necessary. If Stockland's contentions were upheld, Mirvac would have no longer been able to pursue a development application because it would have been out of time to lodge a fresh development application.

Court of Appeal decision

The Court of Appeal dismissed Stockland's application for leave to appeal and upheld the primary P&E court judge's judgement, however, on materially different grounds. The Court of Appeal was unable to agree with the approach of Judge Brabazon in respect of the phrase "taking or interfering with a State resource". The Court of Appeal took the view that the words "taking or interfering" were confined to a particular kind of involvement of State resource in a proposed development which triggered section 3.2.1(5) of the IPA. The words indicated that the nature of the connection would have to be an impact that was adverse to a State's interest. In this case the Court of Appeal said that there was no adverse impact on the State resource as lot 301 was being used for what it was originally intended to be used, a public road, and therefore the change to the development did not trigger section 3.2.1(5) of the IPA. Mirvac's application was deemed to be properly made and not required to be excused under section 4.1.5 (a) of the IPA.

Barro Group Pty Ltd v Redland Shire Council and Ors (2009) 169 LGERA 326; [2009] QCA 310

(McMurdo P, Keane JA and Wilson J – 16 October 2009)

Barro Group Pty Ltd (Barro) submitted a development application to expand the quarrying activities undertaken on the subject site. In the development application Barro stated that the application did not involve the taking of or interfering with a State resource. The land the subject of Barro's application is bisected by a road as defined in the *Integrated Planning Act 1997*. Barro proposed to locate plant and equipment used in its quarrying activities on that road. There was no evidence of the attitude of the State Government to the involvement of the road in the proposed development. By reason of this submission the application was not a properly made application within the meaning of section 3.2.1 of the IPA. Nevertheless, the application proceeded to a decision by the Council. The Council ultimately decided to refuse Barro's application. Barro appealed against that decision to the Queensland Planning and Environment Court.

Planning and Environment Court decision (Searles DCJ)

During the Planning and Environment Court proceedings Barro expressed willingness, albeit relatively late in the proceedings, to remove the plant equipment from the road and, use the road as a road only. Barro further argued, in the alternative, that it would not seek any development permit over the road. The purpose of these arguments was to negate any alleged interference with the State resource. His Honour Judge Searles rejected both arguments. Both arguments, the Court found, were predicated upon the appellant being able to amend its development application and rely upon a new proposal. No application to amend the proposal had been made.

After considering the meaning of "interference with a State resource" in section 12 of the *Integrated Planning Regulation 1998*, the Court found that locating the plant and equipment on the road was an interference with a State resource. Putting the equipment on the road would inhibit full exploitations of rights attached to that road. This meant that the development application was not properly made. It had failed to comply with section 3.2.1(7)(e) of IPA due to the absence of evidence required under section 3.2.1(5) of the IPA (which deals with the taking of or interfering with a State resource). There was, then, no properly made application. The Court found that section 4.1.5(a) of the IPA (which gives the Court the discretion to excuse non-compliance) was not available to cure the defect in the application.

Court of Appeal decision

The Court of Appeal upheld the decision of the primary judge in the Planning and Environment Court and dismissed the appeal. Because Barro's application did not contain the evidence required by section 3.2.1(5) of the IPA, it was not and had never been a properly made application within the meaning of section 3.2.1(7). Council, as the

assessment manager, was not entitled to treat it as a properly made application under section 3.2.1(9).

Barro had argued that these observations were irrelevant to the questions for determination by the Court of Appeal. Barro submitted that the question was solely whether discretion under section 4.1.5(a) of IPA is available to excuse the non compliance with section 3.2.1(5)(a) of IPA. In relation to this argument, the Court stated that it would be odd if the exercise of the excusatory power conferred by section 4.1.5A on the Planning and Environment Court could authorise the Court to make a decision upon an application which, under the specific provisions of IPA, the Council had no authority to acknowledge, assess or decide and which therefore could not give rise to a decision by the Council on an appeal to the Planning and Environment Court.

In the end, the Court concluded that its primary obligation was to give effect to the intention of the legislature as expressed in the statute rather than to a judicial interpretation of the statute. The Court formed the view that the reasoning in *Oakden* (a case in which section 4.1.5A was allowed to cure an application not properly made) should no longer be followed. The views taken in the cases of *Chang* and *Fawks* (cases in which section 4.1.5A was not allowed to be used to excuse non-compliance for an application that was not properly made) is to be preferred. The Court upheld the decision of the primary judge in the Planning and Environment Court and dismissed the appeal.

Solomon Rowland, Lawyer for Crown Solicitor

NB - the Sustainable Planning Act 2009, which commenced 18 December 2009 and replaced the *Integrated Planning Act 1997*, enlarges the Planning and Environment Court's power to excuse non-compliance. Section 440(3) expressly permits the Court to excuse non-compliance with a development application that is not properly made.

Scott Sellwood, Queensland Editor, 24 December 2009