SUPREME COURT OF QUEENSLAND

CITATION:	*Traspunt No 4 Pty Ltd v Moreton Bay Regional Council* [2019] QCA 51
PARTIES:	**TRASPUNT NO 4 PTY LTD** ACN 102 581 313 (applicant/cross respondent) **v** **MORETON BAY REGIONAL COUNCIL** (respondent/cross applicant)
FILE NO/S:	Appeal No 531 of 2018 P & E Appeal No 3002 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane – [2015] QPEC 49 (Horneman-Wren SC DCJ)
DELIVERED ON:	26 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	22 October 2018
JUDGES:	Gotterson and McMurdo JJA and Davis J
ORDERS:	**1. On the application by Traspunt No 4 Pty Ltd:** **(a) Grant leave to appeal.** **(b) Dismiss the appeal.** **2. On the application by Moreton Bay Regional Council:** **(a) Grant leave to appeal.** **(b) Allow the appeal.** **(c) Set aside the order numbered 1 made by the Planning and Environment Court on 15 December 2017.** **(d) Remit the proceeding to the Planning and Environment Court for further consideration and orders.** **(e) Otherwise dismiss the appeal.** **3. Each party to file a submission as to the costs of the applications in this Court, within 21 days of the delivery of the judgment, such submissions not to exceed four pages in length.**

CATCHWORDS: ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – OTHER MATTERS – where the landowner applied to clear vegetation to create firebreaks on each boundary of some land – where the primary judge allowed the clearing of firebreaks on some boundaries but not others – where the primary judge held that residential housing was infrastructure – where the primary judge held that the work was to protect infrastructure and was therefore essential management – where the landowner argues that fences were being maintained by a firebreak and that therefore the work was essential development – whether residential housing was infrastructure under the *Sustainable Planning Act* 2009 (Qld) – whether the maintenance of infrastructure under the *Sustainable Planning Act* 2009 (Qld) included the construction of a firebreak – whether the work was essential development or assessable development

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – CONSISTENCY OF PLANNING SCHEMES WITH OTHER LEGISLATION – where the landowner applied to clear vegetation to create firebreaks on each boundary of some land – where the primary judge allowed the clearing of firebreaks on some boundaries but not others – where the relevant planning scheme designated the work to be assessable development but the relevant regulation did not – where the relevant regulation only prescribed certain development to be assessable development – where the primary judge held that the regulation and the planning scheme were inconsistent as to whether the work was assessable development – where the primary judge held that the relevant provision of the planning scheme was consequently of no effect – whether there was an inconsistency between the regulation and the planning scheme – whether the planning scheme was of effect

Sustainable Planning Act 2009 (Qld), s 232, s 330
Sustainable Planning Regulation 2009 (Qld), sch 26

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SOLICITORS: MacPherson Kelly for the applicant/cross respondent
Moreton Bay Regional Council for the respondent/cross applicant

[1] **GOTTERSON JA:** I agree with the orders proposed by McMurdo JA and with the reasons given by his Honour.

[2] **McMURDO JA:** Traspunt No 4 Pty Ltd ("Traspunt") owns two pieces of freehold land at Rothwell, within the area of the Moreton Bay Regional Council. For some years, Traspunt has wanted to clear vegetation on the land. In 2012, it sought a development permit to do so, which the Council refused. After extensive litigation in the Planning and Environment Court, Horneman-Wren SC DCJ held in 2015 that Traspunt was able to clear firebreaks along the northern and eastern boundaries of the two lots, but not, as Traspunt had also proposed, along the southern and western boundaries.[1] The parties were ordered to confer with a view to formulating appropriate orders and conditions of approval. A further hearing was required, because the parties did not agree on those matters. Ultimately, in December 2017, the proceeding was determined by orders allowing the appeal to the extent that it was declared that the clearing of firebreaks along the northern and eastern boundaries was not assessable development.[2]

[3] Neither Traspunt nor the Council was content with the outcome. Each applied for leave to appeal against the decision, saying that it should have succeeded entirely. As I will discuss, by the time of the hearing in this Court, the Council's position had changed. It no longer opposes the work on the northern and eastern boundaries, but says that this should be pursuant to a different order than that made by the judge.

[4] A party to a proceeding in the Planning and Environment Court may appeal a decision in the proceeding to this Court, but only on a ground of error or mistake in law or jurisdictional error, and only with this Court's leave.[3] In the usual way, this Court has heard full submissions on the merits of the proposed appeals. The submissions raise many legal questions for the Court's determination, including several which were not argued in the Planning and Environment Court and even some which were not raised in the parties' original submissions here.

The history of the dispute

[5] In July 2011, Traspunt wrote to the Council, informing it of its proposal to commence vegetation clearing work on the land, whilst also contending that the work would not require the Council's permission. In September 2011, the Council replied that any clearing would require its consent under the 2005 Redcliffe City Planning Scheme (the "Planning Scheme"). On 6 February 2012, Traspunt lodged with the Council an application for a development permit to clear parts of the lands for firebreaks and other operational works.

[6] On 23 May 2012, the Council advised Traspunt that it required an extension of time, in accordance with s 318(2) of the *Sustainable Planning Act* 2009 (Qld) (the "SPA"), to assess the application. The extension was for a period of 20 business days, which would expire on 21 June 2012. Section 318(2) provided that the Council, as the assessment manager, could extend the "decision-making period" by not more than 20 business days, and without the applicant's agreement. The decision making period could have been extended again, but only with Traspunt's agreement. By a letter dated 20 June 2012, the Council sought a second extension. Traspunt did not agree to it.

[7] Subdivision 4 of Division 3 of Part 5 of Chapter 6 of the SPA provided for a "deemed decision" of applications of the kinds specified in s 330. One of the issues in this case

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1 *Traspunt No 4 Pty Ltd v Moreton Bay Regional Council* [2015] QPEC 49 ("Reasons").

2 *Traspunt No 4 Pty Ltd v Moreton Bay Regional Council (No 2)* [2017] QPEC 76.

3 *Planning and Environment Court Act* 2016 (Qld) s 63.

is whether Traspunt's application was of that kind. Traspunt claimed, and continues to claim, that the application was within s 330, as it was an application requiring code assessment only. The Council claimed, and continues to claim, that it was not an application within s 330, because it is a kind of application expressly excluded from the deeming provisions. If the deeming provisions did apply, Traspunt was able to give a "deemed approval notice" to the Council under s 331(1), which Traspunt did on 28 June 2012, and, by s 331(5), the Council was taken to have approved the application.

[8] On 4 July 2012, the Council decided (or purported to decide) the application by refusing it, for the reasons that the proposed work was inconsistent with provisions of the Planning Scheme and there were not sufficient grounds to justify an approval under its discretionary power conferred by s 326(1)(b) of the SPA.

An earlier proceeding

[9] In August 2012, Traspunt commenced two proceedings against the Council in the Planning and Environment Court. In one, in which it sought a declaration that the application was the subject of a deemed approval, there was a hearing in October 2012 and a judgment delivered by Andrews SC DCJ in the following month.[4] The application was dismissed. Some consideration of the reasons for that decision is necessary, although it is not the decision which is the subject of the present applications for leave to appeal.

[10] Section 330 of the SPA provided that the deeming provisions of subdivision 4 applied to "an application requiring code assessment only", other than:

> "(c) an application for development –
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> …
>
> (iv) in a protected area, critical habitat or area of major interest under the *Nature Conservation Act 1992*; or
>
> (d) a vegetation clearing application under the Vegetation Management Act …"

[11] The Council there argued that Traspunt's application was within three of those exceptions, saying that this would be development in a "critical habitat" under the *Nature Conservation Act* 1992 (Qld) or in an area of major interest under that Act, or that it was a vegetation clearing application under the *Vegetation Management Act* 1999 (Qld) (the "VMA").

[12] Traspunt there argued that the land was not within a "critical habitat" or an "area of major interest" under the *Nature Conservation Act* 1992 (Qld), because the land was not on the register which was maintained under that act for lands of that kind. That submission was rejected. There was then a factual question of whether the land was a "critical habitat", defined in that act to be a "habitat that is essential for the conservation of a viable population of protected wildlife or community of native wildlife …".[5] On the limited evidence before him, the judge held that Traspunt had failed to prove a negative, namely that its land was not a "critical habitat" as defined, and that in consequence, Traspunt had not proved that every exception upon which the Council relied, was inapplicable. On that reasoning, his Honour found that it was unnecessary

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4 *Traspunt No 4 Pty Ltd v Moreton Bay Regional Council* [2012] QPEC 70.

5 *Nature Conservation Act* 1992 (Qld) s 13(1).

to consider the other exceptions argued by the Council and he dismissed Traspunt's application.

The present proceeding

[13] In the second of the proceedings commenced in August 2012, Traspunt filed a notice of appeal against the Council's decision, and it is that case which is the subject of these applications for leave to appeal. The questions for the Planning and Environment Court were:

1. Was the Council's approval required for the work?
2. If the Council's approval was required, had there been a deemed approval of Traspunt's application?
3. If the Council's approval was required, and there had been no deemed approval, should the application be approved?

I will refer to them respectively as the first, second and third questions.

The findings of the primary judge

[14] Horneman-Wren SC DCJ found that the first question should be answered in Traspunt's favour for the clearing on the northern and eastern boundaries, but in the Council's favour for the clearing on the southern and western boundaries.

[15] He further held that, if the work along the northern and eastern boundaries did require the Council's approval, the work was in conflict with the relevant provisions of the Planning Scheme, but that there were sufficient grounds for its approval under s 326(1)(b) of the SPA.[6]

[16] The deemed approval was therefore relevant only to the work on the southern and western boundaries. In answer to the second question, his Honour held that this work was not subject to the deemed approval provisions under the SPA, because Traspunt's application was a vegetation clearing application under the VMA.[7]

[17] He held that, although the work on the southern and western boundaries were in conflict with the Planning Scheme, there were insufficient grounds to approve the development.[8]

The reasoning of the primary judge

[18] The first question required a consideration of provisions of the SPA, the Sustainable Planning Regulation 2009 (Qld) (the "SPR") and the VMA.

[19] Section 7(c) of the SPA defined "development" to include "carrying out operational work". "Operational work" was defined by s 10(f) to include:[9]

> "clearing vegetation, including vegetation to which the Vegetation Management Act applies …"

[20] Section 231(1) of the SPA categorised development as "exempt development", "self-assessable development", "development requiring compliance assessment", "prohibited

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6 Reasons [200].
7 Reasons [172] – [174].
8 Reasons [198].
9 At para 1(f).

development" and "assessable development". By s 231(2), all development was exempt development unless it was one of the other kinds. In this case, the proposed work was exempt development, unless it was assessable development.

[21] By s 235(1), a development permit was unnecessary for exempt development, whereas, by s 238, it was necessary for assessable development.

[22] Section 232(1)(c) provided that a regulation might prescribe that development was (relevantly here) assessable development. Section 232(2) provided that a regulation might prescribe development that a planning scheme could not declare to be assessable development.

[23] Pursuant to s 232(1), a regulation, namely s 9 of the SPR, prescribed development which was assessable development. Relevantly here, it did so by Table 4 within Schedule 3, Part 1. Column 2 of Item 1 of Table 4 described work, involving the clearing of native vegetation, as assessable development, in these terms:

> "Operational work that is the clearing of native vegetation on—
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> (a) freehold land; or
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> (b) indigenous land; or
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> (c) any of the following under the *Land Act 1994*—
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> (i) land subject to a lease;
>
> (ii) a road;
>
> (iii) trust land, other than indigenous land;
>
> (iv) unallocated State land;
>
> (v) land subject to a licence or permit;
>
> unless the clearing is—
>
> (d) on premises to which structure plan arrangements apply; or
>
> (e) clearing, or for another activity or matter, mentioned in schedule 24, part 1; or
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> (f) clearing mentioned in schedule 24, part 2 for the particular land".

[24] Column 3 of Item 1 of Table 4 further prescribed the type of assessment for work of this kind. It was to be by:

> "Code assessment, if the chief executive administering the Vegetation Management Act is the assessment manager".

[25] As the proposed work was operational work,[10] and involved the clearing of native vegetation on freehold land, it was assessable development unless the work was within one of the exceptions in paragraphs (d), (e) and (f) within Table 4. Traspunt argued that it was within paragraph (f), in that it was clearing mentioned in Schedule 24, Part 2. Schedule 24, Part 2, by s 2(c), referred to (relevantly here) clearing that was "necessary for essential management".

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10 By SPA s 10 (definition of "operational work" para 1(f)).

[26] The term "essential management" was defined in Schedule 26 of the SPR (relevantly) as follows:

> "essential management means clearing native vegetation—
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> (a) for establishing or maintaining a necessary firebreak to protect infrastructure other than a fence, road or vehicular track, if the maximum width of the firebreak is equivalent to 1.5 times the height of the tallest vegetation adjacent to the infrastructure, or 20m, whichever is the greater; or
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> (b) for establishing a necessary fire management line if the maximum width of the clearing for the fire management line is 10m; or
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> …
>
> (e) necessary to maintain infrastructure including any core airport infrastructure, buildings, fences, helipads, roads, stockyards, vehicular tracks, watering facilities and constructed drains other than contour banks, other than to source construction material …"

The primary judge was asked to consider only paragraphs (a) and (b) of that definition. In this Court, Traspunt also relies upon paragraph (e).

[27] On the evidence which the judge accepted, a purpose of the clearing on the northern and eastern boundaries was to establish or maintain a necessary firebreak to protect "infrastructure", which was the residential development to the north and east of the subject land.[11] His Honour rejected the Council's submission that Traspunt had to prove that a firebreak of the particular dimensions proposed was necessary, rather than a firebreak *per se*.[12] The work on the northern and eastern boundaries was thereby "essential management" under paragraph (a) of the definition.

[28] The Council argued that the proposed clearing was assessable development upon a further basis, which was that the work was designated to be assessable development also by the Planning Scheme. Assessable development, as defined in Schedule 3 of the SPA, included development declared to be assessable development by a planning scheme governing the land.[13] And s 88(2)(c) of the SPA provided that a key element of a planning scheme was the identification of relevant assessable development requiring code or impact assessment (or both). The Planning Scheme provided that the clearing of vegetation, not associated with a material change of use, was a development requiring assessment, and more particularly a code assessment. However the primary judge held that, in terms of s 233(1) of the SPA, the provisions of the Planning Scheme, which would have made this work assessable development, were inconsistent with a regulation made under s 232(1), namely the regulations by which the work on the northern and eastern boundaries would be "essential management" and thereby exempt development.[14] Consequently, it was held, the work on the northern and eastern boundaries was not assessable development.

[29] The judge found that the clearing proposed along the southern and western boundaries was for the purpose of protecting fences, so that it was expressly excluded from

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11 Reasons [160].
12 Ibid.
13 At para 2.
14 Reasons [180].

paragraph (a). And his Honour held that it was not within paragraph (b), because it was not clearing "for establishing a necessary fire management line".[15] In the judge's view, a fire management line meant "a line for the management of fire",[16] such as an area of "access for bushfire suppression and providing a system of fire breaks."[17] Consequently, the proposed clearing on the southern and western boundaries was not essential management, and instead was assessable development.

[30] The second question was whether there had been a deemed approval of the application, insofar as an approval was required. The judge held that the application for approval was a "vegetation clearing application" under the VMA, as defined in the schedule of the VMA to mean:

> "… a development application that involves development that is—
>
> (a) the clearing of native vegetation as defined under that Act; and
>
> (b) assessable development prescribed under section 232(1) of that Act."

[31] His Honour noted that Traspunt conceded that its application "probably" involved the clearing of native vegetation.[18] As the clearing on the southern and western boundaries was also assessable development prescribed under s 232(1) of the SPA, this was a vegetation clearing application under the VMA and was thereby excluded from the deeming provisions of subdivision 4. Therefore, Traspunt did not have the benefit of a deemed approval.[19]

[32] Before the primary judge, Traspunt argued, as it had before Andrews SC DCJ, that the absence of an entry in the register of land which was a critical habitat or an area of major interest was determinative as to the suggested exemptions, under s 330(c)(iv) of the SPA, from the deeming provisions. The judge held that Traspunt was estopped by the judgment of Andrews SC DCJ, for which his decision on that issue had been essential.[20] His Honour discussed extensively the regime under the *Nature Conservation Act* 1992 (Qld), under which land is assessed and established or identified as land within a critical habitat or area of major interest. He concluded that it was only land which had been established or identified under that regime which was subject to the exceptions within s 330(c)(iv), which was not the case for this land.[21] Consequently, it was only upon the basis that this was a vegetation clearing application under the VMA that the deeming provisions did not apply and there had been no deemed approval (insofar as approval was required) of this application.

[33] As to the merits of the application (the third question), the primary judge determined that the clearing on the southern and western boundaries conflicted with the Natural Features or Resources Overlay Code of the Planning Scheme, and that there were insufficient grounds to justify approval despite that conflict.[22] He further held that had the clearing on the northern and eastern boundaries been assessable development, that clearing would also have conflicted with the Natural Features or Resource

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15 Reasons [163] – [166].
16 Reasons [163].
17 Ibid (footnotes omitted).
18 Reasons [123].
19 Reasons [172] – [174].
20 Reasons [35], [43].
21 Reasons [90].
22 Reasons [192] – [193]; [197] – [199].

Overlay Code, but would have been approved, pursuant to s 326(1)(b) of the SPA, notwithstanding the conflict.[23]

The arguments for the Council's appeal

[34] The Council argues that the judge erred in answering the first question for the work on the northern and eastern boundaries, in two ways. The first error was to hold that the work was within paragraph (a) of the definition of "essential management", upon the basis that it involved the creation of firebreaks to protect "infrastructure" in the form of the adjoining residential development.[24] The Council argues that residential housing does not fall within the definition of "infrastructure" in the SPA, which applies equally to the SPR. The second error is that the judge held that the provisions of the Planning Scheme, according to which this work was assessable development, were invalid as inconsistent with the SPR.

[35] Traspunt submits that the judge was correct in holding that the work was within paragraph (a) of the definition of "essential management". It argues that residential development covers more than simply housing, and that it is infrastructure as that word is used in paragraph (a). Traspunt further submits that the judge was correct in holding that the work was not assessable development by the operation of provisions of the Planning Scheme.

[36] As to the second question (whether there was a deemed approval), the Council argues, and Traspunt accepts, that if any of the development proposed by the application was prescribed as assessable development under s 232(1) of the SPA, the application as a whole would be a vegetation clearing application (as defined in the VMA), so that it would be within the express exclusion from the deeming provisions contained in s 330(d) of the SPA. In other words, the deeming provisions would not apply in the event that the Council's argument about "infrastructure" succeeds, or the judge's conclusion that the work on the southern and western boundaries was not "essential management" stands.

[37] On the third question (the merits of the application for approval), the Council does not challenge the judge's findings, which were findings of fact. That might indicate that the above arguments could not affect the outcome for the northern and eastern boundaries. But as I will discuss, those arguments do matter for this case.

The infrastructure point

[38] It is convenient to set out again the terms of paragraph (a) of the definition of "essential management":[25]

> "[clearing native vegetation] for establishing or maintaining a necessary firebreak to protect infrastructure other than a fence, road or vehicular track …"

[39] In the SPA, the word "infrastructure" is defined in Schedule 3 as follows:

> "includes land, facilities, services and works used for supporting economic activity and meeting environmental needs."

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23 Reasons [199].

24 Reasons [160].

25 SPR sch 26 (definition of "essential management" para (a)).

[40] By s 37 of the *Statutory Instruments Act* 1992 (Qld), words and expressions used in a statutory instrument[26] have the same meanings as they have in the Act under which the statutory instrument is made. Therefore the definition of "infrastructure" in the SPA applied to the SPR.

[41] The Council argues that residential housing does not fall within the definition, because houses do not constitute "facilities" that are "used for supporting economic activity or meeting environmental needs." Rather, infrastructure supports the use of houses.

[42] It is further submitted that the SPA distinguished between the planning for and the provision of infrastructure,[27] and the planning for and assessment and approval of "development",[28] so that it could not be said that the word "infrastructure" included all development.[29] And it is further submitted that according to the ordinary meaning of the word, it would not include housing. The 7th Edition (2017) of the Macquarie Dictionary defines infrastructure as:

> "1. the basic framework or underlying foundation (as of an organisation or a system).
>
> 2. the roads, railways, schools and other capital equipment which comprise such an underlying system within a country or region …
>
> 3. the buildings or permanent installations associated with any organisation, operation, etc".

[43] As Traspunt submits, this is an inclusive definition. Traspunt submits that the word "includes" is usually intended to enlarge the ordinary meaning of the words which preceded it.[30] But in this case, there are items which follow the word "includes" which would fall within the ordinary meaning of infrastructure.

[44] Traspunt's difficulty is that the residential housing which is relevant to this case would not constitute infrastructure on the ordinary meaning of the word, and it is not within the specific terms of the definition. In my view, the word does not include residential housing as it is used in paragraph (a) of the definition of "essential management".

[45] But Traspunt further submits that the judge's finding went further, because his Honour found that the purpose of the proposed clearing:[31]

> "related to establishing a firebreak for the protection of the infrastructure, other than fences, and *particularly the adjoining residential development* …"
>
> (Emphasis added.)

[46] Traspunt makes two points about that passage from the judgment. The first is that the judge referred to the adjoining *residential development*, rather than only the

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26 The SPR being a statutory instrument as defined in s 7 of the *Statutory Instruments Act* 1992 (Qld) and also by way of s 17(1) of the SPA.

27 By Chapters 5 and 8 of the SPA.

28 By Chapter 6 of the SPA.

29 The submission also refers to the distinction between infrastructure and development which is employed within s 89 of the SPA.

30 See *Sherritt Gordon Mines Ltd v Federal Commissioner of Taxation* [1977] VR 342 at 353.

31 Reasons [160].

houses. The second is that, by the word "particularly", the judge was indicating that there was something else which was also infrastructure. Neither of those points is persuasive. A little earlier in the Reasons,[32] the judge said:

> "It is quite apparent from the various statements by Traspunt or on its behalf that Traspunt's proposed vegetation clearing is intended to protect both *residences on land* adjoining certain boundaries on each lot and fence lines on each lot."
>
> (Emphasis added.)

[47] It is sufficiently clear that his Honour had in mind, as the purposes of the firebreaks, the protection of houses and fences. Nothing other than the "residences" was identified as the subject of protection by the establishment of a firebreak. In oral submissions in this Court, counsel for Traspunt suggested that there could be things such as street signs which constituted infrastructure in this area. But apparently that was not Traspunt's case before the primary judge.

[48] In my respectful view, the adjoining "residential development" was not "infrastructure" within paragraph (a), so that the work proposed for the northern and eastern boundaries was not, upon the basis of that paragraph, "essential management".

[49] The new argument for Traspunt about "essential management", which is based upon paragraph (e) of the definition of that term, relates only to Traspunt's case about the southern and western boundaries.

[50] Consequently, the Council has demonstrated that there was an error of law in the conclusion that the work on the northern and eastern boundaries was essential management as defined, so that it was not assessable development. The first question should have been answered in the Council's favour. That is sufficient to warrant leave to appeal being granted, and the appeal being allowed by setting aside the declaration which was made that this work was essential management and not assessable development.

[51] What should also be considered is the Council's argument that it was also assessable development by the operation of the Planning Scheme. The judge considered that the work could not be made assessable development by the Planning Scheme, if it was not assessable development as prescribed by a regulation made pursuant to s 232(1) of the SPA.

[52] Section 233(1) of the SPA provided as follows:

> "To the extent that a planning scheme or temporary local planning instrument is inconsistent with a regulation made under section 232(1) or (2), the planning scheme or temporary local planning instrument is of no effect."

[53] By s 232(2), a regulation was able to prescribe development that a planning scheme could not declare to be assessable development. There was no regulation of that kind in the present case. Rather, there was a regulation which prescribed certain development to be assessable development.

[54] The essence of the judge's reasoning on this question was expressed as follows:[33]

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32 At [155].

33 Reasons [180].

> "In my opinion, where a regulation under s 232(1) makes clearing of certain vegetation assessable development, but also creates an exception to that such that clearing which falls within the exception is not assessable development, a planning scheme which makes assessable that which is made not assessable under the regulation will be inconsistent with the regulation within the meaning of that expression as used in s 233(1). The planning scheme will by operation of s 233(1) be, to that extent, of no effect."

[55] As earlier discussed, the SPA provided that development might be made assessable development by a planning scheme.[34] Clearly, work could be made assessable development by a planning scheme where that had not happened by a regulation made under s 232(1). That would be subject to s 232(2), under which a regulation might prescribe development that a planning scheme could not declare to be (amongst other things) assessable development. But there was no such limitation here.

[56] If this work was essential management, the consequence was that it was excluded from what the regulation prescribed to be assessable development. It is only in that way that a regulation made under s 232(1) or (2) might effectively prescribe land to be exempt development. Absent a prescription of that kind, it was open to the Council to provide, by the Planning Scheme, that this was assessable development. Therefore, in my respectful view, his Honour erred in concluding that the Planning Scheme had no effect in prescribing this as assessable development.

[57] Consequently, there were two bases for answering the first question in favour of the Council.

The second question: no deemed approval

[58] On the judge's finding that the clearing proposed for the southern and western boundaries was assessable development prescribed by regulation made under s 232(1), this was a vegetation clearing application under the VMA and the deeming provisions of sub-division 4 were excluded for all work proposed by the application. That is now common ground. In the same way, if the work proposed for the northern and eastern boundaries was assessable development under a regulation made under s 232(1) (as I have concluded that it was), then, again, this was a vegetation clearing application under the VMA and the deeming provisions did not apply.

The arguments for Traspunt's appeal

[59] Traspunt argues that it is by paragraph (e) of the definition of "essential management" that the work on the southern and western boundaries was excluded from what was prescribed to be assessable development. This was not an argument which was made to the primary judge. The relevant paragraphs of the definition are set out above at [26].

[60] Traspunt argues that the clearing of this vegetation was necessary to "maintain" fences on those boundaries. The judge held that the purpose of the clearing on each boundary was to establish a firebreak for the protection of fences.[35] It was for this reason that the judge held that the clearing on the southern and western boundaries did not fall within paragraphs (a) and (b).

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34 SPA sch 3 (definition of "assessable development") and s 88.

35 Reasons [162], [165].

[61] Importantly, it was paragraph (a) of the definition which specifically referred to clearing work for a firebreak, whereas paragraph (e) made no reference to a firebreak. Paragraph (e) applied only if it is considered that infrastructure, constituted here by fences, would be "maintained" by a firebreak. Traspunt's argument should not be accepted. When read in the context of the definition as a whole, the maintenance of infrastructure, which is the subject of paragraph (e), would involve work which is done to the infrastructure itself. If the maintenance of infrastructure included the construction of a firebreak to protect infrastructure, there would be a considerable overlap between the two categories in paragraphs (a) and (e), and an unavoidable tension between the two where the infrastructure is a fence.

[62] Consequently, the judge's finding that the work on the southern and western boundaries was not essential management should stand.

[63] There is no challenge to the judge's findings that, on the planning merits, the work on these boundaries should not be permitted.

Disposition of the proposed appeals

[64] As the work on the northern and eastern boundaries is not essential management, and it is assessable development, the declaration to the contrary made by the primary judge on 15 December 2017 (the first question), should be set aside.

[65] As the judge's conclusion about the planning merits (the third question) of the application relating to the northern and eastern boundaries is not challenged, it is necessary to make some order in Traspunt's favour. Absent any order, Traspunt would be left in a position where there would be no order in this Court or in the Planning and Environment Court that would disturb the Council's refusal of the application in 2012.

[66] The case should be remitted to the Planning and Environment Court, for two reasons. The first is that, because the work on the northern and eastern boundaries is to be approved, consideration should be given to any appropriate conditions of that approval, which is not a subject of any submission in this Court. The second is a complication coming from the fact that, although the Council was the "assessment manager" for this application, the Chief Executive administering the VMA was a "concurrence agency" for it. This matter was the subject of written submissions which this Court received after the hearing, and from which it now appears to be common ground that the Chief Executive was a concurrence agency.[36]

[67] I have concluded that all of the work was assessable, because it was prescribed to be such under both the SPR, made pursuant to s 232(1), and the Planning Scheme. Consequently, by s 12 and Item 1 of Table 1 of Schedule 6 of the SPR, the Council was the assessment manager, because at least some aspect of the development was assessable against the Planning Scheme. By s 13 and Item 5 of Table 2 of Schedule 7 of the SPR, the Chief Executive was a concurrence agency for the application. And pursuant to s 11 and Item 1 of Table 4 of Part 1 of Schedule 5 of the SPR, the code assessment of the work included an assessment by the Chief Executive, as a concurrence agency, against any code under the VMA, of this application (as well as the Council's code assessment against the code in the Planning Scheme).

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[36] Notwithstanding Traspunt's argument, at one stage in this Court, that the Chief Executive was the assessment manager.

[68] The most recent written submission for Traspunt points to the fact that, in 2012, Traspunt did notify the Chief Executive (by notifying the relevant department) of its application. It points out also that, in March 2012, the Council said that the Chief Executive was not a concurrence agency. In those circumstances, it is unclear whether there was a failure to comply with the relevant statutory provisions for the participation by the Chief Executive in this case. That doubt is conceded by Traspunt, which ultimately submits that this question can be resolved, if necessary, in the Planning and Environment Court.

[69] I would order as follows:

1. On the application by the Council:
   (a) Grant leave to appeal.
   (b) Allow the appeal.
   (c) Set aside the order numbered 1 made by the Planning and Environment Court on 15 December 2017.
   (d) Remit the proceeding to the Planning and Environment Court for further consideration and orders.
   (e) Otherwise dismiss the appeal.
2. On the application by Traspunt:
   (a) Grant leave to appeal.
   (b) Dismiss the appeal.

[70] I would further order that each party should file a submission as to the costs of the applications in this Court, within 21 days of the delivery of the judgment, such submissions not to exceed four pages in length.

[71] **DAVIS J:** I agree with the orders proposed by McMurdo JA and with the reasons given by his Honour.