



Vegetation Clearing Update for Queensland – are you sure you can clear your 'Category X' vegetation without any approvals?

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On 10 May 2019, the Queensland Court of Appeal handed down its decision in *Fairmont Group Pty Ltd v Moreton Bay Regional Council* [2019] QCA 81 which is of great importance to those who propose to clear vegetation in Queensland. This includes both rural and farming communities, and developers in urban areas who are preparing land for development.

To state the effect of this case briefly:

- there is apparently a widely held view that if land is classified as 'Category X' (shown as white on a Property Map of Assessable Vegetation), it can be freely cleared without needing any approvals;
- the Court held that that view is not correct – a development application may in fact be required to clear Category X vegetation – depending on the Planning Scheme and/or local laws of the particular Council.



What happened?

1. The Developer sought to clear vegetation (Category X) on land it owned at Morayfield.
2. The Developer argued that no approval of the Council was required, because the clearing of Category X vegetation is exempt under the State's Planning Regulation 2017 (**the Planning Regulation**).
3. The Council argued otherwise and said that the clearing of such vegetation required approval under the Moreton Bay Regional Planning Scheme 2016 (**the Council's Planning Scheme**).
4. The Developer responded by arguing that the Council's Planning Scheme, to the extent it required a development approval for the clearing, was of no effect because it is inconsistent with the exempt categorisation under the Planning Regulation.

What does the legislation say?

The Planning Regulation categorises development of various kinds as either:

- Prohibited Development – being development for which a development application may not be made;
- Assessable Development – being development for which a development approval is required.
- Accepted Development – being development for which a development approval is not required;

The Planning Regulation then goes into some detail to designate various types of development (including some types of vegetation clearing) into these categories.

The Developer argued that the Planning

Regulation specifically excluded the vegetation clearing from the Prohibited Development and Assessable Development categories, and therefore it must necessarily be Assessable Development (notwithstanding it was not specifically listed in the schedule of Assessable Development in the Planning Regulation).

The Council argued that the Planning Regulation does not place this type of vegetation clearing in any category – therefore it leaves open the potential for the work to be made Assessable Development by a planning scheme and the Council's Planning Scheme does just that.

What did the Court of Appeal say?

Firstly, the Court noted that just because Category X vegetation is defined as 'exempt clearing work' under the Planning Regulation, it does not mean that no development approval is required.

The Court found that Planning Regulation did not designate clearing of Category X vegetation as any of Prohibited, Assessable or Accepted Development. In this context, the Court said:

The Regulation did not have to categorise each and every type of development, and it did not do so in terms of exempt clearing work. It left it open to another categorising instrument to do so, as occurred by the terms of the planning schemes. By that means, it became categorised as assessable development.

Therefore, the Council's Planning Scheme was not inconsistent with the Planning Regulation. Accordingly, the Council's Planning scheme was valid and the Developer was required to obtain a development approval if it wished to clear the Category X vegetation.



Our Comments

1. When you buy land on which vegetation clearing will be crucial to you, do your due diligence and do it properly. Do not assume that if you obtain a Property Map of Assessable Vegetation that shows land as white 'Category X' that you can clear that land without any approvals. In the case of some Council areas, it might in fact be the case that no development approval will be required. However, the reality is many Council's may regulate that type of clearing under their planning schemes and local laws. Expert planning advice should be obtained.
2. The Court of Appeal hearing this case was constituted by 3 judges, as is usually the case. The decision was a majority judgment, meaning that only 2 of the 3 judges found in favour of the Council. The third judge, Crow J, agreed with the Developer's arguments. He noted:

The legislative scheme set out in the Regulation is to allow local councils to make assessable the clearing of vegetation on prescribed land, but only to a limited extent. That is, the intent of the Regulation is to repose in the state for most of the clearing of vegetation on prescribed land the ability to control the clearing activity and to leave to the local governments pursuant to local categorising instruments, only a very narrow ability to control clearing of vegetation.

If this observation is picked up and accepted by the State government, there is a chance that legislation might be passed to overturn the effect of the decision. However, until and unless that occurs, we must all accept the majority decision and its consequences.

Should you wish to discuss any matters arising out of this article, please contact:

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