

## UPDATE

### Variation of an LMA through the Grant of Development Approvals

#### *P & R Vozzo Nominees & Anor v District Council of the Copper Coast [2011] SAERDC 4*

This recent judgment from the ERD Court provides important guidance to Council officers as to what may result in waiver of a Land Management Agreement.

This matter was an appeal to the ERD Court against an enforcement notice issued by the Council under section 84 of the *Development Act 1993*. The Council had issued the notice on the basis that an approved development which was under construction, had contravened provisions of an LMA, in circumstances where there had been no formal waiver by the Council.

The owners of the land appealed the enforcement notice on the basis that three development approvals granted in respect of the land, constituted waivers of the LMA on the basis of inconsistency with the LMA.

This judgment resulted in two findings of particular relevance to Councils in respect to how waivers may be granted and by whom they may be granted.

- **A note on a Decision Notification Form is sufficient to amount to a waiver of an LMA**

In examining the relevant development approvals, the Court held that the following note, contained within each relevant decision notification form, was sufficient, of itself, to constitute a waiver of the LMA:

*"The applicant/owner/builder comply with the terms of the Land Management Agreement unless varied by this Development Approval"*

- **A delegation under section 57(2) of the Act includes delegated authority to vary an LMA**

The Court held that the following delegation under section 57(2) of the *Act* was sufficient to include the power to vary an existing LMA, including by way of waiver:

*to enter into an agreement relating to the development, management, preservation or conservation of land within the area of the Council with the owner of the land.*

(our emphasis)

These rulings were made despite the fact that the terms of the LMA implied that Council staff could only grant a waiver under a specific delegated authority from the elected body of the Council.

Both of the above findings challenge the common assumption held by Councils that, in the absence of a specific delegation to staff made in respect of a specific LMA, only the elected body of the Council may grant a waiver of an LMA.

Further, these findings seem to depart from recent Supreme Court case law authorities in which delegations have been read strictly and literally such that the delegation of a power or function to a staff member only exists if expressly stated. That is, it cannot be implied from the wording of the delegation.

In light of this decision, we recommend that Councils form firm positions as to which delegates within the Council may grant a waiver of an LMA and how such waiver may be granted (and if necessary, consider its register of delegations). In this manner, waivers will be dealt with in a uniform manner and will not be granted in inappropriate or unexpected circumstances.

**For further information please contact Victoria Shute, Associate, Local Government Team on 8235 3078 or [victoria.shute@wallmans.com.au](mailto:victoria.shute@wallmans.com.au)**

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