

13 December 2017

Mr Chris Lamey
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Sent by email:

Dear Chris

Regulation of levee construction on Norman Properties, Toobeah

1. We refer to your request for advice on 6 October 2017 regarding the regulation of levee banks on a group of properties situated in Toobeah, Queensland. For ease of reference, these properties shall be collectively referred to as 'Kalanga.' Specifically, you have sought advice as to the laws governing the construction of levee banks on 'Kalanga' from late 2012 to today's date.
2. Broadly speaking, three sets of levee laws have applied to the construction and modification of levee banks in the Goondiwindi Regional Council (**GR Council**) local government area at various points between late 2012 and the present. These are as follows:
 - Prior to 16 May 2014 (**Local Laws Regulating Levees**);
 - Between 16 May 2014 and 3 July 2017 (**First Tranche of State Laws**); and
 - From 3 July 2017 to the present (**Second Tranche of State Laws**).
3. Due to complexity associated with analysing these three sets of laws, we have divided this advice into the following six parts:
 - Part 1: Background
 - Part 2: Local Laws Regulating Levees
 - Part 3: First Tranche of State Laws
 - Part 4: Second Tranche of State Laws
 - Part 5: When do each of the three regulatory frameworks apply?
 - Part 6: Compliance and enforcement
4. Please note that **Parts 5 and 6 contain our conclusions regarding the applicable legal framework at different points in time and possible options regarding compliance and enforcement.** Part 6 also includes brief advice regarding the use of satellite imagery to ascertain when and where levees were constructed and/or modified.
5. **In summary**, it is our view that the *GR Council Levee Banks (Application of Continuing Local Law) Local Law 2011 (WSC Levee Law)* continued to operate until 15 May 2014. As discussed in the body of this advice, the WSC Local Law prohibited the construction of a levee in the GR Council area without a permit.

6. Neither the First Tranche of State Laws regulating levees (that commenced on 16 May 2014 and was repealed on 03 July 2017) nor the Second Tranche of State Laws regulating levees (that commenced on 03 July 2017) contain provisions extinguishing the application of this WSC Levee Law to levees unlawfully constructed or modified before 15 May 2014.
7. Unless Parliament expresses a clear intention to the contrary (which is not the case in this instance), development is regulated by the laws in place when a development takes place, even if those laws have been repealed. This means that the WSC Levee Law – and the compliance provisions contained therein – **still apply** to unauthorised levees constructed before 15 May 2014. For our purposes the most relevant compliance provision is the power for GR Council to issue a compliance notice, as described in Part 6 of this advice.¹
8. After 15 May 2014, either the First or Second Tranche of State Laws would apply to any work that constituted: the construction of a levee; the modification of an existing, lawful levee; or the construction of a levee that was unlawfully commenced before 15 May 2014. However, it would not apply to the construction of a levee that was lawfully commenced under the WSC Levee Law (that is, work that already had an approval under the WSC Levee Law).
9. Part 6 of this advice describes the compliance and enforcement options that are available under the First and Second Tranche of State laws. Note that limitation dates do apply for certain enforcement procedures under these laws. We can provide more detailed advice about this and any possible court proceedings, if required.

Part 1: Background

10. Title and company searches undertaken by this office indicate that Kalanga is comprised of eight separate titles which are variously owned or leased by individuals and entities associated with Mr John Norman. The relevant details are set out in **Annex 1**, below.
11. We are instructed that a total of approximately 52km of levee banks have been constructed on Kalanga and that construction of these banks commenced in late 2012. It is unclear when construction was completed, or whether it has continued to the present. We are further instructed that these levee banks were constructed without obtaining any formal approval from the relevant assessment manager.
12. Development is generally regulated by the laws in place when a development takes place.² Relevantly,

express words are necessary to take away rights that have accrued or liabilities that have been incurred under a repealed Act. Legal proceedings in

¹ We can find no limitation date regarding the issuing of such a notice by the GR Council.

² See for example: *Rowley v Chief of Army* [2017] FCA 1119, in which Perry J noted that ‘an Act that changes the law ought not to be understood as applying to facts or events that have already occurred so as to confer, impose or otherwise affect substantive rights or liabilities which the law had defined by reference to the past events: *Maxwell v Murphy* (1956) 96 CLR 261 at 267 (Dixon CJ); *ADCO Construction Pty Ltd v Goudappel* [2014] HCA 18; (2014) 254 CLR 1 at [27] (French CJ, Crennan, Keifel and Keane JJ)’.

*relation to any such rights or liabilities may be brought or continued. Penalties and forfeitures under a repealed Act are likewise unaffected.*³

13. The *Acts Interpretation Act 1954* (Qld) (**Acts Interpretations Act**) also makes it clear that the rights, liabilities or obligations acquired, accrued or incurred under previous legislation remain, even after that legislation is repealed. Further, it states that an ‘investigation, proceeding or remedy may be started, continued or completed, and the right, privilege or liability may be enforced and the penalty imposed, as if the repeal or amendment had not happened.’⁴
14. We can find no evidence of new levee laws in Queensland explicitly extinguishing the application of previous levee laws (by retrospectively approving existing, unauthorised levees, for example). As such, it is necessary to understand the legal framework regulating levees at different points in time between late 2012 to the present.
15. As the regulatory framework that applies to levees in Queensland has undergone several changes between late 2012 and today’s date, it has been necessary to analyse a number of legal instruments and amendments to those instruments. For the sake of clarity, these instruments and any relevant amendments have been summarised and set out in **Annex 2**.

Part 2: Local Laws Regulating Levees

16. The *Local Government Act 2009* (QLD) (**Local Government Act**) provides local councils with the power to ‘make and enforce any local law that is necessary and convenient for the good rule and local government of its local government area’.⁵ Relevantly, it also includes a provision that – broadly speaking - prohibits a local council from making a local law that ‘establishes an alternative development process’. However, until 15 May 2014,⁶ levees were exempted from this prohibition,⁷ thereby allowing local councils to make a local law regulating their construction and modification.
17. GR Council was one of the few local councils in Queensland to have a ‘local law’ in place regulating the construction or modification of levees within its jurisdiction. Specifically, on 28 September 2011 GR Council passed a resolution⁸ adopting the *Levee Banks (Application of Continuing Local Law) Local Law 2011 (Levee Banks Local Law)*.⁹ This was officially signed by their Chief Executive on 7 October 2011. The newly adopted Levee Banks Local Law extended the application of the *Waggamba Shire Council Local Law No. 26 (Levee Banks) 2004 (WSC Levee Law)* to the entire GR Council area. This was necessary to conform with the relevant competition law provisions.¹⁰

³ Pearce, D C and Geddes, R S, *Statutory Interpretation in Australia*, LexisNexis Butterworths, 8th ed, 2014, pp. 267-8.

⁴ *Acts Interpretations Act*, s. 20(2), (3).

⁵ *Local Government Act 2009*, s. 28.

⁶ *Land, Water and other Legislation Amendment Act 2013* (QLD) s. 151 (which removed levees from s. 37(5) of the *Local Government Act 2009*).

⁷ *Local Government Act*, s. 37. Original version 2009, (s. 37(5)(c)); amendment 2009 N36 s. 872 Schedule 2, (s. 37(4)(c)) ; amendment 2012 N33 s. 86, (s. 37(5)(c)).

⁸ As per *Local Government Act*, ss. 28, 29.

⁹ The Levee Banks Local Law was also passed pursuant to the now repealed *Local Government Reform Implementation Regulation 2008*, s. 13(2). This Regulation was designed to facilitate council mergers, hence more detailed analysis is not required for the purposes of this advice.

¹⁰ *Local Government Act*, s. 38,

18. The WSC Levee Law (that underpins the Levee Banks Local Law) includes a range of provisions controlling the development of levee banks. Relevantly:
- A person must not construct a levee bank on any land unless authorised by a permit issued under the WSC Levee Law. The maximum penalty for breaching this provision is 200 penalty unit.¹¹
 - An application to construct a levee bank must be in the prescribed form and must specify, amongst other things: the nature and purpose of the proposed levee bank;¹² the total length, maximum height and width at the top and base of the levee bank; the materials of which the levee bank will be constructed;¹³ **details of measures to be taken by the applicant to prevent injury or damage to contiguous land or any land outside the boundaries of the applicant's land arising from the proposed levee bank;**¹⁴ **details of when the proposed works are to be carried out.**¹⁵
 - Additional requirements in relation to a proposed levee bank located on land within the waggamba flood plain, including a requirement to prepare a hydraulic report.¹⁶
19. The WSC Levee Law sets out public notification provisions in relation to any application for a permit, and requires the GR Council to accept submissions in relation to the application for at least 21 days (known as the 'submission period'). The GR Council must also give a copy of the advertisement to 'all owners of land contiguous to the land' on which the levee is to be constructed (that is, to direct neighbours) at the same time the advertisement is lodged for publication.¹⁷ The GR Council is required to consider every submission made in the correct form.¹⁸
20. The WSC Levee Law sets out the process the GR Council must follow when determining an application. Notably, the Council 'must not consider and decide an application until it is in receipt of all the relevant information including a report from the shire engineer.'¹⁹ The GR Council may also invite anyone who made a submission to attend a council meeting in order to 'give a verbal explanation of their submission and any alternatives suggested.'²⁰
21. When deciding the application, the GR Council must consider a range of matters including but not limited to every valid submission; the report of the shire engineer; any verbal submission made at a council meeting.²¹
22. The GR Council may grant a permit authorising the construction of a levee bank if it is satisfied that:
- The grant of the permit is consistent with the objects of the WSC Levee Law;
 - The construction of the levee bank complies with the relevant performance criteria;

¹¹ WSC Levee Law, cl. 1D.

¹² WSC Levee Law, cl. 2(1)(d), (e).

¹³ WSC Levee Law, cl. 2(1)(f).

¹⁴ WSC Levee Law, cl. 2(1)(i).

¹⁵ WSC Levee Law, cl. 2(1)(j).

¹⁶ WSC Levee Law, cl. 2(2), (3), 3(1).

¹⁷ WSC Levee Law, cl. 5(1) – (6) inclusive.

¹⁸ WSC Levee Law, cl. 6(1),(2) ; 7(3)(c).

¹⁹ WSC Levee Law, cl. 7(1).

²⁰ WSC Levee Law, cl. 7(2).

²¹ WSC Levee Law, cl. 3 (a) – (g) inclusive.

- For an application to ‘keep a levee bank on land’ – the levee bank complies with the relevant performance criteria.²²
23. The WSC Levee Law sets out detailed performance criteria with which the levee bank must comply.²³ These criteria include but are not limited to the following:
- The grant of the permit ‘must not unduly affect the levels of timing of flood peaks’.²⁴
 - The grant of the permit ‘**must not result in any detrimental impact on ...other land...or community infrastructure.**’²⁵ (Our emphasis).

Part 3: First Tranche of State Laws

24. Since 16 May 2014, the construction or modification of levees in Queensland has been regulated by a suite of State planning and water laws, as set in **Annex 2** of this advice. This framework will be discussed in more detail, below.
25. In 2013, the *Water Act 2000* (QLD) (**Water Act**) was amended²⁶ to include provisions concerning the regulation of levees. Relevantly, these new provisions provided (amongst other things) for the creation of a regulation²⁷ setting out how a development application for the construction of a new levee or the modification of an existing levee would be assessed by an assessing authority.²⁸
26. The amendments also included ‘transitional provisions’ which stated that the new provisions would not apply to ‘existing levees’. An ‘existing levee’ was (and still is) defined as ‘a levee that was under construction’ at the commencement of the new provisions and ‘has not been modified since the construction of the levee was completed or otherwise came to an end’ or ‘that was existing on the commencement and has not been modified since.’²⁹ Relevantly, the transitional provisions do not provide for retrospective approval of existing, unauthorised levees. Rather, they merely state that they do not regulate ‘existing levees’.
27. The new provisions in the Water Act did not commence until 15 May 2014,³⁰ which coincided with the commencement of corresponding amendments to the *Sustainable Planning Regulation 2009* (QLD) (**Sustainable Planning Regulation**) and *Water Regulation 2002* (QLD) (**Water Regulation 2002**). These regulations – which have now been repealed and replaced with similar provisions in the *Planning Regulation 2017* (QLD) (**Planning Regulation**) and *Water Regulation 2016* (QLD) (**Water Regulation 2016**) – will be discussed in turn.
28. The Sustainable Planning Regulation was amended to bring the construction of new levees or the modification of existing levees (constituting ‘operational work’)³¹ under

²² This may arise under Part 3 of the WSC Local Law.

²³ WSC Levee Law, cl. 7A(1)(a).

²⁴ WSC Levee Law, cl. 7A(6).

²⁵ WSC Levee Law, cl. 7A(10).

²⁶ Amended by the *Land, Water and other Legislation Amendment Act 2013* (QLD).

²⁷ A regulation is a subordinate instrument that sits under a piece of legislation, in this instance the Water Act.

²⁸ Water Act, s. 967.

²⁹ Water Act, s. 1247.

³⁰ As the relevant sections were not commenced by way of proclamation, they automatically commenced one year after passage of the *Land, Water and other Legislation Amendment Act 2013* (QLD): *Acts Interpretation Act 1954* (QLD), s. 15DA(2).

³¹ Sustainable Planning Act, s. 10(1).

State planning laws.³² More specifically, the amendments set out an assessment framework for three categories of levees: category 1, category 2 and category 3.

- Category 1 levees are classified as self-assessable³³ against a code specified in the *Water Regulation 2002*, s. 62(e).³⁴
 - Category 2 levees are classified as assessable development³⁵ against the IDAS Code³⁶ set out in the *Water Regulation 2002*, Schedule 15B,³⁷ with the local council the relevant assessment manager.³⁸
 - Category 3 levees are classified as assessable against the IDAS Code set out in the *Water Regulation 2002*, Schedule 15B³⁹; they also required impact assessment.⁴⁰ While the assessment manager for category 3 levees is the relevant local council, the Queensland State Government is the designated a 'concurrence agency'.⁴¹ This means (amongst other things) that the relevant State Government agency could refuse to approve an application for a category 3 levee, or require the relevant local council to attach certain conditions to an approval.⁴²
29. The amendments to the Sustainable Planning Regulation further provide that the definition of category 1, 2 and 3 levees respectively are those contained in the *Water Regulation 2002*. It also adopted the definition of 'existing levee' contained in the *Water Act* and 'modify' (an existing levee) contained in the *Water Regulation 2002*.⁴³ These definitions are set out in **Annex 3**.
30. In addition to the definitions referred to in the preceding paragraph, the *Water Regulation 2002* was amended to set out the development assessment requirements for each category of levee (as referenced in the *Sustainable Planning Regulation*).⁴⁴ As noted above, this includes the IDAS Code for the construction or modification of a category 2 or category 3 levee. Briefly, the Code is deemed to have been complied with if the specified performance outcomes are met. These performance outcomes are contained in **Annex 4** of this advice.
31. As noted in Annex 2, the *Water Regulation 2002* was repealed in December 2016 and replaced by the *Water Regulation 2016*, which replicated the IDAS Code. The *Water Regulation 2016* also replicated the definitions of category 1, 2 and 3 levees

³² Sustainable Planning Regulation, Schedule 3, Part 1, Table 4; Schedule 3, Part 2, Table 4.

³³ Sustainable Planning Regulation, Schedule 3, Part 2, Table 4.

³⁴ Sustainable Planning Regulation, Schedule 5, Part 2, Table 4. Self-assessable development is development that does not require approval by an assessment manager such as a local council (or a corresponding permit), but must comply with the standards set out in the relevant code. See: Sustainable Planning Act 2009, Schedule 3 (dictionary), s. 232.

³⁵ Sustainable Planning Regulation, Schedule 3, Part 1, Table 4.

³⁶ Integrated Development Assessment System Code.

³⁷ Sustainable Planning Regulation, Schedule 5, Part 1, Table 4.

³⁸ Sustainable Planning Regulation, Schedule 6, Table 3 (which states that the applicable local government is the assessment manager if Tables 1 or 2 do not apply. It appears unlikely that these tables would apply in relation to the levees the subject of this advice).

³⁹ Sustainable Planning Regulation, Schedule 5, Part 1, Table 4.

⁴⁰ Sustainable Planning Regulation, Schedule 3, Part 1, Table 4.

⁴¹ Sustainable Planning Regulation, Schedule 7, Table 2.

⁴² *Sustainable Planning Act 2009 (QLD) (Sustainable Planning Act)*, Subdivision 2, Division 4, Part 3.

⁴³ *Sustainable Planning Regulation 2009*, Schedule 26 (dictionary); *Water Act 2000*, s. 1247; *Water Regulation 2002*, Schedule 17 (dictionary).

⁴⁴ *Water Regulation 2002*, s. 62D, 62(e).

and 'modify' an existing levee contained in the Water Regulation 2002. These provisions remained unchanged until the Water Regulation 2016 was amended in mid-2017. This will be discussed in Part 4 of this advice.

32. The IDAS Code must also be read in conjunction with the decision-making provisions in the Sustainable Planning Act. Essentially, a development is required to be approved if it is consistent with the relevant instruments (in this instance the IDAS Code). Conversely, if it is not consistent with the relevant instrument, it must be refused except in a limited number of circumstances, notably where there are sufficient 'grounds' to justify an approval despite the inconsistency or conflict.⁴⁵ 'Grounds' is defined to mean 'matters of public interest' and to explicitly exclude 'the personal circumstances of an applicant, owner or interested party.'⁴⁶
33. It is important to note that under the Sustainable Planning Act, the Minister retains discretion to direct local councils to decide a development application involving a 'State interest' in a particular way, or override local council's decision-making role entirely by 'calling-in' a particular development application. If a development application is called-in by the Minister, this also has the effect of bypassing the concurrence agency and appeal process.⁴⁷ 'State interest' is defined relatively broadly to encompass the following:
- a) *an interest that the Minister considers affects an economic or environmental interest of the State or a part of the State, including sustainable development; or*
 - b) *an interest that the Minister considers affects the interest of ensuring there is an efficient, effective and accountable planning and development assessment system.*⁴⁸

Part 4: Second Tranche of State laws

34. The Sustainable Planning Act and Sustainable Planning Regulation were repealed and replaced by the *Planning Act 2016* (QLD) (**Planning Act**) and Planning Regulation on 3 July 2017. The new provisions concerning the construction of new levees or the modification of existing levees are very similar to those contained in the repealed legislation. The key provisions are as follows.⁴⁹
35. The definitions of Category 1, 2 and 3 levees are still those contained in the *Water Regulation 2016*.⁵⁰ Category 1 levees remain self-assessable,⁵¹ while Category 2 levees are code assessable⁵² and Category 3 levees are impact assessable.⁵³ The relevant Code is set out in the Water Regulation 2016.⁵⁴ It is the same as the IDAS Code discussed above and set out **Annex 4** of this advice.

⁴⁵ *Sustainable Planning Act*, s. 326. See also: *Grosser v Gold Coast City Council* [2001] QCA 423; (2001) 117 LGERA 153 and *Weightman v Gold Coast City Council* [2002] 2 Qd R 441; [2002] QCA 234.

⁴⁶ *Sustainable Planning Act*, Schedule 3 (dictionary).

⁴⁷ *Sustainable Planning Act*, ss. 417-433.

⁴⁸ *Sustainable Planning Act*, Schedule 3 (dictionary).

⁴⁹ Note that we have not provided a detailed analysis of the entire planning framework contained in the Planning Act as this is not necessary for the purposes of this advice.

⁵⁰ Planning Regulation, Schedule 24 (dictionary); Water Regulation 2016, s. 101.

⁵¹ Planning Regulation, Schedule 7, s. 11.

⁵² Planning Regulation, Schedule 10, s. 32, Table 1.

⁵³ Planning Regulation, Schedule 10, s. 32, Table 1; Water Regulation 2016, Schedule 10, s. 1.

⁵⁴ At Schedule 10.

36. The local council remains the assessment manager for category 2 and 3 levees.⁵⁵ However, referral to the Queensland Government is required for Category 3 levees, who is required to assess the application against the 'State development assessment provisions'.⁵⁶ The referral agency may (amongst other things) direct the local council to approve, approve with conditions or refuse the application.⁵⁷ The State development assessment provisions are defined as 'the document made by the Minister called 'State development assessment provisions', dated 11 August 2017 and published on the department's website.'⁵⁸ These provisions include 'State code 19: Category 3 levees.'⁵⁹
37. Code assessable development must be approved by the assessment manager 'to the extent that it complies with all of the assessment benchmarks for the development'.⁶⁰ The assessment manager may also choose to approve the development if it does not comply with 'some of the assessment benchmarks',⁶¹ and may 'to the extent the development does not comply with some or all the assessment benchmarks, decide to refuse the application only if compliance cannot be achieved by imposing development conditions.'⁶² Assessment benchmarks are contained in the code set out in the Water Regulation 2016, Schedule 10. As noted above, these are the same as those reproduced in **Annex 4** of this advice.
38. By way of contrast, impact assessable development can simply be approved in whole or in part, with or without conditions, or refused.⁶³
39. The Minister may – subject to the relevant requirements – give directions in relation to an undetermined development application that concerns a 'State interest'.⁶⁴ The Minister may then determine the application.⁶⁵ A 'State interest' is broadly defined as 'an interest that the Minister considers (a) affects an economic or environmental interest of the State or a part of the State; or (b) affects the interest of ensuring this Act's purpose is achieved.'
40. The relevant provisions in the Water Act continue to apply (noting that some amendments were made to reflect the introduction of the Planning Regulation). That is, the provisions regarding 'existing levees' have been maintained.⁶⁶

⁵⁵ Planning Regulation, Schedule 8, Table 4.

⁵⁶ Planning Regulation, Schedule 10, s. 32, Table 1.

⁵⁷ Planning Act, s. 56(1)(b).

⁵⁸ Planning Regulation, Schedule 24 (dictionary).

⁵⁹ <http://www.dilgp.qld.gov.au/planning/development-assessment/state-development-assessment-provisions.html>. (Accessed 08 December 2017).

⁶⁰ Planning Act, s. 60(2)(a). Note that where applicable, this is subject to s. 62 (which is entitled 'Complying with referral agency's responses').

⁶¹ Planning Act, s. 60(2)(b). Note that where applicable, this is subject to s. 62 (which is entitled 'Complying with referral agency's responses').

⁶² Planning Act, s. 60(2)(d).

⁶³ Planning Act, s. 60(3). Note that where applicable, this is subject to s. 62 (which is entitled 'Complying with referral agency's responses').

⁶⁴ Planning Act, ss. 93(1), 94, 95.

⁶⁵ Planning Act, ss. 95(1)(a), (c).

⁶⁶ Water Act, ss. 967, 1247.

Part 5: When do each of the three regulatory frameworks apply?

WSC Levee Law

41. It is our view that the WSC Levee Law continued to operate until 15 May 2014, when the Queensland Government removed the exemption that had allowed local councils to make local laws regulating levees.⁶⁷ Further and as noted above, neither the First nor the Second Tranches of State Laws, respectively, contained provisions extinguishing the application of the WSC Levee Law to levees constructed or modified before 16 May 2014 (which is when the First Tranche of State Laws commenced).
42. The WSC Levee Law would therefore apply to all levees completed by 15 May 2014 and to any levees under construction on this date.⁶⁸
43. After 15 May 2014, the First or Second Tranche of State Laws would apply to any work that constituted construction of a levee (including work that was unlawfully commenced before 15 May 2014). But it would not apply to construction of a levee that was lawfully commenced under the WSC Levee Laws (that is, work that already had an approval).

First Tranche of State Laws

44. The First Tranche of State Laws would apply to any development for the modification or construction of levees (including the continuation of an unlawfully constructed levee) carried out after 16 May 2014 (which is when these laws commenced) and before 03 July 2017 (which is when the Second Tranche of State Laws Commenced).⁶⁹

Second Tranche of State Laws

45. The Second Tranche of State Laws would apply to any development for the modification or construction of levees (including the continuation of an unlawfully constructed levee) carried out after 03 July 2017.

Part 6 – Compliance and enforcement

46. Part 6 of this advice examines some of the offence, compliance and enforcement provisions under the WSC Levee Law, First Tranche of State Laws and Second Tranche of State Laws, respectively. We can provide more detailed advice about these matters if required.
47. Note that the GR Council is the assessment manager – and has enforcement powers - under the WSC Levee Law. Based on the information that you have provided us with, the levees on Kalanga are likely to be category 2 levees for the

⁶⁷ This assessment is based on an amendment to the Local Government Act, s. 37, which removed the exemption applying to the creation of local laws for levees. We also note that the Local Government Act, s. 27 states that if 'there is any inconsistency between a local law and a law made by the State, the law made by the State prevails to the extent of the inconsistency.'

⁶⁸ This is due to: the definition of 'existing levee' set out in the Water Act 2000, s. 1247 (set out in **Annex 3** of this advice); the presumption that rights, liabilities or obligations acquired, accrued or incurred under previous legislation remain, even after that legislation is repealed.

⁶⁹ Planning Act, s. 288.

purposes of the First and Second Tranches of State Laws.⁷⁰ As such, the local council is also the assessment manager – and has enforcement powers - under these laws.⁷¹

WSC Levee Law

48. The WSC Levee Law prohibits the construction of levee bank on any land in the absence of a permit.⁷² The maximum penalty is 200 penalty units. The WSC Levee Law includes corresponding compliance and enforcement provisions.⁷³ These include a provision which allows the GR Council to issue a compliance notice to, for example, order the demolition of a levee bank that was not authorised by a permit under the WSC Levee Law.⁷⁴ If the landholder refuses to undertake the demolition, the GR Council may ‘itself have the work carried out.’⁷⁵
49. The Local Government Act also provides for a local government to commence proceedings either: within one year after the offence was committed; or within six months after the offence comes to its knowledge, but within two years after the offence was committed.⁷⁶

First Tranche of State Laws

50. It is an offence under the Sustainable Planning Act to undertake assessable development without an effective development permit. The maximum penalty for breaching this provision is 4500 penalty units.⁷⁷ As assessment manager, the GR Council must generally issue a ‘show cause notice’ (which allows the person to explain why an enforcement notice should not be given) before further enforcement action is taken.⁷⁸ However, if it ‘reasonably considers it is not appropriate in the circumstances to give the notice’, it may elect to directly issue an enforcement notice.⁷⁹ An enforcement notice may require a person to refrain from continuing to commit a development offence or require that person to remedy the commission of the breach (by removing the offending levees, for example). An enforcement notice can be appealed by the alleged offender.⁸⁰
51. The Sustainable Planning Act also includes ‘third party enforcement provisions’. These provisions allow any person to ask the Court to restrain or remedy the commission of a development offence.⁸¹ If the Court is satisfied that an offence has been committed, it may then issue an enforcement order, ordering the offending

⁷⁰ Water Regulation 2002, s. 62C; Water Regulation 2016, s. 101. These provisions contain the definitions for each category of levee.

⁷¹ Sustainable Planning Act, Schedule 3 (definition of ‘assessing authority’); Planning Act, Schedule 2, (definition of ‘enforcement authority’).

⁷² WSC Levee Law, cl. 1D.

⁷³ WSC Levee Law, Part 4.

⁷⁴ WSC Levee Law, cl. 9G(2), (3), (4).

⁷⁵ WSC Levee Law, cl. 9H. See also Local Government Act, s. 129 (which allows an authorised council officer to enter private property with permission) and s. 130 (which allows a local council to apply for a warrant in order to enter private property where an offence under the Local Government Act has been committed). We note that an offence would include non-compliance with a local law (due to the definition of Local Government Act, which includes a local law).

⁷⁶ Local Government Act, ss. 243, 242.

⁷⁷ Sustainable Planning Act, s. 578.

⁷⁸ Sustainable Planning Act, s. 588(1),(2); s. 591.

⁷⁹ Sustainable Planning Act, s. 588(3).

⁸⁰ Sustainable Planning Act, s. 473.

⁸¹ Sustainable Planning Act, s. 601.

party to do or restrain from doing certain things (including demolition of an unauthorised development or remediation works).⁸² Proceedings must be commenced within one year of the commission of the offence or within six months after the offence comes to the complainants knowledge.⁸³

52. Criminal proceedings may also be commenced in the QLD Magistrates Court by the assessment manager (GR Council) or a third party in relation to an alleged breach under the Act. The Court can issue orders to restrain or remedy a breach of the Act (again, this could include an order to demolish unauthorised works or undertake remediation works), or to pay an affected third party compensation.⁸⁴ Proceedings must be commenced within one year of the commission of the offence or within six months after the offence comes to the complainant's knowledge.⁸⁵
53. As noted above, the Minister has discretion to direct local councils to decide a development application involving a 'State interest' in a particular way, or override local council's decision-making role entirely by 'calling-in' a particular development application.⁸⁶ As 'State interest' is defined broadly, it could possibly cover a development application for extensive levees banks, where those levees have or will have a significant impact on the environment and other landholders.

Second Tranche of State Laws

54. The Planning Act includes a suite of offence, compliance and enforcement provisions. Relevantly, it is an offence to carry out assessable development in the absence of an effective development permit. The maximum penalty is 4500 penalty units.⁸⁷ The show cause,⁸⁸ enforcement notice,⁸⁹ third party enforcement⁹⁰ and criminal proceeding provisions⁹¹ are largely similar to those contained in the Sustainable Planning Act. However, there is no time limit imposed on the commencement of third party enforcement proceedings, while criminal proceedings may be commenced within one year of the offence being committed or coming to the complainant's knowledge.⁹²
55. As noted above, the Minister may – subject to the relevant requirements – give directions in relation to an undetermined development application that concerns a 'State interest'.⁹³ The Minister may then determine the application.⁹⁴ As the relatively broad definition of 'State interest' has been maintained, it could cover development application for extensive levees banks, where those levees have or will have a significant impact on the environment and other landholders.

⁸² Sustainable Planning Act, ss. 602, s. 605.

⁸³ Sustainable Planning Act, s. 610.

⁸⁴ Sustainable Planning Act, s. 613.

⁸⁵ Sustainable Planning Act, s. 610.

⁸⁶ *Sustainable Planning Act*, ss. 417-433.

⁸⁷ Planning Act, s. 163.

⁸⁸ Planning Act, s. 167.

⁸⁹ Planning Act, s. 168.

⁹⁰ Planning Act, s. 180.

⁹¹ Planning Act, ss. 174-6 inclusive.

⁹² Planning Act, s. 174.

⁹³ Planning Act, ss. 93(1), 94, 95.

⁹⁴ Planning Act, ss. 95(1)(a), (c).

Use of satellite imagery

56. We have been advised by an expert that specific satellite imagery can be used to ascertain when levee banks on Kalanga were under construction or completed. We have also been advised that the right sort of satellite imagery should be able to detect 'camouflaged' levees. We can provide you with more detailed information about this if required.
57. In any case, the GR Council should avail itself of this technology in order to determine when work on each of the levees that make up the 52km began, when any relevant modifications to each of these levees took place and when they were each completed. Given the nature and extent of the works in question, it is manifestly inadequate to rely entirely on documentation provide by the applicant, particularly for the purposes of issuing a retrospective approval (and given the significant impacts of these levees on surrounding properties).

Please do not hesitate to contact us to discuss this advice or any matters arising from this advice.

Yours sincerely,
EDO NSW

Dr Emma Carmody
Senior Solicitor – Policy and Law Reform

Our Ref: P1779

Annex 1

Title	Owner
5/SP246968	WHYNOT FARM CO PTY LTD
34/SP258473	WHYNOT FARM CO PTY LTD
4/CVN161	AILEEN JOAN NORMAN & JD NORMAN PTY LTD
1/SP281673	AILEEN JOAN NORMAN
6/CVN270	AILEEN JOAN NORMAN
8/CVN327	AILEEN JOAN NORMAN & JD NORMAN PTY LTD
3/SP246968	WHYNOT FARM CO PTY LTD
3/SP205933	WHYNOT FARM CO PTY LTD

Annex 2

Law	Relevant provisions	Relevant commencement/ amendments	Repeal and replaced by
Local government laws			
Goondiwindi Regional Council – Levee Banks (Application of Continuing Local Law) Local Law 2011	All Regulated construction of levies. Imposed fines for breaches.	Commenced 2004 Renewed 2011	Ceased to apply on 16 May 2014 ⁹⁵ and to the extent of any inconsistency with new, State laws regulating levees. ⁹⁶
Local Government Act 2009 (QLD), s. 37	s. 37(4)(c) until amendment. s. 37(5)(c) until amendment. s. 27	s. 37(4)(c) amended 22 November 2012. ⁹⁷ s. 37(5)(c) amended 2013 removing the exemption applying to levees. ⁹⁸	Current
State water laws			
Water Act 2000 (QLD)	ss. 967, 968, 969, 1247, Schedule 4 (definition). Provided for the creation of a Regulation to regulate levees.	Amended 2013. Commenced 15 May 2014. ⁹⁹ Amended 3 July 2017. ¹⁰⁰	Current
Water Regulation 2002 (QLD)	Cll. 62, 62C, 62D, Schedule 15B, Schedule	16 May 2014 ¹⁰¹	6 December 2016. Replaced by Water Regulation 2016 (QLD). ¹⁰²

⁹⁵ By virtue of the *Land, Water and other Legislation Amendment Act 2013* (QLD), which removed s. 37(5)(c) (levees). This subsection had allowed local councils to make local laws regulating levees.

⁹⁶ By virtue of the *Water and Another Regulation Amendment Regulation (No. 1) 2014* (QLD) and *Local Government Act 2009* (QLD). Specifically, this amending Regulation brought the regulation of levees under the *Water Regulation 2002* (QLD) and *Sustainable Planning Regulation 2009* (QLD). These new, State laws must be read in conjunction with the *Local Government Act 2009* (QLD), s. 27, which states that 'if there is any inconsistency between a local law and a law made by the State, the law made by the State prevails to the extent of the inconsistency'.

⁹⁷ *Local Government and Other Legislation Amendment Act 2012* (QLD).

⁹⁸ Amended by the *Land, Water and other Legislation Amendment Act 2013* (QLD). Amendment to s. 37 (set out in Part 10) to commence on a day declared by proclamation. As no proclamation was made, these provisions automatically commenced on year later on 15 May 2014 (*Acts Interpretation Act 1954* (QLD), s. 15DA(2)).

⁹⁹ Amended by the *Land, Water and other Legislation Amendment Act 2013* (QLD). Amendment to the relevant provisions (set out in Part 19, Division 3) to commence on a day declared by proclamation. As no proclamation was made, these provisions automatically commenced on year later on 15 May 2014 (*Acts Interpretation Act 1954* (QLD), s. 15DA(2))

¹⁰⁰ Amended by the *Planning (Consequential) and Other Legislation Amendment Act 2016* (commencing on 3 July 2017). This was to amend the *Water Act 2000* (QLD) so that it was consistent with the new *Planning Act 2016* (QLD).

¹⁰¹ Amended by *Water and Another Regulation Amendment Regulation (No. 1) 2014* (QLD).

¹⁰² *Water Act 2000*, s. 1247.

	17 (Dictionary)		
Water Regulation 2016 (QLD)	Part 10, Division 2; Schedule 10.	6 December 2016 Amended 3 July 2017 (inserted new cl. 101A, amended cl. 102)	Current
State planning laws			
Sustainable Planning Act 2009 (QLD)	s. 232		3 July 2017. Replaced by Planning Act 2016 (QLD)
Sustainable Planning Regulation 2009 (QLD)	Part 3, Division 1; Schedules 3, 5, 7, 26 (Dictionary).	16 May 2014 ¹⁰³	3 July 2017. Replaced by Planning Regulation 2017 (QLD)
Planning Act 2016 (QLD)	Chapter 3, Part 1; s. 48,	3 July 2017	Current
Planning Regulation 2017 (QLD)	Schedule 7 (cl 11), Schedule 10 (cl. 32); Schedules 8, 24 (Dictionary)	3 July 2017	Current

¹⁰³ Amended by *Water and Another Regulation Amendment Regulation (No. 1) 2014 (QLD)*.

Annex 3

Water Regulation 2002, s. 62C (definition of levee)

...

- 2) A **category 1 levee** is a levee that has no off-property impact.
- 3) A **category 2 levee** is a levee—
 - a) that has an off-property impact; and
 - b) for which the affected population is less than 3.
- 4) A **category 3 levee** is a levee—
 - a) that has an off-property impact; and
 - b) for which the affected population is at least 3.
- 5) In this section—

affected population, for a levee, means the total number of persons occupying all buildings on which the levee has a significant impact.

levee property—

- a) means the lot or parcel of land on which a levee is situated; and
- b) includes another lot or parcel of land that is contiguous with the lot or parcel mentioned in paragraph (a) and owned by the same entity.

off-property impact, for a levee, means an impact the levee has on people, property or the environment outside the levee property.

significant impact, of a levee on a building, means each of the following—

- a) an increase, caused by the levee, of more than 5cm in the flow height of water over the floorboards of the building;
- b) an increase, caused by the levee, of more than 0.2 m/s in the flow velocity of water over the floorboards of the building.

Water Act 2000, s. 1247 (definition of existing levee)

- 1) Chapter 8, part 2, division 3, and a regulation made under [section 1014](#) (2)(n) do not apply to an existing levee.
- 2) In this section—

existing levee means a levee—

 - a) that—
 - i. was under construction when [section 967](#) commenced; and
 - ii. has not been modified since the construction of the levee was completed or otherwise came to an end; or
 - b) that was existing on the commencement and has not been modified since.

Water Regulation 2002, Schedule 17 (definition of 'modify' for an existing levee)

modify, for an existing levee, means any or all of the following—

- a) to raise or lower the height of the levee;
- b) to extend or reduce the length of the levee;
- c) to make another change to the levee that affects the flow of water.

Annex 4

Water Regulation 2002 (IDAS Code)

Schedule 15B IDAS code for development applications for construction or modification of particular levees

[section 62D](#)

1 Application of code

- 1) The code applies for the assessment of a development application under the [Sustainable Planning Act 2009](#) for development that is—
 - a) the construction of a new category 2 levee or new category 3 levee (each a **new levee**); or
 - b) the modification of an existing levee if, after the modification, the levee (the **modified levee**) will fulfil the requirements for a category 2 levee or category 3 levee.
- 2) The code should be read together with the document called ‘Guidelines for the construction or modification of category 2 and 3 levees’ published by the department.

Editor’s note—

A copy of the document called ‘Guidelines for the construction or modification of category 2 and 3 levees’ is available on the department’s website.

2 Purpose of code

The purpose of the code is to ensure that a new levee or modified levee meets a set of criteria.

3 Definitions

In this schedule—

modified levee see section 1(b).

new levee see section 1(a).

off-property impact, for a levee, see [section 62C \(5\)](#) of the regulation.

4 Compliance with code

- 1) The code is complied with if each of the performance outcomes stated in column 1 of the table is complied with for a new levee or modified levee.
- 2) A performance outcome is complied with if the new levee or modified levee—
 - a) complies with an acceptable outcome stated in column 2 of the table; or
 - b) otherwise satisfies the performance outcome mentioned in column 1 of the table.

Column 1	Column 2
Performance outcome	Acceptable outcome
<p>1. any off-property impact from the levee is minimised and acceptable having regard to the following—</p> <ul style="list-style-type: none"> • the environment in which the levee is located; • the measures proposed to be taken to mitigate any off-property impact; • any compensation measures for an impact that are proposed by the applicant 	<p>the levee does not result in—</p> <ul style="list-style-type: none"> a) an unacceptable change in hydraulic effects that occur off-property; and b) an unacceptable impact on people, property or the environment
<p>2. the levee is a safe and stable structure</p>	<p>the design, construction, operation and maintenance for the levee is appropriate for the materials used and the levee's intended function</p>
<p>3. community safety is ensured in the event a category 3 levee fails or overtops</p>	<p>appropriate emergency action procedures are in place for category 3 levees</p>