



BUYERS BEWARE

High Court confirms that buyers inherit the sins of previous owners who have not complied with development approvals

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APRIL 2018

On 14 March 2018, the High Court of Australia handed down its decision in *Pike v Tighe* [2018] HCA 9 which is of interest to the development industry and, generally, any person who purchases land in Australia.

What happened?

1. In 2009, the Townsville City Council issued a Development Approval to allow the then owner (the **Original Owner**) of a parcel of land (the **Parent Lot**) to reconfigure the Parent Lot into 2 new Lots — Lot 1 and Lot 2.
2. One of the conditions of the Development Approval was that an easement must be registered to burden Lot 1, to allow for pedestrian and vehicle access and connection of services, for the benefit of Lot 2 (the **Easement Condition**).
3. In breach of the Easement Condition, the Original Owner did not register the required easement.

4. The Original Owner effected the reconfiguration and sold the newly created Lot 1 to Tighe, and then Lot 2 to Pike.
5. After some failed negotiations between Tighe and Pike in relation to a grant of an Easement that would comply with the Easement Condition, Pike was successful in obtaining a declaration in the Planning and Environment Court that Tighe had committed a development offence in failing to comply with the Easement Condition
6. However, Tighe successfully appealed to the Court of Appeal, which decided that the conditions of the Development Approval, including the Easement Condition, bound only the owners of the Parent Lot and any successor in title of that Parent Lot (but not buyers of new Lots created as a result of the reconfiguration of the Parent Lot).
7. Pike appealed to the High Court.

What does the legislation say?

Section 345 of the *Sustainable Planning Act 2009* (the **SPA**) states:

- (1) *A development approval –*
- (a) *attaches to the land the subject of the application to which the approval relates; and*
 - (b) *binds the owner, the owner's successors in title and any occupier of the land.*
- (2) *To remove any doubt, it is declared that subsection (1) applies even if later development, including reconfiguring a lot, is approved for the land or the land as reconfigured.'*

Further, section 580 of the SPA states:

- (1) *A person must not contravene a development approval, including any condition in the approval.*

Maximum penalty – 4500 penalty units'

What did the Court of Appeal say?

On first reading, section 345 of the SPA might seem clear so as to render any future owner liable for complying with all unsatisfied and ongoing conditions of a development approval.

However, the Court of Appeal decided that the Easement Condition was not '*a continuing and freestanding obligation*', but rather was a point in time obligation which required the Original Owner to register the easement at the time of reconfiguration of the Parent Lot. On that basis, the conditions of the Development Approval bound only the Original Owner of the Parent Lot (or any person who bought the Parent Lot before reconfiguration had occurred) – it did not bind owners of the new Lots created from the reconfiguration. Pike appealed to the High Court.

What did the High Court say?

The High Court allowed Pike's appeal, finding that the Court of Appeal was wrong in regarding section 245 of the SPA as applicable only to buyers of the pre-subdivided Parent Lot and not lots created from its subdivision. This follows from the natural and ordinary meaning of section 245(2), which proceeds on the assumption that '*the land the subject of the application to which the approval relates*' is all the land contained in the lots created by the reconfiguration.

The Court observed that a development approval is generally regarded as '*consent to the world at large in relation to land which it is subject*', and section 245 is consistent with that principle.

The Court of Appeal, in its interpretation, had 'glossed' the language of section 245 and in doing so had '*unduly attenuated the scope for protection of the public interest in the efficient and effective use of land.*'

On that basis, Tighe failed to comply with the Easement Condition and so contravened section 580 of the SPA. The High Court remitted the matter back to the Planning and Environment Court.

What are the key points to take away from this?

1. When you buy land, do your due diligence and do it properly. This will involve ensuring that all conditions of a development approval attaching to the land (and any original parcel from which the land was reconfigured) have been fulfilled. Do not be lulled into a false sense of security simply because any physical works that have been undertaken have ostensibly been properly completed. In this regard, a Full Planning and Development Certificate can be obtained from the relevant Council. This will involve a Council officer undertaking a physical inspection of the property, and preparing a statement advising as to the fulfilment or non-fulfilment of each condition in any current development approval. The Certificate will also disclose details of any outstanding prosecutions that have already commenced. The processing time to obtain the Certificate is typically 30 business days – you should ensure that any due diligence clause in your contract allows sufficient time for this Certificate to be obtained.
2. The High Court's judgment states that '*the effect of the Act is not that a person is guilty of an offence at the moment he or she purchases land which does not comply with a condition. Rather, an offence will be committed when a reasonable time to comply with the condition has elapsed or if there is a peremptory refusal to comply with the condition.*' While this is reassuring, one can contemplate a situation where an over-zealous Council commences enforcement action immediately or very soon after it becomes aware of non-compliance. Sometimes buyers may agree to proceed with a purchase on the basis that a deduction or retention is made from the purchase price in order to fund the cost of complying with the outstanding condition after settlement. Even so, the risk of Council enforcement action against the buyer will still be present.
3. Since the events of this case occurred, the SPA has been repealed and replaced with the *Planning Act 2016*. However, it is likely that the equivalent section of the Planning Act, although containing different terminology, (section 73) would lead to the same result.

For more information about this case or a detailed discussion on how these issues may affect you, please contact Robert Lyons.

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