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31 JUL 2006

LEGAL, CONSTITUTIONAL AND
ADMINISTRATIVE REVIEW
COMMITTEE

No 10

28th July, 2006

Dr Lesley Clark
The Chair
Legal, Constitutional and Administrative Review Committee,
Legislative Assembly of Queensland.

Dear Madam,

Please find enclosed a copy of a letter sent to the Ombudsman on 10th May, 2006. This is the third in a series of letters dealing with the same matter. In the first, I have made the substantive complaint. In the second, I sought a clarification of the decision and in the third, I have made a complaint in regard to the decision of the Assistant Ombudsman dealing with the matter.

The initial complaint deals, in part, with a mistake in law. In explaining his decision, the Assistant Ombudsman, Mr Metcalfe, has made essentially the same mistake in law. The principle mistake in question is one of simple logic and the syntax of language – even if the context is slightly complicated.

I draw this to your attention as an enquiry by myself shows this matter has been closed by the Ombudsman without reply or even acknowledgement of my last letter.

There must be accountability in government. Those bodies set up to ensure accountability cannot be exempt from the processes they oversee.

Your Sincerely,



Guy Rauchle

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10th May, 2006

The Parliamentary Commissioner
for Administrative Investigations,
Queensland.

Dear Sir,

Re: Your reference 2006/00588

I refer to a response by Mr Rodney Metcalfe, to my letter of 9th January, 2006, in which I have asked for clarification of your earlier decision in this matter.

In this response, Mr Metcalfe makes the following statement to clarify the determination that the matter does not constitute *serious environmental harm*:

As you are aware, in order to constitute '**serious environmental harm**' under subsection 17(a) of the *Environmental Protection Act 1994* (the Act), the environmental harm complained of must cause 'actual or potential harm to environmental values that is irreversible, of high impact or widespread'. I agree with you that the section does not require the environmental harm to be widespread in order to be considered serious. Nevertheless, the subsection does require that the environmental harm be irreversible or of a high impact.

Mr Metcalfe has misquoted the Act by omission and in full, Section 17 reads as follows:

17 Serious environmental harm

(1) Serious environmental harm is environmental harm (other than environmental nuisance)—

- (a) that causes actual or potential harm to environmental values that is irreversible, of a high impact or widespread; or
- (b) that causes actual or potential harm to environmental values of an area of high conservation value or special significance; or
- (c) that causes actual or potential loss or damage to property of an amount of, or amounts totalling, more than the threshold amount; or
- (d) that results in costs of more than the threshold amount being incurred in taking appropriate action to—
 - (i) prevent or minimise the harm; and
 - (ii) rehabilitate or restore the environment to its condition before the harm.

(2) In this section—

threshold amount means \$50000 or, if a greater amount is prescribed by regulation, the greater amount.

You will note that each of the subsections (a – d) of 17(1) are separated by "or". This means that only one of these conditions (a – d) need to be satisfied in order to be considered 'serious environmental harm'.

In my original letter to the Minister administering the Act, I stated that I believed the harm was serious because of the potential for loss or damage to property to exceed the threshold amount stated in this section. It is not improbable that the costs resulting from a two car collision would exceed \$50,000, particularly given the reasonably possible scenario that each is a relatively new four-wheel-drive sedan towing a trailer carrying two or three motorbikes each and there are multiple severe injuries. The environmental harm therefore satisfies the condition of subsection (c) to be considered 'serious environmental harm'. Furthermore, the cost to remedy the environmental harm (ie. road works to mitigate the risk) would also satisfy subsection (d).

In raising this matter with you originally, I specifically raised these same issues, referencing the same parts of the Act.

The EPA has declined to pursue this matter. Earlier this week I had a telephone conversation with Ms Emma Plinth's supervisor. He quoted 17(1)(a) of the Act (see attached) - saying it

was not serious environmental harm as my one complaint did not make it widespread. Regardless of whether it is widespread, Section 17 (1) is an *or* statement. In my letter of October, I referred to sub-paragraph (c) &(d) - being the cost of potential loss or the cost to mitigate the harm.

Apart from the fact that the EPA had declined to pursue this matter, the principle issue I raised with you originally was that the EPA was misquoting the Act by omission. This is exactly what Mr Metcalfe has done in his reply!

In justifying why a beneficial asset might be exempt, Mr Metcalfe refers to the *Environmental Protection (Noise) Policy 1997*. Quite simply, the issue is not one of noise and it is inappropriate to quote from this policy. Furthermore, being a beneficial asset does not create an exemption from the Act and I refer you to the closure of the foundry section of Yeronga Institute of TAFE.

In addressing the matter of safety, Mr Metcalfe states the following:

The EPA's view is that the recognition of 'safety' in the definition of 'environmental value' is aimed at ensuring that, in the management of environmental matters (particularly the release of contaminants), the safety of individuals is a consideration. The EPA has also advised that addressing actual or potential safety risks from a motor vehicle accident is not an environmental protection function under the Act, and therefore outside the scope of the EPA's role.

The Act does not, in this regard, limit the scope of the meaning of safety. If, in making the Act, it was intended that the scope of the meaning of safety be limited, as suggested by Mr Metcalfe, this would have been done by note or definition. In the absence of a note or specific definition, the usual meaning of 'safety' applies. If there are a range of contexts to which safety might be applied, it would be inappropriate to limit the range to less than what would be considered appropriate by a reasonable person (eg a reasonable person would consider that workplace safety is covered by the *Workplace Health and Safety Act*). For a reasonable person, issues of road safety and traffic are elements of the amenity of the community. Significantly increasing the traffic load without mitigating the additional risk degrades the amenity of the community. From public meetings, objections and complaints made from the community, it is relatively easy to gauge that this is the perception of the community in this instance. There is no basis within the Act to limit the scope of the meaning to exclude 'road safety' and to do so would be contrary to the aims of the Act since a reasonable person would perceive it to be a quality of the environment which the Act is intended to preserve

In making my complaint to the EPA, it was my issue that, in making the approval, Council did not give adequate consideration to the safety of the community and the individuals therein. In terms of the Act "the consequences of traffic volume on the road" do reasonably "constitute 'serious environmental harm' within the meaning of the Act".

Mr Metcalfe has also stated that I have been referred by the EPA to a more appropriate authority, being the Gatton Shire Council. It is my contention that Gatton Shire Council is responsible for causing the 'serious environmental harm' by reason of issuing a development approval while reasonably being aware of the increased risks to the environment but not taking appropriate steps to ensure mitigation of these increased risks. While Gatton Shire Council has a delegated authority to make such approvals, the Council has, in this case, not exercised due diligence in discharging its delegated responsibilities. It is my understanding that the EPA retains a responsibility to oversee the conduct of delegates under the Act. In consideration of this responsibility and that the complaint was made against Council, I do not perceive how Council can be claimed to be a 'more appropriate authority'.

If Mr Allen and Mr Metcalfe are competent to perform their allocated duties, then their findings cast serious doubt on the role of your Office to independently mediate matters of dispute with the Government.

Your Sincerely,

Guy Rauchle