

TASMANIAN PLANNING COMMISSION



DECISION

Planning scheme	Glamorgan Spring Bay Interim Planning Scheme 2015
Amendment	Draft amendment AM 2018-03
Planning authority	Glamorgan Spring Bay Council
Applicant	Ireneinc Planning and Smith Street Studio Planning and Urban Design obo Cambria Green Agriculture and Tourism Management Pty Ltd
Date of decision	22 November 2019

Decision

The Commission has determined on the basis of the evidence before it that the requirements of section 33(2A) are not met, and therefore, it does not have jurisdiction to determine the draft amendment.

Ann Cunningham
Delegate (Chair)

Peter Fischer
Delegate

Note:

References to provisions of the *Land Use Planning and Approvals Act 1993* (the Act) are references to the former provisions of the Act as defined in Schedule 6 – Savings and transitional provisions of the *Land Use Planning and Approvals Amendment (Tasmanian Planning Scheme Act) 2015*. The former provisions apply to an interim planning scheme that was in force prior to the commencement day of the *Land Use Planning and Approvals Amendment (Tasmanian Planning Scheme Act) 2015*. The commencement day was 17 December 2015.

REASONS FOR DECISION

Amendment

Introduce the Cambria Specific Area Plan and other amendments to facilitate a large-scale tourism-based development at Cambria Estate, Swansea.

Site information

The site is located north of the Meredith River with boundaries to the Meredith, Wye and Swan Rivers. The Tasman Highway transects the property, which has frontage to Boathouse Road, Dolphin Sands Road, McNeills Road, Swan River Road and the Tasman Highway. The Swansea Township is located to the south, with Dolphins Sands to the southeast.

The subject site comprises 12 titles with several owners and a combined area of 3,074.4ha. The titles consist of the following:

- Cambria Green Agriculture Development Pty Ltd - CTs 23216/2 & 23216/3;
- Star Green Agriculture Development Ltd – CT 111628/1;
- Emperor Shun Green Agriculture Development Ltd – CT 149607/1;
- Siu Lam Suen – CT 115706/1;
- Moon Green Agriculture Development Ltd – CT 251306/1;
- Liu Kejing – CTs 233262/1, 148927/1 & 115706/2;
- Emperor Yue Green Agriculture Development Ltd – CT 100096/1;
- Shenglong Hong Kong Investment Ltd – CT 100097/1; and
- Sun Green Agriculture Development Ltd – CT 148001/1.

The subject site is a rural property with a history of agricultural use that is now largely used for grazing. The property contains the Cambria homestead which is heritage listed. It also contains a number of registered Aboriginal sites.

Date and place of hearing

A directions hearing was held at the Swansea Town Hall, 12 Franklin Street, Swansea on 14 December 2018. The hearing into the jurisdictional issues was held at the Commission's office on Level 3, 144 Macquarie Street, Hobart on the 30 August 2019.

Prior to the hearing, the delegates made an inspection of the site.

Appearances at the hearing into the jurisdictional issues

Planning authority:	Mr Shane Wells, Manager Development and Compliance
Applicant:	Mr Shaun McElwaine SC of Shaun McElwaine and Associates; Ms Irene Ducket of Ireneinc Planning and Smith Street Studio Planning and Urban Design obo Cambria Green Agriculture and Tourism Management Pty Ltd; and Mr Ronald Hu (RH);
Representors:	Dr Peggy James (PJ); Mr Alain Coltier (AC); Mr Ross Irving (RI); Mr Andrew Wynminga; Ms Cassy O'Connor MP.

Background

1. On 19 March 2018, the applicant lodged a request for the draft amendment with the planning authority. The planning authority purported to initiate the draft amendment under section 34(1)(a) and certify the draft amendment at its meeting of 24 April 2018.
2. On 4 May 2018, the Commission received application materials from the planning authority for a draft amendment for a rezoning and Specific Area Plan to facilitate a large-scale tourism based development at Cambria Estate, Swansea. The draft amendment was forwarded to the Commission purportedly under section 35(4) of the *Land Use Planning and Approvals Act 1993* (the Act). The planning authority then placed the draft amendment on public exhibition in accordance with the Act.
3. The land subject to the draft amendment request is largely owned by Hong Kong registered companies, with Cambria Green Agriculture Development Pty Ltd the only Australian listed company.
4. On 29 November 2018, the planning authority forwarded the Commission copies of all the representations received during the public notification period and its response to those representations in the form of its section 39 report.
5. On 9 January 2019, the Commission received a further submission from representor Dr Peggy James outlining concerns regarding the validity of the landowner consent letters, specifically whether they met the requirements of section 33(2A) of the Act.
6. Directions were issued to Mr McElwaine by the Commission requesting submissions that provided the identity of the signatories on the landowner consent letters, and whether the signatories had the authority to sign on behalf of the owners of the land.
7. On 6 May 2019, the Commission issued further directions to all parties advising that it wished to adjudicate the jurisdictional matters before reconvening the hearing to consider the merits of the draft amendment.
8. On 30 August 2019, the Commission held a hearing into jurisdictional issues regarding the landowner consent letters that accompanied the amendment request.

Jurisdiction

9. Several representors raised issues which related to claimed deficiencies in a number of the letters of consent signed by the owners of the various land titles that are the subject of the draft amendment. The representors questioned whether the letters met the requirements of section 33(2A). This provision is saved by the Savings and Transitional provisions in Schedule 6 of the Act.
10. Section 33 outlines the requirements for requesting an amendment of a planning scheme and relevantly states:
 - (1) A person may request a planning authority to amend a planning scheme administered by it.
 - (2) A request is to be in a form approved by the planning authority or, if a form has been approved by the Commission, is to be in that form.

(2A) If a request under subsection (1) is in respect of one parcel or several parcels of land covered by the planning scheme and is requested by a person who is not the owner of the land to which the proposed amendment applies, the request must be –

 - (a) signed by the owner or owners of the land; or
 - (b) accompanied by the written permission of the owner or owners to the making of the request.
11. The provision in section 33(2A) is expressed in mandatory terms in that it specifies that the section 33(1) request, 'must' be either signed by the owner or owners of the relevant land, or accompanied by the written permission of those persons to the making of the request, thereby setting the requirements for a request in cases where the requestor is not the owner of the land.
12. It is arguable in the Commission's view, that absent satisfaction with what are effectively conditions precedent, the planning authority had no power to initiate the relevant amendment under section 34(1)(a). That provision speaks in terms of being authorised to do that 'in response to a request under section 33' which must surely mean a valid request; that is, one in respect of which the mandatory requirements of section 33(2A) have been met. Reference is made to the provisions of section 10A(1)(a) of the *Acts Interpretation Act 1931* which reads as follows:
 - (1) In any Act –
 - (a) the word "must" is to be construed as being mandatory; and
 - (b) ...
 - (c) ...
13. The issue for determination is whether non-compliance with section 33(2A) is fatal to the request made of the planning authority and to its subsequent resolution in respect of it, which must depend upon the correct construction of that provision. It is generally accepted that a mandatory provision which conditions the exercise of power would go to jurisdiction thereby resulting in invalidity. Whereas a directory provision would generally go to procedure which would not necessarily result in invalidity.

14. The High Court decision in *Project Blue Sky v The Australian Broadcasting Authority*¹ brought about a shift in those kinds of distinctions and said that an act done in breach of a condition regulating the exercise of statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition.
15. The Court said at paragraph 33:

A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.
16. More recently in *Wei v Minister for Immigration*² Justices Gagelar and Nettle explained the process as follows:
 25. ...notwithstanding the note of caution sounded in *Project Blue Sky Inc v Australian Broadcasting Authority*, there remains utility in maintaining the traditional terminological distinction between an "imperative" (or "mandatory") duty on the one hand, and a "directory" duty on the other hand, for the purpose of describing whether or not a material breach of an antecedent statutory duty results in an invalid exercise of a decision-making power. That distinction was explained in *Clayton v Heffron* when it was said:

"Lawyers speak of statutory provisions as imperative when any want of strict compliance with them means that the resulting act, be it a statute, a contract or what you will, is null and void. They speak of them as directory when they mean that although they are legal requirements which it is unlawful to disregard, yet failure to fulfil them does not mean that the resulting act is wholly ineffective, is null and void."
 26. Consistently with *Project Blue Sky Inc*, what is critical to be borne in mind is that assignation of one or other of those labels to a particular statutory duty imposed by a particular statutory provision marks "the end of the inquiry, not the beginning". To label a particular statutory duty either "imperative" or "directory" is to express the conclusion of a process of statutory construction. Central to that process of statutory construction is an inquiry as to whether the statutory purpose of the duty, when considered within the particular statutory scheme of which it forms part, would or would not be advanced by holding an exercise of decision-making power affected by breach of the duty to be invalid.
17. In the Commission's view the wording used in section 33(2A) evidences Parliament's clear intention that where the requestor is not the owner of the land there must be satisfactory evidence of the landowner's permission to the making of the request for the amendment to the planning authority. The consequences of the amendment for the landowner could be significant and it is therefore vital that a person or persons whose interests would be affected, consent to the making of the application. Mere knowledge of the application would not, in the Commission's view be sufficient.
18. Accordingly the Commission determines that in the absence of satisfactory evidence of compliance with section 33(2A), the planning authority had no power to initiate the amendment as there was no valid amendment request before it and the planning authority's resolution must also be invalid. This Commission would therefore be without jurisdiction to hear the draft amendment.

¹ [1998] HCA 28; 194 CLR

² [2015] HCA 51; 90 ALJR 213

Commission's consideration

19. Each of the letters of consent which accompanied the amendment request appear to be signed in Chinese characters by the same signatory apart from the titles not owned by a corporation. The Commission notes that there is 1 title, CT 115706/1, owned by Siu Lam Suen, who appears to have signed the landowner consent letter. Mr Kejing Liu appears to have signed the landowner consent letter for CTs 233262/1, 148927/1 and 115706/2, for which he is named the owner.
20. The representors raised a number of issues regarding these letters which included:
 - that the signatories were not identified;
 - absence of evidence regarding the signatories' authority to sign on behalf of the landowner companies;
 - incorrect descriptions of the landowners and incorrect title reference;
 - discrepancies in the electronic signatures;
 - absence of landowner consent for the road reservations included in the amendment request; and
 - failure to comply with provisions of the *Corporations Act 2001* in the consent letter for Cambria Green Agriculture Development Pty Ltd.
21. At the hearing held on 30 August 2019, the only evidence submitted by the applicant was in the form of 2 unsworn witness statements by Ronald Hu dated May 2019 and 9 August 2019, Mr Ronald Hu's unsworn oral evidence and documentary evidence which included unverified company extracts.
22. In his first statement Mr Hu stated that he is the Chief Executive Officer of 'Cambria Green Agriculture & Tourism Pty Ltd' [sic]. The tendered Current & Historical Extract lists Mr Kejing Liu as a director and Mr Ronald Xiaojun Hu as a director and the Secretary.
23. Prior to the hearing, on 3 April 2019 the Commission wrote to Mr McElwaine in the following terms:

It appears from the documents that accompanied the amendment request that the person requesting the amendment is not the owner of the land to which the amendment applies.

Accompanying the amendment application are 9 separate 'owner consent letters' with respect to the various parcels of land, which presumably comprise all of the land titles that are the subject of the amendment application. Please confirm that this is the case.

Seven of the 9 owner consent letters indicate that separate companies namely Cambria Green Agriculture Development Ltd, Star Green Agriculture Development Ltd, Emperor Shun Green Agriculture Development Ltd, Moon Green Agriculture Development Ltd, Emperor Yue Green Agriculture Development Ltd, Shenglong Hong Kong Investment Ltd, Sun Green Agriculture Development Ltd, are the owners of the variously identified titles. It is apparent that identical Chinese characters appear on 7 of the owner consent letters as signatories on behalf of the 7 different companies without any indication of their identity and capacity to sign on behalf of the companies

One of the owner consent letters with respect to CT 115706/1 is signed by Siu Lam Suen. Liu Kejing is the stated owner of CT 233262/1, CT 148927/1 and CT 115706/2 but the Chinese characters on the owner consent letter appear to be the same as those on the other 7 owner consent letters referred to above.

24. In that letter, the Commission asked Mr McElwaine to provide a submission in relation to the identity of the signatories and whether the signatories had authority to sign on behalf of the owners of the land.
25. In Mr McElwaine's response dated 9 April 2019 he stated:

I am instructed that the position is as follows. The person who has provided me with these instructions is Mr Ronald Hu. He is the person who is appointed as the Manager of Cambria Green Agriculture and Tourism Pty Ltd [sic] (ACN 604 410 086). In what follows, he is the person who has authority on behalf of each of the other corporate entities, and individual landowners, to instruct me generally in this matter. Doubtless as you will understand, Cambria Green Agriculture and Tourism Pty Ltd [sic] is the applicant, and was described as such, in all of the documents lodged with the planning authority.

As the title searches disclose, the following corporate entities are registered as the proprietors of some of the titles:

- Star Green Agriculture Development Ltd;
- Emperor Shun Green Agriculture Development Ltd;
- Moon Green Agriculture Development Ltd;
- Emperor Yue Green Agriculture Development Ltd;
- Shenglong Hong Kong Investment Ltd; and
- Sun Green Agriculture Development Ltd.

None of these companies is registered as a corporation pursuant to the *Corporations Act 2001*. Each is a company incorporated in Hong Kong. There is no legal obligation for a foreign corporation, that is simply a landowner in Australia, to be registered pursuant to the *Corporations Act 2001*. If a foreign corporation carries on business in Australia, then there is an obligation to comply with Part 5B.2, Division 2 of the *Corporations Act 2001*. Registration by a corporation as a landowning entity in Australia does not constitute 'carrying on business' within the meaning of these provisions.

For each of these foreign corporations, Mr Liu Kejing is the only director and the only shareholder. For each consent provided by each corporation, the signature that appears on each of the documents is that of Mr Liu Kejing. As the director and only shareholder of each corporation, it is obvious that he is the person who was able to give consent on behalf of each to the making of the application by Cambria Green Agriculture and Tourism Pty Ltd [sic].

For each consent in relation to CT233262/1, 148927/1 and 115706/2, the signature that appears on each document is that of Mr Liu Kejing, the registered proprietor of each title.

Cambria Green Agriculture Development Pty Ltd is the registered proprietor of the land in CT23216/3. The consent provided on its behalf dated 19 March 2018 is also signed by Mr Liu Kejing. He is recorded as one of the directors of that corporation and he is the only shareholder. Pursuant to s.127(1) and (4) of the *Corporations Act 2001*, he was perfectly able to give consent on its behalf.

26. At paragraph 7 of his May 2019 witness statement Mr Hu states; 'Each consent form is signed by Kejing Liu and with the authority of each company'. He did not say how he knew that Mr Liu had signed the consent letters nor did he say that he had ever seen Mr Liu sign other documents. In oral evidence Mr Hu said that he had sent the unsigned consent letters to the email addresses of the various landowners but provided no other detail. Nor did Mr Hu explain how Mr Liu had been given authority by each of the landowner companies.
27. Apart from Mr Hu's unsubstantiated testimony that the consent letters were signed by Mr Kejing Liu, there was no evidence that the Chinese characters which appeared on the letters in fact represented the signature of Mr Kejing Liu. Mr Hu was not present when the letters were signed and provided no evidence that he had ever seen Mr Kejing Liu sign a document or the basis upon which he claimed that the letters were signed by him. A statutory declaration from Mr Kejing Liu would have been more persuasive in this regard. The Commission notes that the Chinese characters appearing on the Register of Charges search for Shenglong Hong Kong Investment Ltd for Mr Kejing Liu's name appear to be different to those on the consent letters.
28. On the basis of the evidence provided the Commission cannot be satisfied that the Chinese characters appearing on the consent letters represent the signature of Mr Kejing Liu.

Agency

29. In subsequent submissions Mr McElwaine contended that as each of the landowners had expressly appointed Cambria Green Agriculture & Tourism Management Pty Ltd (the Management Company) as its agent, which extended to the formulation and submission of the amendment request to the planning authority, there was no requirement to comply with the provisions of section 33(2A). This is because the request was lodged with the planning authority by Ireneinc as the appointed sub-agent of the Management Company and was not made by any person who was not then the owner of any of the subject lands.
30. Mr McElwaine contends that it was plainly open to each of the landowners to appoint the Management Company as an express agent and referred the Commission to paragraphs from the text *Law of Agency*, 3rd ed (2014) by Tasmanian law Professor Dal Pont. Professor Dal Pont writes that there are at least two essential elements of agency, firstly the consent of both principal and agent and secondly, the authority given to the agent by the principal to act on the principal's behalf.
31. Mr McElwaine goes on to state that each director of each corporate landowner was capable of appointing the Management Company as its agent for the purpose of managing all aspects of the proposed development.
32. In support of this submission Mr McElwaine referred the Commission to paragraph 5 of Mr Hu's unsworn witness statement of May 2019 in which he states:

Cambria Green Agriculture Development Pty Ltd is the Australian Registered Corporation that is responsible for co-ordinating the request for the amendment to the Glamorgan Spring Bay Interim Planning Scheme 2015.....It acts as the agent of each of the foreign corporations. In that capacity, I have the authority of each of the foreign corporations and of Mr Kejing Liu to make this witness statement.

33. The company referred to by Mr Hu is the landowner of CTs 23216/2 and 23216/3. At the hearing before the Commission Mr Hu advised that he had incorrectly referred to this company as the co-ordinator of the amendment request, and sought an amendment to paragraph 5 of his first witness statement to replace the company name with Cambria Green Agriculture & Tourism Management Pty Ltd. A further amendment was requested to paragraph 1 as Mr Hu had neglected to include the word 'Management' where he referred to Cambria Green Agriculture & Tourism Pty Ltd.
34. The Commission accepted these amendments however it is not satisfied simply on the basis of Mr Hu's unsworn statement that the Management Company 'acts as the agent of each of the foreign corporations'. There was no further evidence to support this statement or explain the basis upon which Mr Hu made the statement. It is notable that the ASIC Relational Company Extract for Cambria Green Agriculture & Tourism Management Pty Ltd dated 20 June 2018 attached to the submission of Dr Peggy James dated 26 July 2019, does not list any 'Foreign companies for which the subject company is a local agent'.
35. Whilst the Commission does not disagree with the proposition that the various directors of the landowner companies and individual landowners were capable of appointing the Management Company as their agent, the Commission does not consider that there was sufficient evidence that this in fact occurred. For instance, there was no documentary evidence in the form of company constitutions, company resolutions, minutes of appointments or authority, or statutory declarations from any of the directors to this effect. If such evidence was available it would and should, in the Commission's view, have been within the applicant's power to provide.
36. Nor was there any persuasive evidence of a retrospective ratification of any agency relationship as discussed in Mr McElwaine's submission dated 20 September 2019. Whilst the Commission agrees that agency can be created by subsequent ratification, there was simply no evidence from the principals of the various companies to support such a finding. In the absence of any satisfactory evidence, the Commission is not prepared to accept in this case, that ratification can be inferred from the circumstances.
37. There was no evidence to support Mr McElwaine's contention that Ireneinc had been appointed the sub-agent of the Management Company and the Commission rejects any suggestion that such an appointment can be assumed.
38. For these reasons the Commission rejects the applicant's submission that compliance with the provisions of section 33(2A) of the Act is not necessary.

Landowner signatures and authority to sign

39. Apart from 1 signature on the 9 landowner consent letters, the remaining letters appear to have been signed using the same Chinese characters. Because of the identical nature of the Chinese characters it appears that a stamp or electronic signature was used. The consent letter for CT 115706/1 was evidently signed by Siu Lam Suen. The consent letter for CTs 233262/1, 148927/1 and 115706/2 was addressed to Mr Kejing Liu and is signed with the same Chinese characters as the other 7 letters. For the remaining 7 letters, apart from the name of the nominated landowner company, there is no identification of the signatory.
40. In directions issued by the Commission evidence was requested as to the identity of the signatories and their authority to sign on behalf of the landowner company. In his responding letter of 9 April 2019, Mr McElwaine advised that for each of the foreign landowner companies, Mr Kejing Liu is the only director and the only shareholder. Further, that the Chinese character signatures were those of Mr Kejing Liu. Mr McElwaine advised that the relevant evidence would be provided in the form of a witness statement. The unsworn witness

statement of Ronald Hu dated May 2019 was subsequently filed which annexed an ASIC company extract for Cambria Green Agriculture Development Pty Ltd being the only landowner company registered in Australia and various Annual Returns for the remaining Hong Kong registered landowner companies.

41. The annexures revealed that as at the date of the extracts or returns there were in fact 2 directors of Cambria Green Agriculture Development Pty Ltd namely, Kejing Liu and Xiaojun Hu and 2 directors of Shenglong Hong Kong Investment Limited namely, Li Lihua (9,000 shareholding) and Kejing Liu (1,000 shareholding). Despite this information contained in the annexures to Mr Hu's witness statement, he stated in paragraph 4 referring to the Hong Kong registered companies, 'Kejing Liu is the only director, and is the controller, of each of those corporations...'.
 - PJ: So you admit that when the letter of consent was signed, by someone, um, you didn't actually know if he had the authority to sign, is that correct?
Liu Kejing.
 - RH: I did because he was the director at the time.
 - PJ: But Li Lihua is the 90% owner and director.
 - RH: [inaudible] Ok subject to what they told me from the time that they registered the company and the holding the titles that was the agreement between them.
42. In his second witness statement Mr Hu admits the mistake in his earlier statement noting that the company return for Shenglong Hong Kong Investment Ltd records that there are two directors.
43. This statement however is inconsistent with the evidence that Mr Hu gave at the hearing. He was asked by a representor about his knowledge as to whether Mr Kejing Liu had authority to sign the landowner consent letter:
 - PJ: So you admit that when the letter of consent was signed, by someone, um, you didn't actually know if he had the authority to sign, is that correct?
Liu Kejing.
 - RH: I did because he was the director at the time.
 - PJ: But Li Lihua is the 90% owner and director.
 - RH: [inaudible] Ok subject to what they told me from the time that they registered the company and the holding the titles that was the agreement between them.
44. These statements are contradictory to the statement that Mr Hu made in his first witness statement which was subsequently corrected in his witness statement dated 9 August 2019 and acknowledged by Mr McElwaine. The oral evidence given at the hearing suggests that Mr Hu was aware that there was more than 1 director of Shenglong Hong Kong Investment Ltd at the time that they registered the company. Yet he stated in his written statement that Mr Kejing Lui is the only director. The Commission concludes that either Mr Hu's oral evidence or his written statements are untruthful for both cannot be correct. The Commission accordingly finds Mr Hu's evidence regarding his claimed knowledge of the directorship of Shenglong Hong Kong Investment Ltd misleading and not credible.
45. In his August witness statement Mr Hu states that each of the individuals, namely Mr Kejing Liu and Mr Lihua is authorised to act as the agent of the Shenglong Hong Kong Investment Ltd. At paragraph 5 Mr Hu goes on to state as follows:

I have spoken to each of Mr Li Lihua and Mr Liu Kejing and I have enquired as to whether the minority shareholder, Mr Liu Kejing had authority to act as the agent of that company to provide the landowner consent that is in issue in this proceeding, which is dated 19 March 2019. In substance, I have been informed by each of these gentlemen that Mr Li Lihua gave his full authority to Mr Liu Kejing to act on behalf of the company in its land dealings in Australia, and in particular to provide any document necessary for the purposes of the rezoning application that is the subject of this reference to the TPC.

46. During cross examination, Mr Hu advised that this conversation had taken place on a date after he signed his first witness statement.

RH: I made a phone call, I called the Mr Li Lihua, say are you happy to give authority to Mr Liu to sign on your behalf? He said yes no problem.

PJ: And when did you make that phone call?

RH: Oh that's, in between the, um, in between the two statements. That's before the, the second.

PJ: So you didn't make phone call prior to, um, getting the letter back from Shenglong?

RH: I didn't make a phone call before the first statement made.

PJ: Um, but did you make the phone call prior to actually, um, getting the signature back on the original letter of consent?

RH: No I didn't make that phone call, no.

PJ: No, so you didn't know at that time that Liu Kejing had the authority [inaudible]

RH: It was a mistake, as a result of that mistake. I didn't check.

47. It is notable that Mr Hu said that he asked Mr Li Lihua whether he would give authority to Mr Lui to sign on his behalf when it was his evidence that the consent letter had already been signed before the alleged telephone conversation took place. Again, the Commission finds Mr Hu's evidence with respect to this telephone conversation, misleading and unreliable and therefore of little if any weight.

48. There is no persuasive evidence before the Commission that Mr Kejing Liu, the minority 10% shareholder, had been provided with any authority to sign the consent letter as agent of the Shenglong Hong Kong Investment Ltd on 19 March 2019. Apart from Mr Hu's unreliable hearsay evidence, there is no evidence of any agency arrangement made by the 2 directors.

49. The Hong Kong company return for this company provided with Ronald Hu's May witness statement is dated 16 December 2018. No evidence was presented identifying the directors of the company as at 19 March 2019. During the course of the hearing before the Commission Mr McElwaine tendered a copy of a Register of Charges search for Shenglong Hong Kong Investment Ltd dated 30 August 2019 which listed the directors as Li, Lihua and Liu, Kejing. Mr McElwaine suggested that the Commission could assume that this record of directors would have represented the situation at the date when the consent letter was signed. The Commission questions why the applicant did not provide any documentary evidence of the record of directors as at the relevant date.

50. Mr Hu said in evidence that information was publicly available in Hong Kong and on several occasions suggested that the Commission and representors could go to the Hong Kong Registry and search the records.

RH: I think to, to, to make a thing really straightforward, rather than, rather than for them to question me, all this all this company documentation are public information. You're welcome to go to Hong Kong registry office...

Chair: We won't be doing that.

RH: to do, to do, to do a public search, and that way it kills all the obstacles, rather than accusing me.

...

RH: [inaudible] well to make it, as, as I suggested before, simple you go on, ah, Hong Kong company registry and to do a extensive search with all the details of these companies is public information, so that way you can 100% ensure that he is the director today.

...

RH: Go check it yourself. You can check the titles here in Australia, you can check the, ah, registered company, ah, in Hong Kong and Australia. You can do it. Ok? If you still, you don't want to do it and you say I don't know then, well why you blame me?

...

RH: You're welcome to do a company search in Hong Kong registry, where you have all the updated information plus the history of the company. Then you will have the evidence of everything. And I'm only obligated to provide information, I was sent, I was sent to. OK? I don't, anything beyond that, I don't have capacity to answer that.

51. It was submitted by Mr McElwaine that the Commission could accept that Mr Kejing Liu had the necessary authority to sign the consent letter on behalf of Shenglong Hong Kong Investment Ltd and it is unnecessary for the Commission to enquire as to by what means he was authorised. The Commission disagrees with Mr McElwaine because it is not satisfied on the evidence presented that Mr Kejing Liu did have the necessary authority to sign the landowner consent letter on behalf of the company. Persuasive evidence of authority to sign the consent letter on 19 March 2019 could have been provided by way of a statutory declaration from the directors concerned or other documentary evidence as outlined above. In the absence of such evidence the Commission is not satisfied that Mr Kejing Liu had authority to sign the consent letter on behalf of Shenglong Hong Kong Investment Ltd and finds that section 33(2A) is not met in this case.
52. A second claim of noncompliance relates to the landowner consent letter for CTs 23216/2 & 3 which lands are owned by Cambria Green Agriculture Development Pty Ltd. According to the ASIC Company Extract dated 5 April 2019 there are 2 directors of this company namely, Xiaojun Hu (Ronald Hu) appointed 28 October 2016 and Kejing Liu appointed 24 February 2015.
53. The consent letter appears to have been signed by Mr Kejing Liu on behalf of Cambria Green Agriculture Development Pty Ltd. This company is registered in Australia and therefore subject to the provisions of the *Corporations Act 2001*. Section 127 of the *Corporations Act 2001* is only relevant to a 'company' being a company that is registered under the Act. Mr McElwaine contends that as authorised agent of the company Mr Kejing Liu had the necessary authority to sign the consent letter and accordingly section 127 of the *Corporations Act 2001* is satisfied.

Section 127 reads as follows:

- (1) A company may execute a document without using a common seal if the document is signed by:
 - (a) 2 directors of the company; or
 - (b) a director and a company secretary of the company; or
 - (c) for a proprietary company that has a sole director who is also the sole company secretary—that director.

Note: If a company executes a document in this way, people will be able to rely on the assumptions in subsection 129(5) for dealings in relation to the company.

- (2) A company with a common seal may execute a document if the seal is fixed to the document and the fixing of the seal is witnessed by:
- (a) 2 directors of the company; or
 - (b) a director and a company secretary of the company; or
 - (c) for a proprietary company that has a sole director who is also the sole company secretary—that director.

Note: If a company executes a document in this way, people will be able to rely on the assumptions in subsection 129(6) for dealings in relation to the company.

- (3) A company may execute a document as a deed if the document is expressed to be executed as a deed and is executed in accordance with subsection (1) or (2).
- (4) This section does not limit the ways in which a company may execute a document (including a deed).

54. Sub-section (4) provides that there are other means by which a company may execute a document other than those provided for in subsections (1) and (2). However, if a document appears to have been signed in accordance with section 127(1), it could be assumed that the document has been duly executed (section 129(5)). Of relevance in this regard is the following passage from the Western Australian Court of Appeal's decision in *Caratti v Mammoth Investments Pty Ltd*³:

By s 127(4), s 127 does not limit the ways in which a company may execute a document (including a deed). Section 127(1) and s 127(2) are not mandatory. They do not prescribe the only methods by which a company can execute documents. See *Black & Decker Inc v GMCA Pty Ltd (No 2)* [2008] FCA 504; (2008) 76 IPR 99 [144] (Heerey J). However, if a company executes a document other than by one or other of the methods specified in s 127(1) and s 127(2), the assumption of due execution under s 129(5) or s 129(6) will not be available.

55. The Commission must therefore determine the basis upon which the consent letter could be signed by Mr Kejing Liu. Mr McElwaine submitted that in relation to Cambria Green Agriculture Development Pty Ltd, that Mr Hu had given full authority to Mr Liu to sign the landowner consent.
56. At paragraph 8 of his second witness statement Mr Hu states: 'I have full authority to Mr Liu Kejing to act as the agent of Cambria Green Agriculture Development Pty Ltd in the signing of the landowner consent form on its behalf dated 19 March 2019'. There was no other evidence from Mr Hu regarding the circumstances in which the authority was given, that is, whether by power of attorney, company resolution, or confirmed by relevant documentation. Despite having used the term 'agent' in his written statement when Mr Hu was asked during cross examination about this claimed agency relationship he replied:

Chair: What do you know about any agency relationship Mr Hu, is there?

RH: What's agency?

Chair: So you don't know?

RH: What's, what's agency with regards to this matter. Mr Liu is the landowner, is the company owner.

³ [2016] WASCA 84

Chair: I think the contention is that in correspondence from a letter from Mr McElwain, what does that actually say, have we got that letter there, on 9th of April.

...

PJ: [inaudible] 9th of April is where Mr McElwaine indicates that the, um, letter signed under sections 127(1) and (4) and in his July letter, on, um, page...no I think it's a little further on. As an authorised agent, on page 5 of, of his, er, Mr McElwaine's July letter. Yes that's right.

AC: [inaudible]

PJ: So yes, he's indicated in a previous letter that, section 127, he, um, instructs us all on some, you know, interesting points of law and then advises that it's very common for an authorised agent of a corporate entity to be a director blah de blah blah, and that he had, ah, therefore signed as an agent. It seems to be the clear implication.

Chair: Which?

PJ: In the, ah, second last, well sort of last 4 paragraphs on page 5, so. So he's saying that the document, um ah, doesn't need to have been signed under section 127, which is of course agreed, even though the point is that he had said in his previous letter, he said that it had been signed under section 127, so we're a little puzzled as to why there's a change in story or, ah, understanding here. And, ah, so he continues on, or it could, ah, companies can sign through their authorised agents, which, ah, of course is correct, um, and he provides us with some useful information on that, but, ah, he neglects to mention that that, ah, mechanism for signing is actually something that's set out in section 126 of the Corporations Act. So I'm just simply trying to clarify why it is that, um...[inaudible]

Chair: Yes, well on the last page it does say 'in any event Mr Kejing Liu is the owner of all the shares in Cambria Green Agriculture Development Pty Ltd he is plainly the controller and may act on its behalf as its expressly authorised agent'. So do you, ah, have any evidence that you can give to this panel, ah, about any agency relationship?

RH: So, Mr, Mr Liu is the owner of the, ah...

Chair: Yes.

RH: of titles...

Chair: Yes, yes.

RH: and, ah...

Chair: We've got some evidence about that.

RH: Yep, and ah, and he manage the consortium and I deal with the matters related here in Australia. So that's the set up. I'm not quite sure what's the definition of a agent or the landowner, or if he, that anything he says he signs he does, with regards to this development it's a matter of owner's action or the agent's action I, I don't have the definition for it.

Chair: Well I think that's...

RH: OK.

Chair: that's as far as we need to [inaudible]...

RH: It's just the he's the authorised, he is the, he is the person with authority to do all these activities.

- Chair: So is there any, so you're just saying that? Yes, is there any, was there any arrangement, specific arrangement about that...made?
- RH: Yeah I just mentioned. He representing the consortium from China. How they're arranged among themselves I'm not involved. His arrangement, or the consortium's arrangement with me is I'm authorised to represent this consortium to deal with the matters related to this development here in Australia.
- Chair: How's that arrangement been made? Can you tell us that?
- RH: Well that's made before, um, the land settled. We had meetings here in Australia we had meetings back in China as well. And that was agreed.
- Chair: You don't have any documentary evidence of that?
- RH: I do from time to time. If you want I can provide it.
- PJ: So just to clarify, you ah, can you tell us, this documentation that indicates that that Kejing Liu is entitled, ah, to sign the letters on behalf of Cambria Green Agriculture Development Pty Ltd, um, is that by a board minute or is that in the constitution?
- RH: He is the director of the company.
- PJ: As are you, correct?
- RH: [inaudible] yeah, we both have authorities to sign these forms, but, given that he is the 100% owner of that company and that company, that company, owns titles in Cambria, so he is the more appropriate person to sign on this consent form. That's what we thought.
- PJ: So...
- Chair: So what do you mean 'that's what we thought'?
- RH: Sorry?
- Chair: 'That's what we thought'?
- RH: That's what we agreed. So, he is the 100% owner of the company, he's the 100% owner of the titles that owned by this company. So, because this, this form's called landowner's consent. So he's the appropriate person to sign on it.
- Chair: So you say that's what we thought, was that...
- RH: Yeah at the time...
- Chair: something you discussed?
- RH: yeah, we discussed them, so he signed on it.
- Chair: So there's no, sort of, company minute or record, written record, that that was agreed?
- RH: Not with regards of this consent, no.
- PJ: So, we understand that both of you have authority to sign letters, ah, but, um, in this case you said in your witness statement 'I have full authority to Mr Liu Kejing to act as agent', which I take to mean, ah, that you gave your authority for, Liu, Kejing Liu to act as the agent, but there is no record of that in the board minutes that you can provide, is that correct?
- RH: There's no written report...
- PJ: No.
- RH: but we do have a verbal agreement.

- PJ: So you say.
- PJ: Now, moving onto the, um, agent of, ah, the landowning companies, I should say that, ah I don't think it's ah, given that you have both, you both have the authority to sign, um...
- RH: Sorry which company you refer to?
- PJ: Cambria Green Agricultural Development Pty Ltd, I'd, um, suggest, that ah, it would be necessary to obtain written confirmation of Mr Kejing Liu's authority to sign, given that there has been this inconsistency in information about, ah, the mechanisms...
- Chair: Well, that's, that's a submission.
- PJ: yes, ok, that's a fair point, sure, I get it.
- Chair: He's given evidence that he's not [inaudible]
- PJ: Ok, agent of landowning companies, perhaps we've already cleared this up, but um, I note that you did say in your May witness statement that Cambria Green Agriculture Development, the company we've been discussing right now, Pty Ltd, you did say that that was the agent, um so, just clarifying, that ah, now we're saying that Cambria Green Agriculture Tourism
- RI: Management.
- PJ: Agriculture and Tourism Management Pty Ltd is the agent? Is that correct? That's what you're suggesting?
- RH: Ah, is the agent of the consortium.
- PJ: Ok, despite having said something different in your previous statement in May. So, yep, you've admitted that...
- Chair: Can I just ask is there any specific agreement about that? Any documentary evidence about that?
- RH: We, we had a meetings to discuss, ah, how to manage all this and, ah, to [inaudible] it is not practical for that we have separate submissions from each of the, ah, the, the, the owners. Therefore, ah there's necessary that, the consortium believe, that we register this one company as a investment [inaudible] to manage the whole thing...and it's been operated from day 1. For instance all the engagement for the professionals and doing the report and all the, ah, payment of rates notice and, and professional fees, it's gone by this company.
- ...
- ...
- ...
- PJ: Yeah, so ah, essentially you um, you don't have any written evidence then do you of, ah, of Cambria Green Agriculture and Tourism Pty Ltd being an agent of those companies?
- RH: [inaudible] it's a discussions verbally and via, via emails and also meetings.

57. In this oral evidence Mr Hu contends that he had an understanding with Mr Kejing Liu who was the only shareholder, that it was appropriate that he would sign the consent letters. He claimed that the arrangements were based on verbal agreement. He agrees that he was not involved in the 'consortium arrangements' with respect to the Hong Kong registered landowner companies. It is notable that none of this evidence was included in Mr Hu's witness statements. Whilst the Commission accepts that an agency relationship does not have to be evidenced in writing and can be made by verbal agreement, the Commission is not

persuaded on the basis of Mr Hu's oral evidence, which was given in response to questions asked by representors, that Mr Kejing Liu was given the necessary authority to sign the landowner consent form on behalf of Cambria Green Agriculture Development Pty Ltd. On the whole the Commission found Mr Hu's evidence to be defensive, evasive and not credible.

58. In this case the Commission concludes that the company, Cambria Green Agriculture Development Pty Ltd has failed to comply with section 127(1) of the *Corporations Act 2001* in that the consent letter should have been signed by both directors on the basis that the company had 2 directors at the time the consent letter was signed, that is, 19 March 2018. For these reasons the Commission finds that section 33(2A) of the *Land Use Planning and Approvals Act 1993* is not met in this case.

Discrepancies in documentation

59. The representors identified a number of discrepancies with the letters of consent submitted by the applicant. For example, an incorrect title reference for the land owned by Emperor Yue Green Agriculture Development Ltd; the consent letter contains Chinese characters purporting to be those of Mr Kejing Liu on behalf of Sun Green Agriculture Development Ltd rather than the name of the company landowner, Emperor Yue Green Agriculture Development Ltd; and an incorrect description of the company name for Cambria Green Agriculture and Development Pty Ltd by using the word 'Agricultural' instead of 'Agriculture'.
60. The Commission expected that clarification of the discrepancies would be provided at the hearing. The only evidence from the applicant was that of Mr Hu who claimed that they were "printing errors". He said that he accepted the errors and had not corrected all the errors before the letters were dispatched for signature. Mr Hu said that they were merely mistakes and that he had made previous mistakes and could not guarantee that he would not make mistakes in the future. He did not appear to accept the significance of the errors and his evidence regarding the preparation of the consent letters, dispatch and arrangements for their signing was far from satisfactory. Mr Hu said that he could not recall the date when the letters were dispatched or returned and provided no documentary evidence as to the circumstances.

AC: So you send those letter, those letter to, say to, China? Where China? Hong Kong, or, or you consider Hong Kong it's part of..?

RH: I sent to their emails. Wherever they were is irrelevant, I sent to their emails and they responded.

AC: On the same day?

RH: I can't remember whether it was the same day [inaudible].

AC: Well you should because all dated 19 of, 19 of, er...

RH: Can you remember what you did on that particular day?

AC: [inaudible]

Chair: You can only answer what you can remember.

RH: I'm sorry, I can't remember.

Chair: You can't remember what?

RH: He said "have they replied in the same day..."

Chair: Yeah.

RH: or not". I can't remember. It could be the same day. It could be a few days later.

Chair: Well they're all dated the 19th of March [inaudible].

- RH: [inaudible]
- AC: Except 1. 1 is dated 16th, so why this 1 is dated 16th?
- AC: You don't know, you can't remember, well, thank you for coming Mr Hu.
- RH: Whatever it's dated, that will be the date they signed on it.
- AC: And the [inaudible] 16th of March is the one from Emperor Yue Green Agriculture Development and it's signed by Sun Green Agriculture Development. You might have sent it to the wrong address? I don't know.
- Chair: Do you want to be shown that one? Have you got that there Mr McElwaine, to [inaudible]?
- RH: Yeah, that definitely was a, was obviously a mistake.
- Chair: So what is the mistake?
- RH: Ah, so on top the address the Emperor Yue Green Agriculture Development and down the bottom is Sun Green Agriculture Development. That definitely is a mistake.
- Chair: So what's the mistake?
- RH: The mistake is just the company name down the bottom was incorrectly printed.
- Chair: The Sun Green Agriculture Development Ltd is the incorrect part is it?
- RH: Yeah, yep, I think Sun Green has its own letter of consent. To me it is obvious printing error.
- Chair: So.
- RH: Sun Green Agriculture Development...
- Chair: Yes.
- RH: has got its own consent.
- Chair: So, yeah, so that should be, this is the one signed on 16th of March?
- RH: 16th of March, yep.
- Chair: So the company should be Emperor Yue Green Agriculture?
- RH: Yep, the bottom.
- Chair: Yes.
- RH: Yep.
- RH: [inaudible]
- AC: And what about the date of 16 of March? Apparently you, you received...
- RH: Obviously that's the date for them to sign it.
- AC: You just told us that you received everything on the 19th of March from IreneInc, but apparently this one...
- RH: I didn't say I received everything on 19th. I received the draft. I forwarded it to them and they signed on a certain date.
- AC: So when did you receive the draft for Emperor Yue Green Agriculture? You can't remember?
- RH: I can't remember
- AC: Yes of course.

Chair: So sorry, the documents that you received from Ireneinc to sign are these documents, as we have them, with the dates on them but there weren't any signatures. Is that what you're saying?

RH: No these are the documents back from the landowners.

Chair: Right, so the documents that were sent off by you what did they look like?

RH: That's just the, just the, ah, the empty, the empty documents.

Chair: Yeah, with no signature, is that what you're saying?

RH: [inaudible] with no signature on them.

Chair: But they had the date on them?

RH: I can't remember. I'd have to go find it.

Chair: It would appear from this they're not hand written, they're typed in, the dates.

RH: Yeah but, I can't, I can't remember.

Chair: You can't remember what, what you sent?

RH: No, no I can't remember all the specific ones that I've sent. I have to go and check and confirm that with you.

AC: Ok, and so...

Chair: Sorry, your evidence was that you received them back on 19th, or?

RH: I would have to check.

Chair: You don't know what date you sent them back. Yes, ok.

RH: It's so many documents. How can I remember like every one, when they sent them and when they received them?

AC: [inaudible].

61. Whilst the Commission agrees that there are a number of important discrepancies and mistakes in the form of the landowner consent letters, it does not consider that these discrepancies as identified above are of such significance to invalidate the letters. It accepts that a number of the mistakes in the descriptions were made by Mr Hu in his instructions to the author of the letters.
62. A further issue raised was the failure to comply with provisions of the *Corporations Act 2001* in relation to the registration of foreign entities and the display of address and ACN details on public documents.
63. The only Australian registered company which owns land is Cambria Green Agriculture Development Pty Ltd. Whilst it may constitute a contravention of the *Corporations Act 2001*, the Commission does not consider that non compliance with this requirement within section 153 to set out the company name on a public document as well as its reference to its Australian Company Number or Australian Business Number affects the validity of landowner consent.

Road Reserves

64. A representor made submissions and presented evidence in support of his argument that the draft amendment applies to land that contains road reserves in respect of which Crown Land consent had not been obtained. The submission was refuted by both the planning authority and the applicant. In the section 39 report submitted by the planning authority it was contended that the amendment was initiated only for private land and not for Crown land and at the scale presented the road reserves are not visible. The representor disagreed and contended that the road reserves are visible and are subject to the specific area plan and the overlays.
65. As the Commission has decided that it has no jurisdiction to determine the draft amendment on the basis that no valid landowner consent letters were submitted for CTs 23216/2 & 3 owned by Cambria Green Agriculture Development Pty Ltd and for CT 100097/1 owned by Shenglong Hong Kong Investment Ltd, it is not necessary for it to consider the issue of landowner consent for the road reserves.

Conclusion

66. The Commission is not bound by the rules of evidence (section 10(1) of the *Tasmanian Planning Commission Act 1997*) and can, in appropriate circumstances, rely on circumstantial and hearsay evidence. However, this is not to say that the rules of evidence should necessarily be ignored. Given the significance of the issues raised in relation to the validity of the landowner consent letters and the consequences for a landowner if a draft amendment is approved without its consent, in this case, the Commission considers that caution should be exercised in relying on hearsay, circumstantial and unsworn evidence when other more reliable and convincing evidence could have been provided. Further, no evidence was provided that all of directors of the subject companies were even aware of the amendment request.
67. As stated above, the only evidence from the applicant essentially comprised 2 unsworn witness statements which annexed unverified and difficult to read company annual returns for the foreign companies and Mr Hu's unsworn oral evidence. It was the Commission's observation that Mr Hu was defensive and evasive in his responses to questions asked of him which is also evident in the transcript extracts included in this decision. The Commission considered that much of his evidence was not credible and not supported.
68. The Commission questions why the applicant did not submit more persuasive direct evidence to support its submissions. In the absence of such evidence and for the reasons outlined above, the Commission is not satisfied that the provisions of section 33(2A) of the Act are met in this case.

Decision on draft amendment

69. The Commission has determined on the basis of the evidence before it that the requirements of section 33(2A) are not met, and therefore, it does not have jurisdiction to determine the draft amendment.