SUPREME COURT OF QUEENSLAND

CITATION:	*Rino Properties Pty Ltd v Chief Executive, Department of Environment, Tourism and Innovation & Jackie McKeay* [2026] QSC 161
PARTIES:	**RINO PROPERTIES PTY LTD** (applicant) **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT, TOURISM AND INNOVATION** (first respondent) **v** **JACKIE MCKEAY** (second respondent)
FILE NO/S:	BS 61/26
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	3 August 2026
DELIVERED AT:	Brisbane
HEARING DATE:	29 May 2026
JUDGE:	Wilson J
ORDER:	**1. The application filed on 9 January 2026 is dismissed.** **2. The question of costs be adjourned to a date to be fixed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – FAILURE TO CONSIDER – Where the applicant applied to for judicial review of a decision made on behalf of the first respondent by the second respondent – where the second respondent refused the applicant's request for a declaration that 71,442 tonnes of waste located at a site leased by the first respondent was "exempt waste" under s 35 of the *Waste Reduction and Recycling Act 2011* (Qld) – where the applicant alleges that the second respondent failed to have regard to relevant matters, being the applicant's material describing why the circumstances warranted an exemption under s 35 – where the applicant applies for relief under the *Judicial Review Act 1991* (Qld), or alternatively, the *Civil Proceedings Act 2011* (Qld) – whether the decision-maker failed to have regard to relevant matters when denying the

applicant's request for a declaration that the waste was "exempt waste" – whether the construction of "exceptional circumstances" under s 35 is disjunctive or conjunctive – whether the second respondent applied a disjunctive or conjunctive construction – whether the construction of "exceptional circumstances" under s 35 should take its ordinary meaning – whether the second respondent determined the request with regard to the ordinary meaning of the term – whether the circumstances outlined in the applicant's request were "exceptional"

ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – DECISIONS UNDER AN ENACTMENT – GENERALLY – Where the respondents allege in their submissions that the decision was not made "under an enactment" – where the respondents otherwise accept that the Court has jurisdiction to hear grant relief under the CP Act – whether the Court has jurisdiction to grant relief

Civil Proceedings Act 2011 (Qld), s 10
Environmental Protection Act 1994 (Qld)
Judicial Review Act 1991 (Qld), s 4, 20(1), pt 3
Planning Act 2016 (Qld), s 164
Waste Reduction and Recycling Act 2011 (Qld), s 3, s 4(1), s 4(2)(a), s 4(2)(b), s 5, s 5(c), s 8, s 8AA, s 9, s 25, s 26, s 31, s 32, s 34, s 35, s 36, s 175, div 2, div 3

AQU17 v Minister for Immigration and Border Protection [2018] FCAFC 111
Arora v Minister for Immigration and Border Protection [2017] FCA 484
Australian Retailers Association v Reserve Bank of Australia (2005) 148 FCR 446
Cohn v Hatcher (2005) 146 FCR 275
Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280
D'Amore v Independent Commissioner Against Corruption [2012] NSWSC 473
Djokovic v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs (2022) 289 FCR 21
Griffith University v Tang (2005) 221 CLR 99
Hasim v A-G (Cth) (2013) 218 FCR 25
Hatcher v Cohn (2004) 139 FCR 425
Minister for Aboriginal Affairs v Peko-Wallsend (1986) 162 CLR 24
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane (2021) 274 CLR 398

Nicholson v Parole Board Queensland [2024] QSC 232
Plaintiff M1/2021 v Minister for Home Affairs (2022) 275 CLR 582
Plaintiff M174/2016 v Minister for Immigration and Border Protection (2018) 264 CLR 217
R v Kelly (Edward) [2000] QB 198
R v Thomson [2019] QCA 245
Thomas v Attorney-General and Minister for Justice and Minister for Training and Skills [2017] QSC 308

COUNSEL: K McAuliffe-Lake for the applicant
R Berry for the first and second respondents

SOLICITORS: Mullins Lawyers for the applicant
Crown Solicitor for the first and second respondents

[1] Rino Properties Pty Ltd ('the applicant') applies for a review of a decision by Ms McKeay, ('the second respondent'), made on behalf of the Chief Executive, Department of Environment, Tourism and Innovation ('the first respondent') on 12 December 2026 to refuse the applicant's request for a declaration that some 71,442 tonnes of waste located at 75 Main Beach Road, Pinkenba ('the site') was "exempt waste" pursuant to s 35 of the *Waste Reduction and Recycling Act 2011* (Qld) ('the WRR Act').

[2] At the time of the decision, the second respondent was the first respondent's delegate.

[3] The parties agree that the grounds for review can be condensed by the resolution of the following issues:

(a) with regard to the construction of "exceptional circumstances" for the purposes of s 35 of the WRR Act ('the exceptional circumstance issue'):

(i) what is the correct construction of "exceptional circumstances"; and

(ii) did the second respondent, in making the decision, apply the correct construction?

(b) with regard to the issue of exceptional circumstances as a question of fact ('the question of fact issue'):

(i) are the circumstances here exceptional; and

(ii) did the second respondent, in making the decision, fail to have regard to relevant matters, being the applicant's material explaining the exceptional circumstances; and

(iii) is there evidence capable of supporting the second respondent's material basis for the decision?

(c) in the event that the applicant establishes either (a) or (b) above, what is the appropriate relief under the *Judicial Review Act 1991* (Qld) ('the JR Act'), or alternatively, the *Civil Proceedings Act 2011* ('the CP Act')?

[4] The first respondent also raised the preliminary issue of whether the decision is one which there is an entitlement to review under Part 3 of the JR Act, in that it is a decision made “under an enactment”? (‘the preliminary issue’)

Background

[5] Rino Recycling Pty Ltd (‘Rino Recycling’) operated a waste recycling facility in Pinkenba in Queensland (‘the site’).

[6] In early 2022, Rino Recycling had accumulated stockpiles of material and required further space to accommodate its operations. In April 2022, Rino Recycling established the applicant as a special purpose vehicle to lease additional premises on which to store these materials. To be clear, despite similarities in their names, Rino Recycling and the applicant are two different entities.

[7] The applicant subsequently entered into a lease agreement for the site.

[8] On 4 September 2023, following compliance action under the *Environmental Protection Act 1994* (Qld) for receiving and storing waste material at the site without an environmental authority, the applicant applied for an environmental authority.

[9] The application stated that the material was being stockpiled to prevent it being sent to landfill, and that it was intended that the materials be recycled through Pinkenba Operations Pty Ltd’s (operating as Rino Recycling) waste facility, which was undergoing major redevelopments. The application stated that the material was required to be stockpiled for up to 24 months, “until the latest of August 2025”.

[10] On 6 October 2023, following compliance action by the Brisbane City Council relating to stockpiling of the material on the site, Rino Recycling submitted a development application.

[11] That development application was initially refused, but on appeal to the Planning and Environment Court, orders were made on 21 December 2023 which effected the approval of the development application, subject to conditions (‘the DA’).[1] The DA was issued to Rino Recycling and one of the conditions required the removal of specified fill materials from the site prior to 30 June 2025.

[12] Following that approval, Environmental Authority P-EA-100498546 (‘the EA’) was issued to the applicant, as leaseholder for the site, for the storage of the waste on a “temporary” [2] basis.

[13] It is noted that the waste was not produced by the applicant. The waste is comprised of intermixed soil, co-mingled with predominantly inert construction and demolition waste, a material proportion of which was generated out of the 2022 Brisbane Floods and deposited on the site between February and November 2022.

[14] On 14 August 2025, the Department of Environment, Tourism, Science and Innovation (‘the Department’) advised Rino Recycling that it had been approved for a discounted waste levy for residual waste from its recycling activities.

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1 Both Rino Recycling and the applicant were parties to that proceeding.

2 “Temporary” is not defined in the EA.

[15] On 25 August 2025, FTI Consulting was appointed as receiver and manager to the Rino group of companies, including Rino Recycling.

The decision by the second respondent

[16] On 26 August 2025, the applicant applied for a declaration pursuant to s 35 of the WRR Act that the waste on the site be declared exempt waste.

[17] The application was made by Mr Porter on behalf of the applicant.

[18] The application stated that it had been the applicant's intention to process the material at Rino Recycling's waste facility prior to December 2025. However, due to operational constraints, Rino Recycling had been unable to do so.

[19] The applicant was now seeking to dispose of the material to landfill. The applicant indicated that following the removal and disposal of the materials, it would seek to surrender the EA.

[20] On 24 September 2025, an officer from the Department made inquiries with the receivers and managers of the Rino group, FTI Consulting, which included:

(a) the receivership arrangements in place for entities including the applicant;

(b) the identification of appropriate persons with whom the Department should correspond and direct its inquiries for the s 35 exemption process; and

(c) clarification as to who was making the operational decisions about the viability of recycling the stockpiled material at the site.

[21] On 1 October 2025, FTI Consulting responded to the Department's inquiries and stated that:

(a) their appointment did not extend to the applicant;

(b) information requests about the s 35 exemption should be directed to the applicant; and

(c) it was their understanding that the applicant held the lease over the site and was responsible for the site, including the removal of the stockpiled materials.

[22] On 3 October 2025, the second respondent requested information from the applicant, including:

(a) the authority of Mr Porter to act on behalf of the applicant; and

(b) further explanations about what exceptional circumstances were said to exist, why the material had to be disposed of to landfill, and what actions had been taken to identify alternatives to disposing of the material to landfill.

[23] On 15 October 2025, the applicant responded to this correspondence and in relation to the exceptional circumstances issue, raised the following matters:

(a) issues relating to the appointment of receivers to Rino Recycling and the difficulties faced by the applicant in dealing with the removal of the waste materials;

(b) that the applicant was a separate lessor and special purpose vehicle entity which "cannot lawfully process, transport or dispose of the material without the direction and cooperation of the Receivers/Administrators, as ownership and control of the material rests with them"; and

(c) the applicant could not remove the material "without breaching ownership provisions".

[24] With respect to the disposal of the material to landfill, the applicant advised that due to the degradation of the material over time, the alternative of processing the material through the Eagle Farm Road waste facility was now impracticable. No other alternative had been identified that would allow compliance with the site's EA within the available timeframe.

[25] On 5 November 2025, the second respondent wrote to the applicant ('the November letter') advising that, at that time, she was inclined to refuse the applicant's request to declare the waste as exempt waste under s 35 of the WRR Act.

[26] The November letter set out the following:

> "As the delegate of the Chief Executive Officer under the WRR Act, section 35 Exceptional Circumstances states that I may declare waste to be exempt if I am satisfied that exceptional circumstances apply for a particular waste or type of waste, or the disposal of particular waste or type of waste. In doing so I may, by publication on the department's website, declare the waste to exempt waste. I may also apply limits or conditions in the declaration of the waste as exempt waste and that the declaration of waste as exempt waste has effect subject to any limits or conditions included in the declaration.
>
> As the delegate, and on the basis of the information currently before me, I am inclined to refuse the request to declare the waste as exempt waste under the section 35 provisions of the WRR Act.
>
> The reasons for refusing the request to declare the waste as exempt waste under the section 35 provisions of the WRR Act are currently as follows.
>
> - On 25 August 2025, Pinkenba Operations Pty Ltd, trading as Rino Recycling, went into administration with the Clean Energy Finance Corporation appointing FTI Consulting as Receiver and Manager to the Rino Recycling Group of companies.
>
> - Rino Properties is a separate entity to Rino Recycling and is not considered to be part of the administration process.
>
> - FTI Consulting have advised the department that the waste is the responsibility of Rino Properties. From the department's perspective, this waste is solely under the control of Rino Properties because the EA which authorises the temporary storage of the waste is held by Rino Properties on a site leased by Rino Properties.

- The development approval for 75 Main Beach Road, Pinkenba (EA P-EA-100498546) was issued to Rino Properties by the Planning and Environment Court in December 2023 following the Brisbane City Council's initial refusal of the development approval.

- The court ordered development approval was issued with agreed conditions which included that (in summary) all fill (waste) material be removed by 30 June 2025 (including the waste the subject of the request) and that a contaminated land report be submitted to the Brisbane City Council by 30 August 2025.

- This is consistent with the EA application submitted to the department by Rino Properties in August 2023 which stated that the waste storage on the site was of a temporary nature and would not exceed 24 months (i.e. August 2025).

- There is no legislative definition for exceptional circumstances however, it is accepted that exceptional circumstances could include being unexpected, uncommon, unavoidable and significantly affecting an individual's ability to act as required.

- The circumstances described by Rino Properties do not appear to be unexpected, uncommon or unavoidable. By contrast, the circumstances appear to be caused by Rino Properties' failure to remove the waste from the site by June or August 2025 and are unrelated to the comparatively recent circumstance of the Rino administration.

Before finalising my considerations, you are invited to make representations in relation to the aforementioned reasons I have outlined. Representations should be accompanied by supporting evidence. I understand that this outcome is not what you were hoping to achieve, but I consider that a section 35 declaration is not appropriate to the circumstances outlined in the request."

[27] The applicant took up the second respondent's invitation to make further representations and on 27 November 2025, lawyers, on behalf of the applicant, provided further submissions as to why the circumstances were exceptional circumstances, and attached a number of documents.

[28] Relevantly, the applicant identified the following matters in this correspondence:

(a) facts that it urged the Department to consider with respect to any information received from FTI Consulting purporting to reject liability of Rino Recycling for the site;

(b) the applicant could not afford the cost of removing the waste without an exemption to the waste levy;

(c) the applicant was a special purpose vehicle for Rino Recycling, and it was a "legal anomaly" that it was not caught by the solvency issues of Rino Recycling;

(d) there were common directors as between Rino Recycling and the applicant, and that removal of the waste was a cost that was provisioned in the financial accounts for Rino Recycling; and

(e) Rino Recycling (and not the applicant) had made the application for the DA.

[29] The correspondence also referred to FTI Consulting's assertion to the Department that the “waste [was] the responsibility of [the applicant]” because of the EA. The applicant rejected this assertion. The applicant stated that the waste material belonged to Rino Recycling, and that the applicant was not, and had never been, in a financial position to deal with the waste material without Rino Recycling.

[30] This correspondence addressed at length whether exceptional circumstances exist to warrant or justify the exemption, and submitted that there are clearly elements that were "unexpected", "uncommon", "unavoidable" and "significantly affecting an individual's ability to act as required":

> “**Unexpected**
>
> 3.1. *First*, as the evidence above and attached demonstrates, there is a clear nexus between Rino Recycling operations and the management of waste feedstock material at MBR2. Rino Properties was, for all intents and purposes, a special purpose vehicle. All relevant decisions taken about Rino Properties and the waste feedstock material were made at Rino Recycling Board level.
>
> 3.2. From June 2025, Rino Recycling was facing a far more significant existential threat regarding its future operations and it was unable to take any immediate action at that time with regard to removal of waste material due to financial constraints and immediate business focus on keeping the business viable.
>
> 3.3. Circumstances overtook the directors in August 2025 when CEFC appointed a Receiver. That was unexpected and from that point forward, neither the directors of Rino Recycling nor Rino Properties could take any step to meet Rino Properties obligations given that the company always was funded by Rino Recycling or its shareholders (shared in common).
>
> **Uncommon**
>
> 4.1. *Second*, the sheer volume of waste feedstock material at MBR2 is not commonplace. The current estimated costs of removal including the current waste levy is $12 million. The gate takings for waste material dumped at MBR2 was taken and held by Rino Recycling, for the corporate organisation structure as noted above.
>
> 4.2. It is not common that 70,000 tonnes of waste material would be temporarily stored on a temporary site but for the fact that the waste processing plant that owned the material was situated

down the road. On any metric, the $ millions added to the cost of the removal of the stock will impact how and who will be able to remove the waste feedstock material.

4.3. It is an uncommon amount of waste material so close to an urban regional area and it will take an uncommon sum of money to remove it unless DETSI grants an exemption.

4.4. Once the lease over MBR2 expires, Rino Properties has no lawful right of occupation and the liability for [sic] falls onto the Landlord. Similarly, if/when the Rino Recycling business is sold, the ability to pay for the removal of the waste material at MBR2 also ceases if CEFC takes the proceeds of the sale and moves on.

4.5. Granting the exemption to the waste levy now, at least gives Rino Properties and the Landlord some prospect of extracting a deal whereby removal costs for the waste are included in the sale price for the Rino Recycling business.

4.6. Without the exemption, the prospect of negotiating an outcome with third parties essentially disappears.

Unavoidable

5.1. *Third*, it is trite to say with the benefit of hindsight that the current circumstances were avoidable, however, as the material attached demonstrates, it was always the case that the company and its operations were part of Rino Recycling group of companies' operations. That much is evident in the inclusion of MBR2 costs being incorporated into the financial accounts of QRT Operations Ltd (and controlled entities including Rino Recycling) and key decisions regarding the waste feedstock material being taken at Board level within Rino Recycling.

5.2. As noted above, Rino Properties was operationally hamstrung by the maelstrom concerning Rino Recycling:

5.2.1. **Business under severe operational stress**

(a) Plant performance deteriorated sharply through Q1/Q2 2025 due to sustained wet weather and culminated in the March cyclone event.

(b) Recovery rates fell materially below FY25 forecasts, driving down revenue and escalating operating losses.

(c) The operations team focus across this period was stabilisation of the business - throughput, contamination control, uptime - just to avoid breaching commercial contracts.

5.2.2. **CEFC covenant pressure and imminent breach**

(a) CEFC issued repeated, escalating RFIs concerning stockpile liabilities, Debt Service Coverage Ratio headroom, liquidity and cash burn.

(b) By May/June 2025, CEFC had signalled the likelihood of a "Review Event" unless immediate liquidity support was provided.

(c) Rino Recycling directors were dealing daily with solvency management, covenant compliance, and CEFC's demands.

5.2.3. **Funding stress dominated all decision-making**

(a) Senior lender funding was restricted. CEFC released only ~$2. 6m.

(b) The fund managers (AQ/Alceon) injected >$10m in subordinated loans to prevent collapse.

(c) CEFC has since recovered, or will recover, 100% of principal and interest. The subordinated lenders will recover nothing.

(d) Every dollar of discretionary expenditure was subject to CEFC approval - including any expenditure relating to MBR2.

5.2.4. **CEFC-imposed cash freeze**

(a) From May 2025, CEFC made clear that no unapproved discretionary capex would be supported.

(b) That freeze necessarily captured MBR2 removal works.

(c) The Rino Recycling directors had no access to Rino Recycling cash to fund or contract removal works, even if they wished to.

5.2.5. **IVIBR2 was static and non-receiving**

(a) No waste has been placed at MBR2 since late 2022.

(b) It was a static site with no operational change, no environmental deterioration flagged, and no fresh deposits.

(c) Given the liquidity crisis, static non-receiving stockpiles were deprioritised behind business survival.

5.2.6. **Proposed recapitalisation of the business and CEFC's reaction**

(a) Alceon presented CEFC with a recapitalisation plan in July 2025, including a controlled shutdown of external in-bound material and a staged processing of stockpiles (Eagle Farm Road + MBR1 + MBR2) to restore full compliance and pave the way for a new investor in the business.

(b) CEFC immediately commenced enforcement proceedings, including engaging the Receivers.

(c) Once CEFC appointed Receivers (August 2025), all control was removed from the Rino Recycling directors including any ability to act on MBR2.

(d) Since August, CEFC/Receivers have decided to not shut the gate to new material, receiving more revenue at the EFR plant rather than processing the existing stockpiles at MBR2.

5.3. It was always Rino Properties' intention to remove the waste feedstock, however, that was necessarily contingent on Rino Recycling resolving its own financial issues.

5.4. A key part of the solution was the waste levy credit request (albeit for 41 Main Beach Road, Pinkenba). DETSI was aware of these issues as early as 20 August 2025.4

5.5. Given the acute financial and operational distress, neither Rino Recycling nor Rino Properties had the financial or operational capacity to take any action regarding MBR2.

5.6. No waste material or feedstock has been deposited at MBR2 since late 2022. Further, all discretionary expenditure, which included stockpile removal, was frozen by CEFC.

5.7. When the Rino Recycling directors put forward a recapitalisation plan to CEFC that included clearing stockpiles at 45 Eagle Farm Road and both Main Beach Road sites (including MBR2), CEFC instead appointed Receivers, who seemingly do not intend to address the MBR2 material and are instead accepting third party feedstock material.

5.8. Given the anomaly in the corporate structure for Rino Properties being technically outside the QRT Operations and controlled entities, the eventual external administration has left Rino

Properties in a proverbial legal limbo; unable to self-fund any of its operation given that prior to appointment of the Receiver, the company was practically and operationally a subsidiary of the companies in receivership.

5.9. As such, the current circumstances that Rino Properties now face outside of its control (since Receivers were appointed) therefore make the present issues with removal of waste now unavoidable.

6. Significantly affecting ability to act

6.1. Fourth, for the reasons set out above and in the attachments, the appointment of Receivers to Rino Recycling has effectively prohibited Rino Properties and its director from doing anything proactive in terms of dealing with waste material at MBR2 without an exemption of the waste levy.

6.2. While the Receiver and Manager appointed to Rino Recycling may state to DETSI that the "waste /s the responsibility of Rino Properties" because of the EA, that characterisation is disingenuous in the context of the complete factual matrix, as follows:

6. 2. 1. The waste material belongs to Rino Recycling. Rino Recycling took circa $7 million in gate fees for some of the waste.

6. 2.2. Rino Properties, not having assets of its own, was fully funded by Rino Recycling and/or its funders and was never in a financial position to deal with the waste material without Rino Recycling.

6. 2.3. As lessee of MBR2, it followed that Rino Properties was named on the DA and EA over the Site, but that was always necessary and expected as the SPV that held the lease for and on behalf of Rino Recycling. That much is evident from the submissions made to the Queensland Planning & Environment Court in the appeal against BCC's initial ruling - Rino Recycling was the First Appellant and lodged the DA in the first instance.

6. 2.4. Rino Recycling Receivers are in the midst of a tender and sale process which has in media reports courted initial offers up to $120 million for the Pinkenba Operations Pty Ltd plant and equipment.

6. 2. 5. Without knowing the full amount of the CEFC debt claim and/or state of the QRT Operations other creditor debts, it is not inconceivable that Rino Recycling will be left with some money to remove the waste material at

> MBR2 with an exemption of the waste levy, whereas Rino Properties has no prospect of paying any amount."

[31] On 12 December 2025, the second respondent wrote to the applicant's lawyers advising of her decision to refuse to declare the waste as exempt under s 35 of the WRR Act and setting out her reasons for that decision ('the December letter'):

> "As the delegate of the Chief Executive Officer under the WRR Act for this decision. I have considered the further information provided in the November correspondence. Consequently, I confirm my refusal of the request to declare the waste as exempt under the section 35 provisions of the WRR Act. The reasons for this decision are outlined below.
>
> - On 25 August 2025, Pinkenba Operations Pty Ltd, trading as Rino Recycling, went into administration with the Clean Energy Finance Corporation appointing FTI Consulting as Receiver and Manager to the Rino Recycling Group of companies.
>
> - Rino Properties is a separate entity to Rino Recycling and is not considered to be part of the administration process.
>
> - FTI Consulting have advised the department that the waste is the responsibility of Rino Properties. From the department's perspective, this waste is solely under the control of Rino Properties because the EA which authorises the temporary storage of the waste is held by Rino Properties on a site leased by Rino Properties. The further information provided in the November correspondence confirmed FTI Consulting's position in relation to the ownership of the waste.
>
> - The development approval for the site (EA P-EA-100498546) was issued to Rino Recycling by the Planning and Environment Court in December 2023 following the Brisbane City Council's initial refusal of the development approval.
>
> - The court ordered development approval was issued with agreed conditions which included that (in summary) all fill (waste) material be removed by 30 June 2025 (including the waste the subject of the request) and that a contaminated land report be submitted to the Brisbane City Council by 30 August 2025.
>
> - This is consistent with the EA application submitted to the department by Rino Properties in August 2023 which stated that the waste storage on the site was of a temporary nature and would not exceed 24 months (i. e. August 2025).
>
> - There is no legislative definition for exceptional circumstances however, it is accepted that exceptional circumstances could include being unexpected, uncommon, unavoidable and significantly affecting an individual's ability to act as required.

- The circumstances outlined in the November correspondence do not constitute exceptional circumstances as they are not unexpected, uncommon or unavoidable. Instead, the circumstances leading to the continued stockpiling of waste at the site would be more appropriately construed as a direct outcome of the commercial management of Rino Properties and Rino Recycling.

- The waste levy was introduced by the Queensland Government to, inter alia, reduce the amount of waste going to landfill and encourage waste avoidance. It would not be appropriate to use a waste levy exemption to rectify difficulties experienced by private entities in the management of commercial operations. These types of difficulties are more appropriately dealt with via civil remedies."

[32] It is noted that the first seven bullet points are markedly similar in both the November and December letter.

The preliminary issue

[33] The applicant seeks orders pursuant to Part 3 of the JR Act and, or in the alternative, s 10 of the CP Act.

[34] The respondents in their written submissions raised the issue about whether the decision identified by the applicant is one to which there is an entitlement to review under Part 3 of the JR Act. The respondents submit that the decision does not satisfy one of the essential elements required for it to be made "under an enactment", namely, it does not itself confer, alter or otherwise affect legal rights and obligations.[3] However, the respondents accept that this Court has jurisdiction to hear the applicant's challenge as the applicant has applied for declaratory relief under the CP Act.

[35] The applicant does not accept that the decision is one to which there is no entitlement to review under Part 3 of the JR Act. The applicant states that the respondents' characterisation of the decision not to make the declaration as being one which does not "itself confer, alter or otherwise affect legal rights and obligations" is incorrect.

[36] This preliminary issue raised by the respondents affects the source of jurisdiction to grant relief. However, in the circumstances of this case it is a non-issue.

[37] Pursuant to the CP Act, there is clearly jurisdiction to hear and determine the matter and if required grant declaratory relief.

[38] Accordingly, the preliminary issue raised by the respondents has no practical consequence as the determination and resolution of the issues raised in the applicant's application can be achieved by way of declaration pursuant to the CP Act.

[39] In any event, I have determined that none of the grounds raised by the applicant have any basis. Accordingly, the issue of relief is not relevant.

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3 JR Act, ss 4 and 20(1); *Griffith University v Tang* (2005) 221 CLR 99, [80], [89].

[40] In such circumstances, it is unnecessary to resolve the preliminary issue raised by the respondents.

The exceptional circumstances issue

What is the correct construction of "exceptional circumstances"?

[41] The term "exceptional circumstances" as prescribed by s 35 of the WRR Act assumes considerable importance in this application.

[42] Section 35 of the WRR Act states:

> "**35 Chief executive may declare waste to be exempt waste in exceptional circumstances**
>
> (1) This section applies if the chief executive is satisfied that ***exceptional circumstances apply*** for–
>
> (a) particular waste or a type of waste; or
>
> (b) the disposal of particular waste or a type of waste.
>
> (2) The chief executive may, by publication on the department's website, declare the waste to be exempt waste.
>
> (3) The chief executive may declare the waste to be exempt waste subject to any limits or conditions included in the declaration of the waste as exempt waste.
>
> (4) A declaration of waste as exempt waste has effect subject to any limits or conditions included in the declaration."
>
> [emphasis added]

[43] The meaning of "exceptional circumstances" is integral to the operation of s 35, and the construction of this term is a question of law.

[44] The term is not defined in the Act, there is no assistance in the explanatory memoranda, and there are no cases considering the meaning of "exceptional circumstances" in the context of the WRR Act.

[45] Although the Act does not specify what amounts to "exceptional circumstances", the term is to be read in its statutory context and with regard to the legislative intent.[4]

[46] The objects of the WRR Act relevantly include the promotion of waste avoidance and reduction, and resource recovery and efficiency actions, and the minimisation of the disposal of waste through encouragement of waste avoidance and the recovery, re-use and recycling of waste.[5]

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4 *R v Thomson* [2019] QCA 245 at [17].

5 WRR Act, s 3. See, in particular, ss 3(a) and (d).

[47] If a function or power is conferred on a person under the WRR Act, the person must perform the function or exercise the power in a way that best achieves the objects of the Act.[6]

[48] The achievement of the objects of the WRR Act must, if practicable, be guided by the waste and resource management hierarchy, and the waste and resource management principles.[7]

[49] Relevantly, the waste and resource management hierarchy contains a number of precepts and sets out the preferred order in which waste and resource management options should be considered.[8] The disposal of waste is the last preference in the hierarchy and is to be considered "only if there is no viable alternative".

[50] A primary outcome intended to arise from the implementation of the Act is that of a reduction in the amount of waste that permanently, or at least indefinitely, effectively becomes incorporated into the land (commonly referred to as becoming "landfill").[9]

[51] The objects of the WRR Act are intended to primarily be achieved through a number of approaches, listed in s 5 of the Act. One such approach is that of price signalling, including through the introduction of a levy on waste delivered to a levyable waste disposal site.[10]

[52] Chapter 3 of the WRR Act deals with the waste levy.

[53] The main purpose of the chapter is to impose a levy on waste delivered to a levyable waste disposal site, and to allow for exemptions from the levy, or a discounted levy rate, for particular waste.[11]

[54] The operator of a levyable waste disposal site is liable to pay the State the "waste levy" on all levyable waste that is delivered to the site.[12] "Levyable waste" is waste that is delivered to a levyable waste disposal site, other than "exempt waste".[13]

[55] The definition of "exempt waste" sets out a number of particular categories, or types, of waste.[14]

[56] Waste is exempt waste if it falls within one of those categories which include:

(a) disaster management waste;

(b) serious local event waste;

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6 WRR Act, s 4(1).

7 WRR Act, s 4(2)(a)-(b).

8 WRR Act, s 9.

9 WRR Act, s 8, which addresses the concept of "disposal". The meaning of "waste" is contained in s 8AA of the Act.

10 WRR Act, s 5(c).

11 WRR Act, s 25.

12 WRR Act, s 36. Although it is not relevant for present purposes, it is noted for completeness that this applies if the site is in the "waste levy zone" or, if the site is in the "non-levy zone" and the waste was generated outside the non-levy zone (terms are defined in s 26).

13 WRR Act, s 26.

14 WRR Act, s 26.

(c) waste approved by the chief executive to be exempt waste for a particular exempt waste application; and

(d) other waste, either prescribed by regulation to be exempt, or for which there is in force under the chapter a declaration by the chief executive that the waste is exempt waste.

[57] Part 2 of Chapter 3 deals with the identification of exempt waste and continues the delineation of particular types of waste with a separation between the treatment of:

(a) firstly, the category of waste approved by the chief executive to be exempt waste for a particular exempt waste application; and

(b) secondly, the category of other waste for which there is in force a declaration by the chief executive that the waste is exempt waste.

[58] The first category is subject to the application and approval process set out in Division 2. Decisions under Division 2 are generally subject to the review provisions contained in Chapter 9 of the WRR Act.[15] This includes rights of internal review and, following that, a right to apply to the Queensland Civil and Administrative Review Tribunal for external review.[16]

[59] The second category is not subject to the application and approval process in Division 2. It is dealt with separately in Division 3, "Declaring waste to be exempt waste", which contains only a single section being s 35.

[60] There is no provision for any application process for a declaration under s 35, and it is not subject to the review provisions under the WRR Act.

[61] The statutory scheme sets out the circumstances of when waste is exempt in the following circumstances:

(a) some types of waste are exempt from payment of the levy as a "default";

(b) some types of waste are exempt if, through an application process, they are approved as exempt; and

(c) other types of waste can be exempt if they are prescribed to be so through subordinate legislation or if they are the subject of a declaration by the chief executive under Chapter 3.[17]

[62] Accordingly, the purpose of s 35 is to provide a mechanism to allow for an exemption to the levy which does not otherwise fall within the exemption regime.

[63] The power given to the chief executive is limited in the sense of the circumstances in which it can be made. A declaration can only be made:

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15 Under s 175 of the WRR Act, a person who has been, or is entitled to be, given an information notice for a decision may apply for internal review of the decision. An information notice must be given for various decisions under Division 2, including the imposition of certain conditions on an approval of an exempt waste application (s 31), the refusal of an application (s 32), and a cancellation or certain amendments of an approval (s 34).

16 WRR Act, ss 174-179 (internal review) and 180 (external review).

17 WRR Act, s 26 – see subparagraph (f)(i) of the definition of "exempt waste".

(a) if the subject waste does not already fall within the other exemptions for which the Act provides; and

(b) then only if the chief executive considers the circumstances to be "exceptional".

[64] This limited area of operation is congruent with the overall statutory scheme which already contains a number of provisions other than s 35 which deal with exemptions in circumstances which have been specifically identified as requiring exemption from the levy either as a matter of course (by default or through subordinate legislation), or subject to approval (by application).

[65] The existence of the power also reflects a recognition that circumstances may arise from time to time which do not fall within the operation of the exemption provisions, but for which it may be desirable to allow an exemption to the payment of a levy nonetheless.

[66] The ability to make a declaration under s 35 provides some flexibility to do so.

[67] Although there is some limitation on the circumstances which may give rise to an exercise of the power, the power is "broad" in the sense that there are no express considerations or restrictions on the formation of the chief executive's satisfaction as to whether or not particular circumstances are "exceptional".

[68] The term "exceptional circumstances" has been considered in various legislative contexts with a common vein of meaning, being an ordinary, familiar English adjective.

[69] *R v Kelly (Edward)*[18] considered the term "exceptional circumstances" in the context of sentencing legislation:

> "We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."[19]

[70] In an immigration case, *AQU17 v Minister for Immigration and Border Protection*, [20] the plurality stated at [13]:

> "Exceptional circumstances" is not a defined term for the purposes of s 473DD(a) and the words are to be given their ordinary meaning. In ordinary meaning, circumstances are "exceptional" if the circumstances may reasonably be seen as producing a situation which is out of the ordinary course, unusual, special or uncommon: *BVZ16*; *Plaintiff M174*. In *Plaintiff M174* the plurality

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18 [2000] QB 198.

19 At 208. This formulation has been accepted in a number of cases involving statutes with similar phrases, including by the High Court in the context of migration legislation: *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217, 229 [30].

20 [2018] FCAFC 111.

(Gageler, Keane and Nettle JJ with whom Gordon and Edelman JJ each agreed in separate reasons) observed at [30] in relation to the requirement in s 473DD(a):

> Quite what will amount to exceptional circumstances is inherently incapable of exhaustive statement. The word "exceptional", in such a context, is not a term of art but "an ordinary, familiar English adjective": "[t]o be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered"."

[71] The meaning of "exceptional circumstances" must be determined having regard to the statutory context in which it appears.[21]

[72] In circumstances where a statute has adopted broad terms, it may be wrong to limit the circumstances which might be regarded as "exceptional".[22]

[73] When considering exceptional circumstances, it may be useful to have regard to whether circumstances could properly be characterised as, for example, "unusual" or "uncommon". However, this does not mean that the language of an Act, that is, "exceptional circumstances", can be substituted with the words "unusual" or "uncommon".[23]

[74] In relation to the WRR Act there is no indication in the legislation that the phrase "exceptional circumstances" is to be given any limitation on the ordinary understanding of the meaning. There is nothing in s 35, or elsewhere in the WRR Act, to suggest any such limitation.

[75] There is no one clear prescription of what circumstances are capable of being regarded as exceptional.

[76] Consideration is to be given not only to the unusualness of the individual factors but to their weight and those factors, which, taken alone may not be out of the ordinary, may in combination constitute an exceptional case.[24]

[77] In this case, s 35 of the WRR Act confers a power which is confined in terms of the circumstances in which it may be exercised, but broad in the sense that there are no express considerations or restrictions on the formation of the chief executive's satisfaction as to whether or not particular circumstances are "exceptional".

[78] The requirement that the chief executive be satisfied that the circumstances are exceptional is a relatively high bar as:

(a) the purpose of the power, namely, to provide a mechanism by which a person or entity may be exempted from the general obligation of payment of the levy

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21 *Hasim v A-G (Cth)* (2013) 218 FCR 25, 39 [55].

22 *Arora v Minister for Immigration and Border Protection* [2017] FCA 484, [20], referring to *Hatcher v Cohn* (2004) 139 FCR 425 (This decision of Kiefel J, as her Honour then was, was overturned on appeal, but not on this point).

23 *Arora v Minister for Immigration and Border Protection* [2017] FCA 484, [21], referring to *Cohn v Hatcher* (2005) 146 FCR 275.

24 *R v Thomson* [2019] QCA 245 at [17].

despite not falling within the scope of the already limited exceptions for which the Act provides; and

(b) the statutory objects of waste avoidance and a reduction in the amount of waste that becomes landfill, and the achievement of those objects through, in part, the imposition of the waste levy, and the limited categories of exemption from that levy.

Did the second respondent apply the correct construction of exceptional circumstances?

[79] It is necessary to consider the terms of the reasons in the December letter which forms the decision. After setting out a number of factors relevant to her consideration, the second respondent stated:

> - "There is no legislative definition for exceptional circumstances however, it is accepted that exceptional circumstances could include being unexpected, uncommon, unavoidable and significantly affecting an individual's ability to act as required.
> - The circumstances outlined in the November correspondence do not constitute exceptional circumstances as they are not unexpected, uncommon or unavoidable. Instead, the circumstances leading to the continued stockpiling of waste at the site would be more appropriately construed as a direct outcome of the commercial management of [the applicant] and Rino Recycling.
> - The waste levy was introduced by the Queensland Government to, inter alia, reduce the amount of waste going to landfill and encourage waste avoidance. It would not be appropriate to use a waste levy exemption to rectify difficulties experienced by private entities in the management of commercial operations. These types of difficulties are more appropriately dealt with via civil remedies."

[80] I note that the November letter by the second respondent was in similar terms as to the meaning of exceptional circumstances.

[81] The applicant states that test used by the second respondent for "exceptional circumstances" imposes a very high standard and that the threshold imposed was unjustifiably stringent, particularly so with the inclusion of "unavoidable" as an element. At the hearing, the applicant's counsel framed her submission in this way:

> "It seems to set a higher threshold than what is seen in other cases, in that it seems to require that something be unexpected, unavoidable, uncommon and significantly affect the ability of a person to comply. Those unexpected, unavoidable, uncommon, taken in isolation – might perhaps not be too offensive, which is probably not the word that I'm looking for – but the practical effect of it seems to be that it had to be something completely unsurprised – completely caught everyone by surprise, that nobody knew – that there was no way that somebody could have tried to avoid it, it's not something that happens, it's something that's not common."

[82] Further, the applicant states that the second respondent appears to have determined the request on the basis that s 35 would only enliven where they were satisfied of all four of the elements, which imposes a burden very much higher than that adopted in other cases.

[83] Even if this is not the case, then the applicant submits that the second respondent proceeded on the basis that only some of the elements would have to be present, it would still impose a threshold higher than that contemplated by the WRR Act. Accordingly, the applicant submits that the premise on which the decision was made, and therefore the decision itself, is fundamentally infected by legal error.

[84] Further the applicant submits that because the reasons in the decision are so short, it is difficult to tell what the reasoning process undertaken by the second respondent was.

[85] Taking the December letter as a whole, the applicant submits that it gives rise to a reasonable apprehension that the second respondent has been so loose in her approach to what is exceptional, that she has:

(a) applied the elements either literally or in a functionally cumulative way, which sets the bar too high; or

(b) did not have regard to the material.

[86] The second of those options feeds into a further issue raised by the applicant.

Consideration

[87] The second respondent did not impose a cumulative or conjunctive test, requiring all four elements of "unexpected, uncommon, unavoidable and significantly affecting an individual's ability to act as required" to be satisfied. The entirety of the sentence used by the second respondent should be put in context. The second respondent stated:

> "[I]t is accepted that exceptional circumstances ***could include being*** unexpected, uncommon, unavoidable and significantly affecting an individual's ability to act as required." [emphasis added]

[88] The second respondent was setting out matters that "exceptional circumstances" could include. The term "include" is generally a term of expansion, not limitation, with the listed items being examples of what "exceptional circumstances" could cover.

[89] The second respondent used the words "unexpected", "uncommon", "unavoidable" and "significantly affecting an individual's ability to act as required" as general examples of expressions which were apt to identify the type of circumstances informing the content of what might be "exceptional circumstances". In doing so, the second respondent did not impose a mandatory requirement for all four elements to be satisfied.

[90] The second respondent then states that the circumstances outlined in the applicant's November correspondence did not constitute exceptional circumstances as they were not unexpected, uncommon or unavoidable. The use of "or" makes it clear that the

second respondent did not impose a cumulative threshold for all four elements to be satisfied.

[91] The second respondent then went on to express her conclusion that the circumstances "[did] not constitute exceptional circumstances".

[92] The second respondent explained that the circumstances would be more appropriately construed as a direct outcome of the commercial management of the applicant and Rino Recycling. By doing so, the second respondent identified the relevant statutory purpose of the introduction of the waste levy and stated that it would not be appropriate to use a waste levy exemption to rectify difficulties experienced by private entities in the management of commercial operations.

[93] The second respondent's conclusion applied an understanding of the term "exceptional circumstances", informed by its ordinary meaning in light of the statutory context.

[94] In that context, the words used by the second respondent were generally acceptable descriptors of an ordinary meaning, which could then be used in the particular context of the WRR Act to inform the meaning of exceptional circumstances.

[95] In this case, the second respondent stated that the circumstances were not "unexpected, uncommon or unavoidable". I note that the second respondent used descriptors, and a combination of descriptors, not used in other cases cited. However, this is of no consequence.

[96] The term "exceptional circumstances" is not a term of art.

[97] The identification of whether circumstances could properly be characterised as fitting within (for example) "out of the ordinary course", "unusual", "special" or "uncommon" is a useful tool. However, it is not prescriptive or exhaustive of the expressions of ordinary meaning that may be employed by an administrative decision-maker. Decision makers are not precluded from using expressions which differ from its formulation as used in previously in other case.

[98] I note that the expressions used by the second respondent generally convey a similar concept as to ordinary meaning as those described in *R v Kelly* (and other cases) and could be used to characterise circumstances which are not regularly, routinely or normally encountered or if the circumstances may reasonably be seen as producing a situation which is out of the ordinary course, unusual, special or uncommon.

[99] The effect of the second respondent's reasoning was that in the context of the purpose of the WRR Act and the power to exempt from payment of the levy, the applicant and Rino Recycling's decisions to set up its affairs in a particular way, and the consequences or difficulties associated with that, were not circumstances that she was satisfied were "exceptional circumstances" for the purposes of s 35.

[100] Such a conclusion is consistent with the second respondent identifying the meaning of "exceptional circumstances" as properly construed for the purposes of s 35 and applying that meaning to the circumstances before her.

[101] As identified by the second respondent, the waste levy was introduced to, among other things, reduce the amount of waste going to landfill and to encourage waste avoidance. In her view, it would not be appropriate to use a waste levy exemption to rectify difficulties experienced by private entities in the management of commercial operations.

[102] The second respondent's reasons should be:

(a) construed in a practical and common-sense manner, without an eye finely attuned to error, and with a degree of tolerance for looseness in language, [25] unhappy phrasing or verbal slip;[26] and

(b) read fairly and with an eye to the substance of the reasoning.[27]

[103] In my view it is clear from the terms of her reasons that the second respondent properly applied the correct construction of "exceptional circumstances".

The question of fact issues

Are the circumstances here "exceptional"?

[104] In this case, the applicant highlights the following factual circumstances:

(a) the waste was not produced by the applicant;

(b) the waste is comprised of intermixed soil, co-mingled with predominantly inert construction and demolition waste, a material proportion of which was generated out of the 2022 Brisbane Floods and deposited on the site between February and November 2022;

(c) until the receivers purported to disavow ownership of (and, therefore, liability for) the waste, the applicant proceeded on the basis that the Waste was not its property;

(d) whilst the applicant holds the lease for the site (and, on that basis, the EA) it otherwise possesses no plant or assets and operated at a loss of $622,014 in the 23/24 financial year;

(e) the applicant sits within a group of companies which, in concert, operated a recycling enterprise processing approximately 1M tonnes of construction and demolition waste up to and until the Clean Energy Finance Corporation's appointment of receivers on 25 August 2025; and

(f) the applicant is the only entity in that group which was not captured by the appointment.

[105] Where the DA requires the waste be removed by 30 June 2025, and where the applicant has lost any capacity to recycle the waste following the receivership of the rest of the group, the material must be disposed of in order to avoid committing an

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25 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, 287; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272, 291.

26 Ibid.

27 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 291; *D'Amore v Independent Commissioner Against Corruption* [2012] NSWSC 473 at [87].

offence.[28] But, as the applicant stresses, it is the only corporation in the group which remains standing and undertaking that action itself would make the applicant liable for the payment of millions of dollars in waste levies. The applicant states that it has no capacity to pay even a fraction of that amount.

[106] The applicant states that it finds itself in an impossible position as:

(a) it had no control over the operations of the other corporations in the group;

(b) the appointment of receivers to all other corporations in the group by the government owed Clean Energy Finance Corporation has left the applicant as the last surviving entity of the group;

(c) if undisturbed, the decision will mean that the applicant is required to pay the full waste levy on the entire volume of the waste in order to remove the waste from the site; and

(d) having no capacity at all to do so, it will be unable to remove the waste and will be at risk of committing a development offence.

[107] In the applicant's submission these circumstances are plainly exceptional.

[108] Accordingly, the applicant states that the following circumstances (taken individually or cumulatively) as set out in their submissions and material to the second respondent amount to exceptional circumstances:

(a) composition of waste;

(b) difficulty recycling waste due to composition;

(c) levies contributing to financial stress;

(d) decision making ability being directed or affected by the lender;

(e) the applicant being the only entity not captured by appointment of receivers;

(f) receivers position regarding ownership and processing of waste;

(g) alternative attempts to resolve;

(h) the applicant having no means by which to comply absent the exemption, and being risk of committing an offence; and

(i) refusing exemption does not achieve objects of the WRR Act.

[109] The applicant states that the combination of circumstances in which it finds itself are special, uncommon, and out of the ordinary course. They are, the applicant submits, in the ordinary meaning of those words, exceptional.

[110] Accordingly, the applicant seeks a declaration that exceptional circumstances apply in relation to the waste for the purposes of s 35 of the Act.

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28 See *Planning Act 2016* (Qld), s 164.

Consideration

[111] It is not appropriate for the Court to enter the fray and make the declaration that the applicant seeks.

[112] In the absence of any statutory consideration of the weight to be given to various considerations, it is generally for the decision maker and not the Court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power.[29]

[113] In *Plaintiff M1/2021 v Minister for Home Affairs*,[30] Kiefel CJ, Keane, Gordon and Steward JJ explained:

> "Labels like 'active intellectual process' and 'proper, genuine and realistic consideration' must be understood in their proper context. These formulas have the danger of creating 'a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any [decision-maker's] decision can be scrutinised'. That is not the correct approach. As Mason J stated in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, '[t]he limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind'. The court does not substitute its decision for that of an administrative decision-maker." [citations omitted]

[114] In *Nicholson v Parole Board Queensland*,[31] Bowskill CJ adopted the Full Court of the Federal Court's summary in *Djokovic v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs* of the relevant legal principles applicable where the exercise of a power depends on a state of satisfaction.[32]

[115] Further, Bowskill CJ acknowledged the "area of decisional freedom" of the decision maker:

> "The criterion conditioning the exercise of the statutory power to make a no cooperation declaration – whether the Board is (or is not) satisfied the prisoner has given satisfactory cooperation – involves an assessment and value judgment on the part of the Board. It is the existence of that opinion or belief on the part of the Board on which the statutory power to make a no cooperation declaration depends, rather than the fact of cooperation itself.
>
> The "area of decisional freedom" left to the decision maker in a context such as this was described by Lord Brightman in *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484 at 518 as follows:
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>> "Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad

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29 *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 39-40.

30 (2022) 275 CLR 582, 599-560 [24].

31 [2024] QSC 232.

32 At [52] quoting *Djokovic v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs* (2022) 289 FCR 21 at [21]-[27].

> spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely." [Citations omitted]

[116] A perverse decision is one which there is no probative evidence to support it.[33] This is not such a case. As can be seen later in my reasons addressing the question of fact issue, I am satisfied that:

(a) the second respondent, in making the decision, had regard to relevant matters, being the applicant's material explaining the exceptional circumstances; [34] and

(b) there is evidence capable of supporting the second respondent's material basis for the decision.[35]

[117] Even if the decision was perverse (which in this case, I am not satisfied it was), the applicant has not provided me with any authority that the remedy is for the Court to step in and make factual findings.

[118] In this case, the criterion conditioning the exercise of the statutory power to make a decision under s 35 of the WRR Act declaring the waste exempt involves an assessment in value, judgment on the part of the second respondent as to whether exceptional circumstances exist. It is the existence of that opinion or belief on the part of the second respondent on which the statutory power to make the decision depends, rather than the fact of exceptional circumstances itself.

[119] My role is to examine the formation of the second respondent's state of satisfaction and determine whether it was formed according to law; it is not to form the state of satisfaction itself.

[120] In the circumstances, it is not for this court to make a factual finding about whether the exceptional circumstances exist.

Did the second respondent, in making the decision, fail to have regard to relevant matters, being the applicant's material explaining the exceptional circumstances?

[121] In the December letter, the second respondent concluded that the circumstances outlined by the applicant did not constitute exceptional circumstances as they were not unexpected, uncommon or unavoidable.

[122] The applicant has set out a list of what it regards as exceptional circumstances as raised on the material provided to the respondents.

[123] The applicant's complaint is that the December letter does not address these matters. Rather, the applicant states that the second respondent provided a brief response which sets out nine bullet points; six of which are the same as in the November letter.

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33 *Thomas v Attorney-General and Minister for Justice and Minister for Training and Skills* [2017] QSC 308 at [51].

34 See [129]-[156].

35 See [160]-[164].

[124] After the November letter the applicant provided the respondents with a lengthy submission which attached relevant documents. The applicant states that the December letter provides a brief response which does not address this material.

[125] The applicant submits that the second respondent's decision ignores virtually all the evidence placed before her by the applicant regarding the events and steps taken to attempt to prevent the closure of the recycling program operated by the Group. As the applicant's counsel stated at the hearing:

> "[T]here's an oblique reference to "direct outcome of the commercial management of Rino Properties and Rino Recycling", which glosses over in its entirety the fact that the applicant genuinely believed, up until the receiver has disavowed ownership, that the operator would take responsible for the waste and it always proceeded on that basis, that the reason why the enterprise, as a group, was in trouble was not – in no small part because of the waste levies themselves, despite being a highly effectively processor, and that there'd been several attempts to try and salvage the business."

[126] The applicant states that the final two dot points of the December correspondence comprise the second respondent's consideration of the applicant's material. However, the applicant states there is no reference to the:

(a) origins of the material;

(b) content of the material;

(c) difficulties with processing that material;

(d) financial and practical difficulties encountered by the applicant;

(e) correspondence with the Minister; or

(f) difficulties with the lender.

[127] The applicant characterises the second respondent's statement of "direct outcome of the commercial management of Rino Properties" as so vague as to be meaningless.

[128] Considering the brief reasons and lack of reference to material in the December letter, the applicant submits that the second respondent, in making the decision, failed to have regard to relevant matters, being the applicant's material explaining the exceptional circumstances.

Consideration

[129] As noted, the second respondent's reasons should be construed in a practical and common-sense manner and without an eye finely attuned to error. As an administrative decisionmaker, the second respondent's reasons are "meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed".[36]

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[36] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272.

[130] I note that the second respondent did not need to provide any reasons for a determination not to make a declaration of exemption from the levy under s 35 of the WRR Act. Unlike other exemption decisions, it is specifically excluded from the requirement of production of an information notice. The second respondent voluntarily gave reasons in the nature of correspondence intended to inform the applicant about the decision, rather than a formal statement of reasons.

[131] The November letter by the second respondent expressed her view that she was "inclined to refuse the applicant's request" to declare the waste as exempt waste pursuant to s 35 WRR Act. The second respondent then sets out eight bullet points as her reasons for refusing the request to declare the waste as exempt waste under s 35 WRR Act.

[132] The first six bullet points summarise at a high level the series of arrangements that were in place, including that:

(a) Pinkenba Operations Pty Ltd, trading as Rino Recycling, had gone into administration;

(b) the applicant was a separate entity to Rino Recycling and was not considered to be a part of the administration process;

(c) the waste was under the sole control of the applicant as the EA concerned a site leased by the applicant;

(d) the developmental approval of the site was issued to the applicant;

(e) the conditions of the court ordered development approval included that all fill (waste) material be removed by 30 June 2025 (including the waste the subject of the request) and that a contaminated land report be submitted to the Brisbane City Council by 30 August 2025; and

(f) the conditions of the development approval were consistent with the EA application submitted to the first respondent by the applicant, which provided that the waste storage on the site was of a temporary nature.

[133] In the November letter, the second respondent concluded by stating that the circumstances described by the applicant did not appear to be unexpected, uncommon or unavoidable. By contrast, she stated that the circumstances appeared to be caused by the applicant's failure to remove the waste from the site by June or August 2025 and were unrelated to the comparatively recent circumstances of the Rino administration.

[134] The second respondent invited further representations by the applicant before finalising her considerations.

[135] The applicant then took up this invitation and provided comprehensive submissions and material, in particular addressing the criterion used by the second respondent in considering whether exceptional circumstances existed.

[136] The December letter confirmed the second respondent's refusal of the applicant's request to declare the waste as exempt waste pursuant to s 35 of the WRR Act.

[137] The second respondent repeated the first seven bullet points as set out in the November letter and then adds:

> - "The circumstances outlined in the November correspondence do not constitute exceptional circumstances as they are not unexpected, uncommon or unavoidable. Instead, the circumstances leading to the continued stockpiling of waste at the site would be more appropriately construed as a direct outcome of the commercial management of Rino Properties and Rino Recycling.
>
> - The waste levy was introduced by the Queensland Government to, inter alia, reduce the amount of waste going to landfill and encourage waste avoidance. It would not be appropriate to use a waste levy exemption to rectify difficulties experienced by private entities in the management of commercial operations. These types of difficulties are more appropriately dealt with via civil remedies."

[138] This conclusion cannot be viewed in a vacuum and is informed by the factual circumstances set out by the second respondent in the preceding bullet points.

[139] The respondents' counsel's submissions at the hearing framed the second respondent's reasons in this way:

> "She refers to the circumstances leading to the continued stockpiling of waste at the site. Those are all of those things that I took your Honour to earlier. And then, she refers to those circumstances as being more appropriately construed as a direct outcome of commercial management. And then, she looks at the purpose, and in the context of the Act – and the purpose of the power – she decides it would not be appropriate to use a waste levy exemption to rectify those difficulties that have been described to her by the applicant. And she describes those difficulties globally as being difficulties experienced by private entities in the management of commercial operations.
>
> In my submission, all of those phrases can actually – can be understood to refer to the circumstances in that correspondence that's been presented to her, in the submissions that were made to her in the application, and including – and primarily, all of those circumstances raised for her consideration by the applicant themselves."

[140] In the circumstances I agree.

[141] I accept that the second respondent's brief reasons encapsulate at a high level the material that was before her in the context of the issues raised by s 35 of the WRR Act.

[142] The core of the applicant's submissions and material to the second respondent addressed the position they found themselves in, including what the applicant submits are the following exceptional circumstances:

(a) the composition of waste;

(b) the difficulty in recycling waste due to its composition;

(c) the levies contributing to financial stress;

(d) the decision making ability being directed or affected by the lender;

(e) the applicant being the only entity not captured by appointment of receivers;

(f) the receiver's position regarding ownership and processing of waste;

(g) alternative attempts to resolve;

(h) the applicant having no means by which to comply absent the exemption, and being risk of committing an offence; and

(i) refusing exemption does not achieve objects of the WRR Act.

[143] Plainly, the second respondent did not address each of these circumstances in her reasons.

[144] However, these circumstances identified by the applicant fall under the umbrella of the commercial management of Rino Properties and the applicant and can be attributed to the difficulties experienced by them in in the management of their commercial operations.

[145] The first six bullet points of the second respondent's letter highlights:

(a) Rino Recycling going into administration;

(b) the applicant and Rino Recycling is a separate entity and is not part of the administration process;

(c) the applicant's responsibility for the management of the waste under the EA on a site leased by the applicant;

(d) the developmental approval of the site was issued to the Rino Recycling;

(e) the conditions of the court ordered development approval; and

(f) the conditions of the development approval is consistent with the EA application submitted by the applicant.

[146] All of which bespeaks at a high level the commercial arrangement the applicant made with Rino Recycling and the difficulties experienced by the entities in the management of the commercial operations.

[147] The second respondent also considered the statutory scheme by concluding that it would not be appropriate to use a waste levy exemption to rectify difficulties experienced by private entities in the management of commercial operations.

[148] The terms and effect of the December letter demonstrate that that the second respondent considered the applicant's material.

[149] I note in the December letter the second respondent explicitly:

(a) referred to the letter from the applicant's lawyer dated 27 November 2025 and defines it as the "November correspondence".

(b) stated that she "ha[d] considered the further information provided in the November correspondence"; and

(c) referred to the "further information provided in the November correspondence" in the bullet points setting out her reasons.

[150] The second respondent's conclusion in the December letter include a statement that "[t]he circumstances outlined in the November correspondence do not constitute exceptional circumstances…".

[151] Further, since the December letter, the second respondent has sworn an affidavit which states that she took into account the material attached to her affidavit. I note that the attachments do not include the November letter where she set out her preliminary view.

[152] The second respondent was not cross examined about her sworn affidavit asserting that she took into account the relevant material. The applicant's counsel stated that she didn't want to do so because to do so would be "unseemly".

[153] Ultimately, the second respondent's affidavit remains uncontested. Clearly, I am not obliged to accept the second respondent's affidavit to the exclusion of other material.

[154] However, considering all the material, I accept the second respondent's sworn affidavit on face value. I am not satisfied, taking the material as a whole, to proceed otherwise.

[155] The December letter, albeit brief, covers at a high level the submissions and material made by the applicant.

[156] In my view, in the circumstances, the applicant's complaint that the second respondent "failed to have proper regard to relevant material" is not substantiated.

Is there evidence capable of supporting the second respondent's material basis for the decision?

[157] The applicant submits that final two bullet points in the December letter comprise the sum total of the consideration given by the second respondent.

[158] The applicant submits that when read fairly and as a whole, the second respondent determined that the relevant issues with respect to the request were the extent to which the circumstances were:

(a) "unexpected, uncommon or unavoidable"; and

(b) "a direct outcome of the commercial management of Rino Properties and Rino Recycling".

[159] The second respondent states that the meaning of "direct outcome of the commercial management" is uncertain which formed the following submission by the applicant's counsel at the hearing:

> "And the first step in that is what exactly does it mean, what do they mean by "direct outcome of the commercial management of Rino Properties", because, as we've gone over a few times now, quite a few of the factors that were contributing to the downfall of the enterprise were external factors rather than direct management decisions, or does it mean they take an adverse view about the way the company was set up, or does it mean they think there was some particular decision that was made that was not appropriate or was – it's difficult to know what it means, and if it means any of those things, there's no material before the decision-maker, in my submission, capable of supporting a conclusion, and further, if we had been put on notice that that was what the decision-maker was going to refuse us on, we would have put on material directly relevant to it."

Consideration

[160] Decision makers' findings must be based on some evidence or supporting material. Clearly, findings cannot be made where there is no evidence or material to support such a finding. By "no evidence" this has traditionally meant "not a skerrick of evidence".[37]

[161] The applicant makes a complaint about the lack of particulars forming the basis of the second respondent's reliance upon the "direct outcome of the commercial management" by the applicant and that there is no material capable of supporting this conclusion.

[162] However, taken at a high level, this part of the second respondent's reasons refers to the commercial arrangements the applicant made with Rino Recycling and the difficulties experienced by the entities in the management of the commercial operations. The applicant's material sets out numerous difficulties experienced by the applicant in this context and is riddled with evidence supporting this state of affairs.

[163] The second respondent makes it clear that, in her view, the commercial management of Rino Properties and the applicant does not constitute exceptional circumstances and are matters to be dealt with in other ways, such as civil remedies.

[164] In my view, there is evidence capable of supporting the second respondent's material basis for the decision.

Conclusion

[165] None of the applicant's grounds have any basis.

[166] The application is dismissed.

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37 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398, 408 [17]; *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446, 587 [575] per Weinberg J, quoting Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004) at 239.

Costs

[167] Costs ordinarily follow the event.

[168] I will give the parties an opportunity to consider these reasons before they are required to file and serve short written submissions on the question of costs. I encourage the parties to agree on an order for costs.

[169] If this cannot occur, the parties should, within 14 days, file and serve written submissions as to costs.

[170] If it is appropriate, I will then deal with the question of costs on the papers, unless either party requests a hearing. To facilitate that process, I will adjourn the question of costs to a date to be fixed.