of all or part of a work. The effect of this subclause is to require an enforcement authority to consider reasonable alternatives before ordering demolition or removal of all or part of a building or other works in which there may be significant investment.*"

[139] In his affidavit, Mr Benfer deposes to the farm budget and his savings not extending to meet the cost of entirely removing the fill from the farm. His evidence was unchallenged and I accept it.

[140] Having regard to the absence of direct flood impact, Mr Benfer's willingness to lodge a development application and the matters referred to in paragraph [135] above, I am not satisfied that it is not possible or practical to take steps to make the works comply with a development approval.

Were the timeframes for removal of the fill reasonable?

[141] The third ground of appeal is that, in the alternative, if it was reasonable for the Council to require Mr Benfer to remove the fill from the land, the prescribed timeframes for its removal are too short having regard to the volume of fill on the land.

[142] As I have already noted in paragraph [86] above, the Council concedes that the enforcement notice should be changed to allow a reasonable time for removal of the fill. It submits that the timeframe should be enlarged to six months.

[143] Had the Council persuaded me that it was reasonable to require the removal of the fill, having regard to the evidence of Mr MacDonald, I accept that six months would be a reasonable timeframe.

Conclusion regarding the appeal against enforcement notice

[144] For the reasons provided above, the Council has not discharged the onus. The appeal should be allowed and the enforcement notice set aside.

The application for enforcement orders

[145] Originating Application No. 3339 of 2018 seeks enforcement orders requiring Mr Benfer to remove approximately 10 000 cubic metres of fill and reinstate the land to as close as practicable to natural ground level or such other satisfactory level as determined by him based upon reports by qualified and relevant persons. The relief is sought in relation to fill introduced onto the land between May 2014 and September 2017.

[146] The Council relies on two development offences to found its relief, namely:

(a) a development offence under s 578 of the *Sustainable Planning Act 2009* for operational work carried out between May 2015 and 2 July 2017; and

(b) a development offence under s 163 of the *Planning Act 2016* for operational work carried out between 3 July 2017 and September 2017.

[147] The issues raised for consideration are:

(a) whether the court has power to make an enforcement order that requires a person to remedy the effect of a development offence committed under the *Sustainable Planning Act 2009*;

(b) whether the Council has demonstrated the commission of a development offence under s 578 of the *Sustainable Planning Act 2009*;

(c) whether the Council has demonstrated the commission of a development offence under s 163 of the *Planning Act 2016*; and

(d) whether the court should grant the relief sought.

[148] During oral submissions, the Council conceded that, if the court does not have power to make an enforcement order with respect to a development offence under the *Sustainable Planning Act 2009*, no enforcement order should be made as the Council is unable to identify the extent of the fill imported after 3 July 2017.[16]

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16 Transcript 30 January 2019 T1-42/L38-43.

Power to grant enforcement orders

[149] Section 180(1) of the *Planning Act 2016* confers a right to start proceedings in the P&E Court for an enforcement order. "*Enforcement order*" is defined in schedule 2 of the *Planning Act 2016*, relevantly in this case, by reference to s 180(2). It states:

> "(2) An ***enforcement order*** is an order that requires a person to do either or both of the following –
>
> (a) refrain from committing a development offence;
>
> (b) remedy the effect of a development offence in a stated way."

[150] The courts power to make an enforcement order is enlivened where s 180(3) of the *Planning Act 2016* is satisfied. It states:

> "(3) The P&E Court may make an enforcement order if the court considers the development offence –
>
> (a) has been committed; or
>
> (b) will be committed unless the order is made."

[151] A "*development offence*" is defined in schedule 2 of the *Planning Act 2016* by reference to s 161. Section 161 of the *Planning Act 2016* is contained in chapter 5, part 2 and states:

> "**161 What part is about**
>
> This part creates offences (each a ***development offence***), subject to any exemption under this part or to chapter 7, part 1."

[152] Chapter 5 part 2 of the *Planning Act 2016* creates five offences. Those offences include an offence under s 163 of the *Planning Act 2016*. That part of the *Planning Act 2016* commenced on 3 July 2017.

[153] My attention was not drawn to any provision that stipulates that a development offence under the now repealed *Sustainable Planning Act 2009* is a development offence for the purposes of the *Planning Act 2016*. To the contrary, the Council accepts that the definition of "*development offence*" under the *Planning Act 2016* is tied by s 161 to an offence created in chapter 5, part 2 of that Act.[17]

[154] Nevertheless, in its Outline of Submissions dated 29 January 2019, the Council submits the court has jurisdiction to grant the relief it seeks because:

(a) the Council has established that a development offence has been committed for the purposes of the *Planning Act 2016* (pursuant to s 163 of the *Planning Act 2016*, relating to the works continuing after 3 July 2017) and the power in s 180(3) to make an enforcement order is therefore enlivened;

(b) the Council has established that a development offence was committed under the *Sustainable Planning Act 2009*;

(c) it is therefore clear that all of the 10 299 cubic metres of fill introduced onto the land (and relocated upon it) was done so unlawfully;

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[17] See *Caravan Parks Association of Queensland Ltd v Rockhampton Regional Council & Anor* [2018] QPEC 52.

(d) under each Act, the offences are precisely the same including:

(i) the nature of the offence;

(ii) the elements of the offence; and

(iii) the maximum penalty for the offence;

(e) there was therefore no legislative intent to change the offence or the consequences of committing the offence;

(f) there is a legislative intent for any enforcement authority to be able to take steps under the *Planning Act 2016* to remedy the commission of a development offence under the *Sustainable Planning Act 2009*, as evidenced by s 310 of the *Planning Act 2016*. Accordingly, local authorities (and other entities falling within the definition of an enforcement authority) have a pathway to compel a landowner to remedy an offence under either the *Sustainable Planning Act 2009* or the *Planning Act 2016*. It is in the interest of justice, and of upholding the planning law, for the court to similarly compel a person to remedy an offence under either Act (once the power to make an enforcement order is enlivened, as it is in this case); and

(g) the court has broad powers concerning the scope of enforcement orders that can be made, which is apparent from sub-sections 180(2), (5) and (6), including the examples contained at those sub-sections. Section 180(2) authorises the court to make an enforcement order to remedy the effect of a development offence "*in a stated way*". Although the filling and relocation works commenced under the *Sustainable Planning Act 2009*, it is appropriate for the "*stated way*" of remedying the offence in this instance to be by way of removal of all of the unlawful fill.

[155] There are a number of reasons why I do not accept the Council's submissions.

[156] First, when considering the court's jurisdiction, the starting point is the language of s 180 of the *Planning Act 2016*. The language of the section does not confer power to make an enforcement order on the basis that the court considers a development offence has been committed under the repealed *Sustainable Planning Act 2009*. In addition, the provision does not confer power to make an order requiring a person to remedy the effect of a development offence under the *Sustainable Planning Act 2009*. To the contrary, the powers under s 180 of the *Planning Act 2016* are expressly limited by reference to a "*development offence*", which does not include a development offence under the *Sustainable Planning Act 2009*.

[157] Second, I do not accept that there is an apparent legislative intent not to change the offence or the consequences of committing the offence. The offences are not identical. Their scope is limited by exceptions expressed in the respective legislation. Those exceptions differ. For example, the *Sustainable Planning Act 2009* has no equivalent to s 29(10)(a) of the *Planning Act 2016*.

[158] Further, while the maximum penalty for an offence under s 578 of the *Sustainable Planning Act 2009* was 4 500 penalty units at the time that Act was repealed, that was not always the case. It was increased from 1 665 penalty units on 19 May 2017, upon commencement of s 78 of the *Local Government Electoral (Transparency and*

Accountability in Local Government) and Other Legislation Amendment Act 2017 (Qld).

[159] Section 20C(2) of the *Acts Interpretation Act 1954* (Qld) provides:

> "**20C Creation of offences and changes in penalties**
>
> (1) In this section—
>
> ***Act*** includes a provision of an Act.
>
> (2) If an Act makes an act or omission an offence, the act or omission is only an offence if committed after the Act commences.
>
> (3) If an Act increases the maximum or minimum penalty, or the penalty, for an offence, the increase applies only to an offence committed after the Act commences."

[160] Clear words would be required to displace the operation of this provision. My attention was not directed to a relevant contrary intention.[18]

[161] Third, I am not persuaded that the inclusion of a transitional provision with respect to enforcement notices evidences a legislative intent to permit the court to compel a person to remedy an offence under either Act. To the contrary, the absence of a similar deeming provision for the purpose of s 180 of the *Planning Act 2016* supports a legislative intent that the mechanism for redress of development offences under the *Sustainable Planning Act 2009* is limited to enforcement notices.

[162] I do not accept that limiting the mechanisms for pursuing development offences committed under the repealed *Sustainable Planning Act 2009* is contrary to the interests of justice.

[163] Section 310 of the *Planning Act 2016* provides a mechanism for upholding planning law, albeit one that is limited by a provision intended to ensure that the enforcement authority considers reasonable alternatives to demolition or removal of works.

[164] That enforcement mechanism is not without teeth. As I have already mentioned, under s 168(5) of the *Planning Act 2016*, it is an offence to contravene an enforcement notice. Section 172 of the *Planning Act 2016* also assists. It states:

> "**172 Application in response to show cause or enforcement notice**
>
> If a person applies for a development permit in response to a show cause notice, or as required by an enforcement notice, the person—
>
> (a) must not withdraw the application, unless the person has a reasonable excuse; and
>
> (b) must take all necessary and reasonable steps to enable the application to be decided as soon as practicable, unless the person has a reasonable excuse; and
>
> (c) if the person appeals the decision on the application—must take all necessary and reasonable steps to enable the appeal to be decided as soon as practicable, unless the person has a reasonable excuse.
>
> Maximum penalty—4,500 penalty units."

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18 *Acts Interpretation Act 1954*, s 4.

[165] Fourth, I do not accept that the power to remedy the effect of a development offence under the *Planning Act 2016* "*in a stated way*" permits the court to make an order requiring a person to take action that does not involve remedying the effect of a development offence under the *Planning Act 2016*. The Council has not demonstrated that the removal of fill imported prior to 3 July 2017 would remedy the effect of the offence under s 163 of the *Planning Act 2016*.

[166] In oral submissions, the Council advanced further argument in support of its submission that the court has jurisdiction to grant the relief it seeks. It sought to rely on s 20 of the *Acts Interpretation Act 1954*, which states:

> "**20 Saving of operation of repealed Act etc**
>
> (1) In this section—
>
> ***Act*** includes a provision of an Act.
>
> ***repeal*** includes expiry.
>
> (2) The repeal or amendment of an Act does not—
>
> (a) revive anything not in force or existing at the time the repeal or amendment takes effect; or
>
> (b) affect the previous operation of the Act or anything suffered, done or begun under the Act; or
>
> (c) **affect a right, privilege or liability acquired, accrued or incurred under the Act**; or
>
> (d) **affect a penalty incurred in relation to an offence arising under the Act**; or
>
> (e) **affect an investigation, proceeding or remedy in relation to a right, privilege, liability or penalty mentioned in paragraph (c) or (d).**
>
> (3) **The** investigation, **proceeding or remedy may be started, continued or completed, and the right, privilege or liability may be enforced and the penalty imposed, as if the repeal or amendment had not happened.**
>
> (4) Without limiting subsections (2) and (3), the repeal or amendment of an Act does not affect—
>
> (a) the proof of anything that has happened; or
>
> (b) any right, privilege or liability saved by the operation of the Act; or
>
> (c) any repeal or amendment made by the Act; or
>
> (d) any savings, transitional or validating effect of the Act.
>
> (5) This section is in addition to, and does not limit, sections 19 and 20A, or any provision of the law by which the repeal or amendment is made."

(emphasis added)

[167] The Council submits that the court has power to make an enforcement order notwithstanding the repeal of the *Sustainable Planning Act 2009*. It submits that, pursuant to s 20 of the *Acts Interpretation Act 1954*, the repeal does not affect the liability or penalty incurred by the commission of the offence under s 578, nor a

proceeding or remedy in relation to that liability or penalty. The Council further submits that Mr Benfer incurred the liability or penalty at the time of the commission of the offence.[19]

[168] In order to establish the court has power to make the enforcement orders sought, the Council would need to establish that the repeal did not affect both s 578 of the *Sustainable Planning Act 2009* and s 601 of the *Sustainable Planning Act 2009*. Section 601 conferred a power on the court to make enforcement orders to remedy or restrain the commission of a development offence under that Act.

[169] I do not accept that the power to start proceedings under s 601 of the *Sustainable Planning Act 2009* is saved by application of s 20 of the *Acts Interpretation Act 1954*. Pursuant to s 4 of the *Acts Interpretation Act 1954*, the application of that Act may be displaced, wholly or partly, by a contrary intention appearing in any Act.

[170] In my view, the saving and transitional provisions of the *Planning Act 2016* indicate a contrary intention sufficient to displace the operation of s 20 of the *Acts Interpretation Act 1954*, at least insofar as it would permit a proceeding for enforcement orders to be started despite the repeal of s 601 of the *Sustainable Planning Act 2009*.[20] The contrary intention is supported by three provisions, namely s 310, s 311 and s 312 of the *Planning Act 2016*.

[171] As I have already observed above, s 310 of the *Planning Act 2016* makes provision for enforcement action with respect to development offences under the *Sustainable Planning Act 2009* after its repeal. However, it limits the available enforcement actions to the issue of show cause notices and enforcement notices.

[172] Section 311 of the *Planning Act 2016* states:

> "**311 Proceedings generally**
>
> (1) Subject to section 312, **this section applies to a matter under the old Act, if a person**—
>
> (a) **had started proceedings before the commencement but the proceedings had not ended before the commencement**; or
>
> (b) **had, immediately before the commencement, a right to start proceedings**; or
>
> (c) has a right to start proceedings that arises after the commencement in relation to—
>
> (i) a statutory instrument mentioned in section 287; or
>
> (ii) an application mentioned in section 288.
>
> (2) **For proceedings that were started in the Planning and Environment Court**, Magistrates Court or the Court of Appeal—
>
> (a) **the old Act continues to apply to the proceedings**; and

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19 *R v PAZ* [2017] QCA 263; [2018] 3 Qd R 50, [136] – [147].

20 As to what is required to displace the operation of the *Acts Interpretation Act 1954*, see *ADCO Constructions Pty Ltd v Goudappel & Anor* [2014] HCA 18; (2014) 254 CLR 1, 22 [52].

(b) this Act applies to any appeal in relation to the proceedings as if the matter giving rise to the appeal happened under this Act.

(3) For proceedings that were started in a building and development committee—

(a) if the committee had been established before the old Act was repealed—

(i) the old Act continues to apply to the proceedings; and

(ii) this Act applies to any appeal in relation to the proceedings; and

(iii) the committee must continue to hear the proceedings despite the repeal of the old Act; or

(b) if the committee had not been established before the old Act was repealed—this Act applies to the proceedings, and any appeal in relation to the proceedings.

(4) **For proceedings mentioned in subsection (1)(b) or (c), proceedings may be brought only under this Act**."

(emphasis added)

[173] As I noted in *Jakel Pty Ltd & Ors v Brisbane City Council & Anor*,[21] s 311 of the *Planning Act 2016* draws a clear distinction between:

(a) proceedings that had already commenced when the *Planning Act 2016* came into force,[22] to which the *Sustainable Planning Act 2009* will continue to apply[23] by virtue of s 311(2) of the *Planning Act 2016*;[24] and

(b) proceedings that had not commenced when the *Planning Act 2016* came into force,[25] for which there is:

(i) no equivalent to s 311(2) of the *Planning Act 2016*; rather,

(ii) a requirement that the proceedings be brought under the *Planning Act 2016*.[26]

[174] This indicates a general intention only to permit proceedings under the repealed *Sustainable Planning Act 2009* to be continued or completed, not started.

[175] This legislative intent is supported by s 312 of the *Planning Act 2016*, which provides an exception to s 311. It permits a person to bring a proceeding under the *Sustainable Planning Act 2009*, despite its repeal, but only in relation to the matters nominated therein. A proceeding for enforcement orders is not so nominated.

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21 [2018] QPEC 21; [2018] QPELR 763, 769 [28].
22 See s 311(1)(a) of the *Planning Act 2016.*
23 other than for appeals with respect to those appeals, which are subject to the *Planning Act 2016*
24 It applies to proceedings that "*were*" started.
25 See s 311(1)(b) and (c) of the *Planning Act 2016.*
26 See s 311(4) of the *Planning Act 2016.*

[176] As I also noted in *Jakel Pty Ltd & Ors v Brisbane City Council & Anor*,[27] with respect to s 311 and s 312, which were cl 308 and cl 309 in the *Planning Bill 2015* respectively, the *Planning Bill 2015 Explanatory Notes* states:

> "**Proceedings generally**
>
> *Clause 308* provides for proceedings not started before the old Act was repealed to be brought under the Bill. However, if a proceeding was started in the Planning and Environment Court before the old Act was repealed, the started proceeding must be continued under the old Act. Any appeal in relation to the proceeding would be under the Bill.
>
> If the started proceeding was to a building and development dispute resolution committee under the old Act, and a committee had been established to hear the proceeding, the old Act continues to apply however any appeal would be under the Bill. If no committee had been established, the Bill applies to proceedings.
>
> **Particular proceedings**
>
> ***Clause 309* provides for the old Act to continue to apply to proceedings, and any appeal about the proceeding, brought after the commencement in relation to particular matters under the old Act**.
>
> **This is mostly because the Bill has no equivalent to the matters listed, and consequently provides no rights to start proceedings about them.**
>
> **However the table identifying the matters also includes a proceeding about a claim for compensation under the old Act, section 710 or 716. This is consistent with the intent to provide continuity for the resolution of compensation claims, as provided for under clause 293.**
>
> However the clause provides that the new, more comprehensive excusory powers under the P&E Court Act apply to the proceedings, notwithstanding that they are under the old Act."
>
> (emphasis added)

[177] The fact that s 312 of the *Planning Act 2016* provides specifically for those proceedings that may be commenced under the *Sustainable Planning Act 2009* supports the legislative intent that other proceedings provided for by that Act may not be commenced after its repeal.

[178] For the reasons in paragraphs [168] to [177] above, I do not accept the Council's further submissions with respect to the court's power to make enforcement orders about offences committed under the *Sustainable Planning Act 2009*. I also note that, in any event, the Originating Application did not seek orders under s 601 of the *Sustainable Planning Act 2009*. It was commenced under s 180 of the *Planning Act 2016*.

Should the court grant the relief sought?

[179] In light of the concession noted at paragraph [148] above, it is unnecessary for me to consider whether the Council has demonstrated the commission of the offences or whether, in the exercise of the discretion the court should grant the relief sought.

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27 [2018] QPEC 21; [2018] QPELR 763, 770 [33].

[180] Nevertheless, I note that, even if the court had power to make an enforcement order about a development offence under the *Sustainable Planning Act 2009*, I would not grant the relief sought for three reasons.

[181] First, with respect to each of the offences it was necessary for the Council to satisfy me[28] that the importation of fill constituted assessable development. With respect to both the offence under s 578 of the *Sustainable Planning Act 2009* and the offence under s 163 of the *Planning Act 2016*, operational work involving filling was assessable development provided it did not involve the placement of topsoil. The Council did not direct my attention to any evidence to demonstrate that the works undertaken by Mr Benfer did not involve the placement of topsoil. As such, I am not satisfied that the Council discharged the onus with respect to this element of the offences.

[182] Second, with respect to the offence under s 163 of the *Planning Act 2016*, I accept the evidence of Mr Benfer. Although Mr Benfer had difficulty with some details, this is understandable given the time that has passed. He impressed me as an honest witness. He did not seek to hide from the fact that he had introduced fill onto his land. However, having regard to his evidence, I am not satisfied that he has imported more than 50 cubic metres of fill after 3 July 2017.

[183] Third, even if the Council had established the commission of the respective development offences, I am not persuaded that the relief sought is appropriate having regard to:

(a) the delay in commencing the proceedings;

(b) Mr Benfer's indication that he was willing to make a development application; and

(c) the evidence of Mr Rowlands, particularly his opinion that the fill does not interfere with the flow path of the local catchment nor lead to direct flood impacts on adjacent land in either a regional or local flood event.

Conclusion regarding the application for enforcement orders

[184] The Council has not discharged the onus. The application is dismissed.

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[28] The standard of proof is that referred to in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336.