

# MAGISTRATES COURT OF QUEENSLAND

REGISTRY: DALBY  
NUMBER: MAG-492/05

COMPLAINANT: **PETER ROBERT WITHEYMAN**

DEFENDANT: **HARVEY SCOTT SIMPSON**

The Defendant is charged that:

1. between 25 January 2001 and 15 April 2004 at Hebel in the Magistrates Court District of Goondiwindi he did start assessable development without an effective development permit for the development, and further that
2. between 25 January 2001 and 15 April 2004 at Hebel in the Magistrates Court District of Goondiwindi he did clear trees or allow trees to be cleared on land other than under a tree clearing permit or under an exemption under Part 6 Division 3 of the Land Act 1994, and further that
3. between 25 January 2001 and 15 April 2004 at Hebel in the Magistrates Court District of Goondiwindi he did do a trespass related act, being cultivation of the land, in relation to non-freehold or trust land.

Particulars of each offence are set out in the complaint.

This is a case concerning rural land clearing. The legislation seeks to manage development to ensure that it is ecologically sustainable. The Defendant is the registered owner of a property called Tara which is Lot 2 on Crown Plan BEL5381 in the Parish of Byra and the Shire of Balonne. The property contains 5257 hectares. The Mulga Downs Road crosses the property and a stock route runs across that road. The prosecution alleges that a significant area of vegetation has been cleared on the property and on the road reserve.

The onus rests with the prosecution to prove each and every element of each of those offences beyond reasonable doubt. The prosecution is assisted in so doing by a number of evidentiary provisions in the legislation. The Prosecution has called witnesses and produced certificates and other pieces of documentary evidence.

It has certainly been proved beyond reasonable doubt that there has been clearing on parts of the land owned by the Defendant. The evidence and photographs prove that he has cultivated his land to grow wheat. This activity would require clearing of the land. The question in this case is whether the Prosecution has proved beyond reasonable doubt that this clearing has taken place in areas where it is unlawful to clear at a time when it was unlawful so to do.

So far as charge 1 is concerned, it is submitted by the defence that the clearing of regional ecosystems which are "of concern" and "not of concern" were not assessable development at the relevant time so such clearing cannot constitute an offence. It is submitted that only clearing in areas proved to be remnant endangered ecosystems which takes place without a development permit and which is not subject to any exemption is assessable development and therefore can constitute an offence. The prosecution submits that all clearing of any remnant ecosystem is assessable development and will therefore be unlawful if it occurs without a permit or exemption.

Charge 2 relates to the alleged clearing of trees without a permit on the road reserve and stock route. Charge 3 relates to the cultivation of wheat crops on the road reserve.

The Integrated Planning Act 1997 in Section 1.3.5 provides that operational work includes the clearing of vegetation on freehold land. Section 3.1.4 provides that a development permit is necessary for assessable development. Section 4.3.1 makes it an offence to carry out assessable development without a development permit. Schedule 8 provides that

assessable development includes (3A) carrying out operational work that is the clearing of native vegetation on freehold land, unless the clearing is (b) necessary for essential management; or (c) necessary for routine management in an area that is outside an area of high nature conservation value; and an area vulnerable to land degradation; and a remnant endangered regional ecosystem shown on a regional ecosystem map.

Essential management means establishing and maintaining fire breaks and built infrastructures. Routine management means clearing native vegetation to establish built infrastructure, or that is not remnant vegetation, or for supplying fodder for stock in drought conditions only. "Clear" for vegetation is defined to mean remove or cut down, ringbark, push over, poison or destroy the vegetation in any way.

The Vegetation Management Act 1999 provides that the purposes of the Act are to regulate the clearing of vegetation on freehold land to preserve remnant endangered regional ecosystems, remnant of concern regional ecosystems, and vegetation in areas of high nature conservation value and areas vulnerable to land degradation. This was amended in 2000 by Act 35 of 2000 to remove the reference to remnant of concern regional ecosystems. The intention of Parliament about these amendments is explained in the Explanatory Notes to the Vegetation Management Amendment Bill 2000 and in the Second Reading Speech of Minister Welford in Hansard. The changes in the legislation remove references to "of concern" regional ecosystems. Act No 1 of 2004 reinserted the reference to "remnant of concern regional ecosystems" from 29 April 2004.

The Vegetation Management Act 1999 defines a regional ecosystem map as a map certified by the Chief Executive as the regional ecosystem map for the particular area and maintained by the Department for the purpose of showing for the area remnant endangered regional ecosystems and remnant of concern regional ecosystems and remnant not of concern regional ecosystems and numbers that reference regional ecosystems.

A Certificate under Section 66B of the Vegetation Management Act 1999 was admitted into evidence as Exhibits 25. Section 66B provides that statements made in a certificate are evidence of the matters stated in the absence of evidence to the contrary. The statements in this case relate to whether vegetation in a stated area has been cleared, the person's conclusions drawn from a stated remotely sensed image, and whether a stated area is an area of remnant vegetation. Two further certificates under the Land Act were admitted into evidence and form part of the same exhibit.

Evidence may be derived from the comparison of remotely sensed images which can prove a change in vegetation cover. The remotely sensed images cannot provide proof of the nature of the vegetation on the land. These images cannot show whether vegetation is remnant or non remnant. Nor can they prove whether the change occurred from natural factors such as fire, drought, flood, storm or wind or by mechanical clearing or some other form of human intervention.

The certificates provide evidence that the remotely sensed images reveal a reduction in vegetation in the stated areas. If these certificates can be linked to evidence obtained from a site inspection that mechanical clearing has occurred at specific indicative sites, and linked further to evidence as to the relevant mapping according to the regional ecosystem maps, the prosecution may establish a case against the defendant.

The property concerned was subject to a site inspection by Peter Witheyman and Craig Elliot. The officers visited seven sites and took a series of photographs. They recorded the GPS co-ordinates of each of the sites they visited. These sites have not been plotted on any map to compare them with any regional ecosystem map or with the satellite images used by the remote sensing scientist. These officers were vague in their evidence about which regional ecosystem map they used in their investigation on the site.

A large number of the photographs they took show cultivation. A large number of the photographs are of areas outside the areas relevant to this prosecution.

The photographs of coals and sticks do not of themselves provide evidence of clearing. The coals and sticks are clearly the remnants of a fire of some description. It may have been a bush fire, or a camp fire. I am not satisfied that the photographs of tracks at Site 4 have been proven to be dozer tracks or that these photographs can prove dozers were parked in this area. I am not satisfied that the finding of an empty grease gun cartridge at Site 4 can provide evidence that dozers were used to clear vegetation and were greased at that site. There are numerous possibilities about the history of that cartridge and nothing to indicate the version advanced by the prosecution.

Site 7 apparently is within the location of the road reserve. The series of photographs do not disclose wheat growing in that area. They do show a number of fences.

If each of the seven sites had been plotted onto a map which showed the relevant DCDB and the regional ecosystem map applicable to this prosecution, then the relative location of the sites would have been discernible.

Peter Witheyman agreed that there are various versions of the regional ecosystem maps which is very confusing for everyone. He also agreed that a survey would be needed to prove whether the fences were on the road reserve and he agreed that no full survey was done. It was rather concerning during his evidence to consider the emails which reported that the remotely sensed images used by the prosecution to prove clearing of the land did not show a very large shed which is actually on the property. The area around the shed simply looked like pasture in the images.

Linda Lawrence used regional ecosystem map versions 3 and 4 and overlaid them over the areas she determined had been cleared in the remotely sensed images in her presentation which is Exhibit 29.

In Slide 11 which is derived from confirmed regional ecosystem map 2.1 most of the clearing occurs in remnant of concern regional eco-system. In slide 12, noted to be based on regional ecosystem map 2.1, this classification changes significantly and most now is in the remnant endangered regional ecosystem. In Slide 13, noted to be based on regional ecosystem map version 3, the classification appears to remain identical to Slide 12. In Slide 14, noted to be based on regional ecosystem map 4.0, most of the clearing is now classified as remnant of concern. There is a small area shown as remnant endangered, but this has not been measured separately.

Similarly a comparison of Slides 21, 22, 23, and 24 which are based on the same series of the various different regional ecosystem maps, the relevant area is classified in the first three as remnant of concern, but in version 4 in Slide 24 the area is classified as non remnant regional ecosystem.

A regional ecosystem map is defined in the Vegetation Management Act to mean a map certified by the Chief Executive as the regional ecosystem map for a particular area and maintained by the department for the purposes of showing for the area remnant endangered ecosystems, remnant of concern regional ecosystems, remnant not of concern regional ecosystems and numbers that reference regional ecosystems.

The maps tendered further break down each stated category into dominant and subdominant subgroups. It is clear that the Vegetation Management Act does not recognise those subcategories. It is also clear that a regional ecosystem map should show all the numbers that reference the various regional ecosystems.

Exhibit 1 is a copy of the certified 2003 regional ecosystem map. Comparing Exhibit 1 with the maps prepared by Linda Lawrence in exhibit 27, it is clear that the only areas of alleged clearing that occurs in areas mapped as remnant endangered regional ecosystems are the two areas shown as comprising 12.5 ha and 0.8 ha in Slide 8 of Exhibit 29. Both of these areas are within what is shown as "Sub-dominant". They fall in an area which does not have any notation of any number that references the regional ecosystem.

The witness Helen Cartin gave evidence that some regional ecosystem maps have incorrectly shown naturally occurring open plains as areas that have been cleared. She also agreed that site data would have made the mapping process more accurate. She thought a field inspection would have been appropriate in this case, but one was not done. She agreed that the methodology recommended by Neldner was not adopted in the formation of the regional ecosystem maps. That methodology required a ground assessment. In this case there was no botanical ground assessment completed.

The question of the division of categories into dominant and sub-dominant parts by the department has led to doubt about the interpretation of the maps. Linda Lawrence responded to this difficulty by combining the two distinct parcels into one. A legal officer in the Department, according to the evidence of the witnesses in this case, had previously indicated that the sub-dominant areas should be excluded from areas the subject of any prosecution, in view of the absence of statutory recognition of sub-dominant areas. The Witness Peter Witheyman agreed with this interpretation. Counsel for the Defendant submits that the maps relied upon as a whole are illegal and cannot therefore be used by the Prosecution to prove the case.

I find I am satisfied that the Prosecution must prove for Charge 1 that the area cleared was within an area of land properly mapped as remnant endangered regional ecosystem in a regional ecosystem map under the Vegetation Management Act 1999. I find in this case the

only area the prosecution has so proved for Charge 1 falls within an area that is mapped as sub-dominant on a map that fails to record for that area the numbers that reference the particular regional ecosystem. These two factors lead to doubt as to whether that area is part of a remnant endangered regional ecosystem. I therefore find that the prosecution has failed to prove to the required standard all the elements of the first charge and I find the defendant not guilty.

So far as Charges 2 and 3 are concerned, I am satisfied that the Prosecution must prove beyond reasonable doubt the location of the Road Reserve and that clearing has taken place within the area of that reserve. If the Prosecution can prove to the required standard that wheat is being cultivated in the area, this will suffice to prove the offences.

The Road Reserve concerned had been surveyed in 1892. Information about that survey is limited in terms of the technology available at that time. The prosecution in this case must match up the location of the survey points located on the ground by the experienced cadastral surveyor with the public records of the road reserve and compare this with the remotely sensed images which show a change in vegetation.

A computerised set of information concerning property boundaries is used by the Department. This is the Digital Cadastral Data Base ("DCDB").

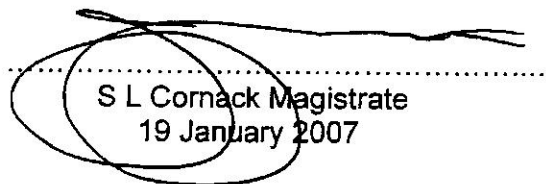
Linda Lawrence moved the DCDB approximately 100 metres to the south west for the purpose of assessing the area of alleged clearing on the road reserve. She did this only for the purposes of this prosecution. The permanent records of the department were not also altered. After she obtained information from Mr Mallett the surveyor, she moved the DCDB further. Her movement of this data set affected her assessment of the areas allegedly unlawfully cleared. She agreed the position of the DCDB was critical to the calculation of the unlawfully cleared areas and to determine the position of the road.



Linda Lawrence amended her calculations several times, the last being on the morning of the first day of the trial. At page 240 of the transcript she appears to agree that there was no clearing on the road reserve.

The work done by the surveyor was never acted upon by the department to update its records. The surveyor described the work he did as the bare minimum to align the DCDB. He said it was a rough approximate as good as can be with the available data. He said that a conclusive survey of the area that could align the DCDB with the imagery would take a couple of weeks and cost \$15,000.00. He spent a day at the site. He located and reinstated three points and calculated four other points to determine the location of the road reserve. He agreed that there was a scarcity of original marks that were still evident.

In respect of Charges 2 and 3 I find that the evidence called by the Prosecution fails to establish to the required standard the precise location of the road reserve. I therefore find the Defendant not guilty of Charges 2 and 3.

  
S L Cornack Magistrate  
19 January 2007