DISTRICT COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BD3536/07

Appellant:

PETER ROBERT WITHEYMAN

Respondent:

HARVEY SCOTT SIMPSON

REASONS FOR JUDGMENT

Delivered the twentieth day of March, 2009

1. This appeal was heard before me on 7th October, 2008.

Some preliminary matters

2. I should first apologise to the parties for the time it has taken me to deliver my judgment in this matter. Since the hearing I have spent twelve weeks sitting in circuit towns, and that fact - together with some other factors which I need not go into - has meant that it simply has not been possible for me to deal with this matter as expeditiously as I would have wished.

3. In my reasons I have quoted from the transcript provided to me some days after the hearing. There are, I am afraid, numerous errors in the transcript. Most of them are fairly obvious. It seemed better to me when referring to counsel's oral submissions to quote them as printed in the transcript, and not to "edit" the record at this time.

The Trial

4. On 24th October, 2006 the respondent appeared in the Magistrates' Court at Dalby in answer to the complaint of the appellant. That complaint was in the following terms:

   (1) *... that between 25 January 2001 and 15 April 2004, at Hebel ...* [the respondent] *did start assessable development without an effective development permit for the development*

   .....

   Particulars

   1. *The assessable development was operational work that was the clearing of native vegetation on freehold land.*

2. *The unlawful clearing was on land described as Lot 2 on Plan BEL5381, Parish of Byra, Shire of Balonne.*

3. *The area of unlawful clearing totalled 600.9 hectares, being 13.8 hectares of 'endangered' regional ecosystem, 520.0 hectares of 'of concern' regional ecosystem, and 67.1 hectares of 'not of concern' regional ecosystem.*[1]

(2) *... that between 25 January 2001 and 15 April 2004 at Hebel ...* [the respondent] *... 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*

.....

Particulars

1. *The unlawful clearing was on the road reserves adjoining and separating parts of Lot 2 on Plan BEL5381, Parish of Byra, Shire of Balonne.*

2. *The area of unlawful clearing totalled 38.3 hectares.*

(3) *... that between 25 January 2001 and 15 April 2004 at Hebel ...* [the respondent] *did do a trespass related act, being cultivation of the land, in relation to non-freehold or trust land*

.....

Particulars

1. *The cultivation was on the road reserves adjoining and separating parts of Lot 2 on Plan BEL5381, Parish of Byra, Shire of Balonne.*

2. *The cultivation included the planting of wheat crops.*

3. *The cultivation is ongoing.*

5. The respondent pleaded "not guilty" to each of these charges. Evidence was lead by the appellant that day, and again on the following day. The matter was then adjourned to 14th December, 2006 when, after some preliminary matters were dealt with, the appellant closed its case, and the respondent elected not to give evidence. Counsel

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1. The particulars of the areas alleged to have been cleared were amended on the first day of the hearing - see pages 3 and 4 of the transcript. The amendments are not material so far as this appeal is concerned.

then addressed her Honour, who reserved her decision.

6. On 19th January, 2007 her Honour dismissed each of the three charges. She then heard submissions on an application by the respondent for an order for costs.

7. On 22nd January, 2007 her Honour ordered that the appellant pay the respondent's costs in the amount of $15,993.80.

The Appeal

8. On 16th February, 2007 the appellant filed his notice of appeal in which he appeals against the dismissal of each of the complaints and also against the costs order.

9. The grounds of appeal set out in the notice of appeal are not particularly illuminating. They are:

1. *The learned Magistrate erred in fact and/or law when she dismissed the complaint.*

2. *The learned Magistrate erred in law/or fact when she failed to find that the evidence established beyond reasonable doubt that with respect to Count 1 that the defendant did start the assessable development as particularized without an effective development permit for the development.*

[Note: see sections 66B and 68A of Vegetation Management Act 1991]

3. (i) *The learned magistrate erred in law and or fact when she failed to find that the evidence established beyond reasonable doubt that with respect to Counts 2 and 3 that the defendant did clear or allow trees to be cleared and did cultivate land as particularized without a tree clearing permit or under an exemption under the Land Act 1994.*

[Note: see section 431E of the Land Act 1994]

(ii) *If the learned Magistrate was correct in finding that the defendant had not breached section 225(1) of the Land Act 1994 in respect of the area particularized, she should have found that he breached section 4.3.1(1) of the Integrated Planning Act 1997 with respect to that area by starting an assessable development without an effective development permit and have amended the complaint accordingly pursuant to section 48 of the Justices Act 1886.*

4. *The learned Magistrate erred in the exercise of her discretion when she ordered that the complainant pay $15,993.80 costs to the*

defendant in that she failed to properly take into account section 158A(2)(a)(e) & (f) of the Justices Act 1886.

10. Before me the only submissions made related to the respondent's acquittal on the first charge. It follows that the appeals against the learned magistrate's decisions on the second and third counts should be dismissed. If the appellant is successful in his appeal in respect of count 1 the costs order would have to be reconsidered. If the appellant does not succeed with respect to his appeal against the count one acquittal then the appellant accepts that the costs order will remain.[2]

11. In the circumstances, what follows should be taken to be a reference to the first charge unless I indicate otherwise.

Her Honour's Decision

12. Having set out the charges brought against the respondent her Honour said:

> *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 ... 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.*

13. Her Honour then observed that the prosecution bore the onus of proving beyond reasonable doubt every element of the offences, and that there was a number of statutory evidentiary provisions which assisted this process.

14. She then said:

> *It has certainly been proved ... 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 any exemption is assessable development and therefore can constitute an offence. The prosecution submits that all clearing of any*

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2. See the transcript at page 1-27.

remnant ecosystem is assessable development and will therefore be unlawful if it occurs without a permit or exemption.

15. Her Honour then went on to discuss some of the provisions of the *Integrated Planning Act 1997*. She said:

> *The ... Act 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.*

16. Her Honour then referred to the *Vegetation Management Act 1999* and observed 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 values and areas vulnerable to land degradation." She noted that the *Act* was amended in 2000 to remove the reference to remnant of concern regional ecosystems - a change largely reversed by a further amendment in 2004.

17. She then said:

> *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.*

18. Certificates under section 66B of the *Vegetation Management Act 1999* were admitted into evidence. Under the *Act* these documents are evidence of the matters stated in them in the absence of evidence to the contrary. Of these certificates her Honour said:

> *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.

19. There was evidence before her Honour of a site inspection conducted by two witnesses. Apparently these witnesses visited seven sites, took photographs, and recorded the "GPS co-ordinates" of the sites. Her Honour said of these witnesses:

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 the 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.

.....

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.

[One of the witnesses who conducted a site inspection] *agreed that there are various versions of the regional ecosystem maps which is very confusing for everyone. He also 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.*

20. Her Honour then discussed the evidence of Linda Lawrence, a witness who had prepared a "presentation" in which she overlaid two versions of regional ecosystem

maps "over the areas she determined had been cleared in the remotely sensed images." Her Honour observed that there were inconsistencies in the classification of the ecosystem in a number of the slides which constituted part of the "presentation."

21. Her Honour noted that a regional ecosystem map is defined in the *Vegetation Management Act 1999* to mean a map certified by the chief executive as the regional ecosystem map for a particular area and maintained for the purpose of showing for the area remnant endangered ecosystems, remnant of concern regional systems, remnant not of concern regional ecosystems and numbers that reference regional ecosystems.

22. Her Honour, having referred to the definition of "regional ecosystem map," noted that the maps which were tendered before her "broke down" each category of ecosystems into "dominant" and "subdominant" - a classification which is not one authorised by the *Act.*

23. Her Honour continued:

> *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 agree 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 Nelder 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 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 by used by the Prosecution to prove the case.*

24. Her Honour then made the following findings:

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.

The Appellant's Submissions

25. The essential submission of the appellant is that her Honour misunderstood what had to be proved by the prosecution. It is submitted that she misdirected herself as to the proper construction of the relevant Act. Had she properly directed herself, then on her findings she must have convicted the respondent.

26. The following summarises the essential submissions made by the appellant in his second written submission filed on 29th April, 2008.

a. Her Honour correctly identified this as a case concerning land clearing and found that there had been clearing on parts of the land owned by the respondent.

b. The submission then refers to her Honour's stating that the question she had to answer was whether the prosecution had proved that clearing had taken place in areas where it was unlawful at a time when it was unlawful, and that the prosecution must prove that the area cleared was within an area of land mapped as remnant endangered regional ecosystem in a regional ecosystem map under the *Vegetation Management Act 1999*.

c. The appellant submitted that the "process for approval to clear land" at the relevant time consisted of two stages:

   i. The lodging of a development application under the *Integrated Planning Act 1997*;

   ii. That application must then be assessed in the prescribed manner against the criteria provided under the *Vegetation Management Act 1999*.

d. The offence charged here was under the *Integrated Planning Act 1997*, not the *Vegetation Management Act 1999*. The elements of the charge were:

   i. A person;

ii. Must not start assessable development;

iii. Without a development permit for the work.

e. Of these elements the only one that was contentious was the second.

f. Assessable development means development specified in Schedule 8, Part 1, and that schedule defines assessable development as:

3A. Carrying out operational work that is the clearing of native vegetation on freehold land, unless the clearing is-

(a) to the extent necessary to build a single residence ..., or

(b) necessary for essential management; or

(c) necessary for routine management in an area that is outside-

(i) an area of high nature conservation value; and
(ii) an area vulnerable to land degradation; and
(iii) a remnant endangered regional ecosystem shown on a regional ecosystem map; or

.....

g. The prosecution had to prove that the vegetation cleared was native vegetation, which was not in dispute. The dispute which arose was what sub-class of vegetation was cleared - but this was relevant only to the question of penalty.

h. The clearing was not essential management nor was it routine management - and hence it was assessable development.

i. It is then argued that under the *Integrated Planning Act 1997* all development is exempt development unless it is assessable development or self-assessable development. This development was not exempt development.

j. Being assessable development the provisions of chapter 3 of the *Integrated Planning Act 1997* applied. Section 3.1.4 of the *Act* provides that a development permit is necessary for assessable development work, but not for self-assessable or exempt development. As a permit was required, the submission contends, it was an offence to start the clearing without a permit.

k. The submission contends that the provisions of the *Vegetation Management Act 1999* are relevant only for the purposes of considering an application for a permit, and in considering, in the event of a conviction, the extent of the penalty.

l. In submitting that the *Vegetation Management Act 1999* was not relevant to the question of whether or not an offence had been proved to have been committed, the appellant urged:

i. under the *Integrated Planning Act 1997* the assessment manager for an application is the chief executive administering the *Vegetation Management Act 1999*;

ii. the method of assessment of an application is a "code assessment" - that is, one which takes into account the material provided by the applicant and the codes relevant to the development;

iii. it is only during the assessment stage that the provisions of the *Vegetation Management Act 1999* have relevance.

m. The submission then turns to deal with the purposes of the *Vegetation Management Act 1999* and some of the history relating to the section which defines the purposes of the *Act*. As originally enacted the section read:

Purposes of Act

3.(1) The purposes of this Act are to regulate the clearing of vegetation on freehold land to --

(a) preserve the following --

(i) remnant endangered regional ecosystems;
(ii) remnant of concern regional ecosystems;
(iii) vegetation in areas of high nature conservation values and areas vulnerable to land degradation; and

(b) ensure that the clearing does not cause land degradation; and

(c) maintain or increase biodiversity; and

(d) maintain ecological processes; and

(e) allow for ecologically sustainable land use.

(2) The purposes are achieved mainly by providing for ---

(a) codes for the Integrated Planning Act 1997 relating to the clearing of vegetation that are applicable codes for the assessment of development applications under IDAS; and

(b) the enforcement of vegetation clearing provisions.

However the *Act* was amended prior to its coming into force. The Explanatory Note states:

The Premier and Minister made a commitment at public forums to remove references to 'of concern' regional ecosystems from the Vegetation Management Act 1999 unless financial assistance was forthcoming from the Commonwealth. The Commonwealth has not made any commitment to a financial assistance package. As a consequence, the Queensland Government has moved to honour the Premier's commitment.

The amended provision reads:

Purposes of Act

3.(1) The purposes of this Act are to regulate the clearing of vegetation on freehold land to --

(a) preserve the following --

(i) remnant endangered regional ecosystems;

(ii) vegetation in areas of high nature conservation value and areas vulnerable to land degradation; and

(b) ensure that the clearing does not cause land degradation; and

(c) maintain or increase biodiversity; and

(d) maintain ecological processes; and

(e) allow for ecologically sustainable land use.

(2) The purposes are achieved mainly by providing for --

(a) codes for the Integrated Planning Act 1997 relating to the clearing of vegetation that are applicable codes for the assessment of development applications under IDAS; and

(b) the enforcement of vegetation clearing provisions.

n. The appellant then argued that the amendment to section 3 "did not preclude the preservation of any type of native vegetation (whether or not it falls outside remnant endangered regional ecosystems) if that native vegetation was in areas of high nature conservation value and areas vulnerable to land degradation."

o. The submission continued:

The defendant's submissions only told half the story at best. Both purposes had to be assessed. It is the Department utilising information provided by the defendant land holder together with relevant codes that will decide if the purposes of the VMA are achieved. If they are then a permit will issue. If not a permit will not issue and the disaffected landholder may appeal to the Planning and Environment Court under IPA.

It is therefore not for the defendant to determine for himself whether he can clear native vegetation on his property.

For the IPA the clearing of native vegetation however it is defined in the VMA must not be cleared without a development permit.

Having determined there was clearing of vegetation on the Simpson land, Her Honour simply had to determine whether that vegetation was native vegetation and whether or not a development permit had been issued for the clearing.

p. The submission concludes by asserting that, as her Honour had found that there had been clearing on the relevant land, and that there was "no dispute or evidence to the contrary" that the land cleared was native vegetation or that a development permit had been issued,[3] the real question for her Honour's determination was: did the respondent "clear native vegetation on his freehold land while he was not the holder of a development permit?"

The Respondent's Written Submissions

27. The following is a summary of the respondent's written submissions.

a. The submissions also refers to the history of the *Vegetation Management Act 1999* "particularly as regards the particular regional ecosystems intended to be protected."

b. It refers to the purposes of the *Act* as originally enacted, and to the fact that the *Act* also effected amendments to the *Integrated Planning Act 1997* - including amending the definition of "operational work."

c. It then refers to the amendment to section 3 of the *Vegetation Management Act 1999* made shortly prior to the *Act's* commencement in September, 2000. It refers too to the explanatory note, and adds to the quotation given above the following:

Ways in which the policy objective is to be achieved

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3. The submission would appear to be in error - presumably typographical - at this point. There was, of course, common ground that a permit had not been issued.

The policy objectives will be achieved by removing the preservation of 'of concern' regional ecosystems from the purpose of the Act .....

The submission also refers to the Minister's second reading speech:[4]

As a consequence of the Commonwealth's failure, the Queensland Government is forced to review the legislation. Amendments are required to ensure the burden for doing the right thing - for protecting important vegetation communities and managing land sustainably - does not fall unfairly on a few land-holders. The principal change made by the Vegetation Management Amendment Bill 2000 is to remove provisions that provide for the protection of "of concern" or vulnerable regional ecosystems. These are ecosystems where between 70% to 90% of the original vegetation type has been cleared.

With no Commonwealth funding support, we regrettably have no choice but to remove mandatory protection for these areas before the Vegetation Management Act is proclaimed. This action honours a commitment the Premier made at a Community Cabinet meeting in Roma. This amendment means that on freehold land, we will protect "endangered" regional ecosystems - that is, those with 10% or less of their original vegetation remaining - but rely upon the regional vegetation planning process and regional vegetation planning committees to voluntarily extend protection, through a local planning process, beyond this level.

d. The outcome was that remnant "not of concern" regional ecosystems were not referred to at all in the *Vegetation Management Act* as assented to, and in the *Act* as proclaimed only in the definition of "regional ecosystem map."

e. The submission then refers to the 2004 amendments which re-introduced remnant "of concern" regional ecosystems into the purposes of the *Act* and added remnant "not of concern" regional ecosystems. These changes were introduced after the alleged offences had been "completed" - but before the complaint was made.

f. The nub of the arguments of the parties was summarised in paragraph 23 of the submission:

At the trial, the competing contentions of the parties were broadly as follows. The appellant contended for a literal interpretation. On that approach, all that needed to be proved was that native vegetation on freehold land had been cleared without a development permit, and (so the argument goes) the different treatment of different regional ecosystems by the VMA was irrelevant. The respondent contended for a purposive interpretation. On that

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4. Referring to s. 14B of the *Acts Interpretation Act 1954*.

approach, it was evident from the legislative history that only a remnant endangered regional ecosystem was intended to be protected by the VMA before the amendments effected by the 2004 Amendment Act. Other regional ecosystems were not to be protected or assessed.

g. The respondent submits, referring to section 14A(1) of the *Acts Interpretation Act 1954*, that it is now well accepted that a purposive and not a literal approach to statutory construction is to be preferred, and that "the propriety of departing from a literal interpretation is not confined to situations where the operation of the statute would otherwise be absurd, extraordinary, capricious or irrational." The submission refers to the joint judgment of Mason and Wilson JJ in *Cooper Brookes (Wollongong) Proprietary Limited v. The Commissioner of Taxation of the Commonwealth of Australia*.[5]

h. The respondent then submits that "it is self evident" that the interpretation of the vegetation clearing provisions of the *Integrated Planning Act 1997* needs to be undertaken by reference to the *Vegetation Management Act 1999* - which itself effected the relevant amendments to the *Integrated Planning Act 1997* - and by the historical context of their enactment. That being the case, the submission goes, it was clearly the intention of the parliament prior to 2004 that "of concern" and "not of concern" regional ecosystems were not protected, and hence it would be contrary to the objectives of both *Acts* to conclude that the clearing of "of concern" and "not of concern" vegetation was unlawful.

i. The submission also urges that the same conclusion may be reached by a different line of argument. The argument that is developed is as follows:

   i. For operational work that is the clearing of native vegetation the assessment manager was the chief executive administering the *Vegetation Management Act 1999*;

   ii. The type of assessment required was "code assessment" - that is, the assessment manager was required to assess an application having regard to the applicable code. If a regional vegetation management plan was not made for a region, the part of a State policy identified as a code for the clearing of vegetation was an applicable code;

   iii. The State Policy for Vegetation Management on Freehold Land published in September, 2000 contained a code for the clearing of vegetation, but, as regards regional ecosystems, the code was confined to remnant endangered regional ecosystems;

   iv. When the 2004 amendments commenced a new code was published

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5. [1980-1981] 147 C.L.R. 297, 321.

which recognised that the purpose of the *Vegetation Management Act 1999* now extended to conserving remnant "of concern" and "not of concern" regional ecosystems;

v. Pursuant to s 3.5.13(4)(a) of the *Integrated Planning Act 1997* "the assessment manager may refuse the application *only* if the assessment manager is satisfied ... the development does not comply with the applicable code." As, during the offence period, there was no code applicable to "of concern" or "not of concern" regional ecosystems, it was impossible for the assessment manager to be satisfied that any development by way of clearing vegetation did not comply with an applicable code, with the consequence that any development application was required to be approved. Hence the clearing done by the respondent could not be unlawful.

j. The respondent's submission then refers to the decision of Robin D.C.J. (sitting as a judge of the Planning and Environment Court) in *Elliott v. B.C.C.*[6]

k. The submissions of the respondent then turn to the so called "mapping point." This submission starts on the basis that, at the relevant time, an offence could only be committed in respect of a remnant endangered regional ecosystem and essentially deals with the learned magistrate's conclusion that she could not be satisfied that the areas which were proved to have been cleared had been correctly mapped. The way the appeal was conducted before me means that I do not really have to consider the so called "mapping point."

l. The balance of the submissions deal with issues which again, in the light of the way the appeal was conducted before me, do not arise for my determination.

Oral Submissions

28. Counsel for the appellant submitted:[7]

> *Once it is established that the clearing falls within the provisions of schedule 8 and section 3A in part 1 it is assessable development and it requires a permit. The scheme of the legislation is such that an application for such a permit is permitted under the legislation and details of this have been set out in the addendum outline. That requires assessment under the legislation. That is where the provisions of the Vegetation Management Act may become relevant because for reasons I'll take your Honour through in a moment, the Vegetation Management Act provides the criteria particularly by the way of adopting codes for the purpose of the assessment that's made but the scheme*

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6. 2002 Q.P.E.L.R. 425, 429

7. Pages 1-18 and 1-19 of the transcript.

of the legislation is that one must apply for the permit. That will be assessed according to the criteria that apply under the Act.

If a person is dissatisfied with a decision that he's (sic) *made on such an application there is a remedy by way of appeal to the Planning and Environment Court and that is the way in which those sorts of issues are decided. What is abundantly clear, in our submission, under the legislation is that - is that it is not for an individual landholder to himself - or herself, simply decide what they can and can't clear in the absence of an application or permit.*

Now our learned friends, as we understand it from their outline of submissions, depart from that approach by arguing that somehow the meaning of what is assessable development is altered for the purposes of the Integrated Planning Act because of recourse to the Vegetation Management Act and because that demonstrates that a purpose of the Vegetation Management Act was to regulate the clearing of vegetation on freehold land to preserve remnant endangered regional ecosystem as such. ....

29. Counsel for the appellant then took me to various sections of the *Vegetation Management Act 1999* and the *Integrated Planning Act 1997* and discussed some of the history of the various amendments. He then continued:

So, what one can say is that although, under the Integrated Planning Act, what is required is proof of the clearing of native vegetation as it's described. In terms of the way in which these things are described for the purpose of mapping purposes, for the purpose of the assessment of such an application under the Vegetation Management Act, establishing that something is remnant vegetation will effectively be the same thing because of that definition of vegetation in section (a), providing it can be said that the question of excluding young grasses is dealt with.

And as I took your Honour to earlier, the evidence of the expert here that she excluded the grass eco systems from the areas that she identified, there being obviously no questions of mangroves being involved in the location that we're concerned with. I'll also asked your Honour to note the provisions of section 9, which talks about vegetation management. And, again, remembering that the submission that we're making to your Honour is that the true purpose of this legislation is to provide the basis for the assessment of the application that needs to be made to allow assessable development to occur.

But here vegetation management is the management of vegetation, the way it achieves the purposes of the Act and it simply, in subsection (2), says that it may include the sorts of things that were set out in the earlier section and some others, that is, the purpose of section - section 3 in - perhaps, some other purposes such as the retention of riparian vegetation which is in additional purposes set out there.

Now, what's important to note from those provisions is that under the Vegetation Management Act, the concept of preserving, as purpose of the Act, the regional endangered eco systems as they're defined in the Act, was not stated to be the sole purpose of the legislation. And it means that this was not the only criteria which was to be applied to an application for a development permit to clear vegetation.

And, ... as we perceive it the submissions that our learned friends make focus on that aspect of what's stated in the purposes of the Vegetation Management Act in order to develop an argument that, therefore, that's what's proscribed as being unlawful clearing but, in fact, it does no such thing, in our respectful submission.

What the Act sets out, remembering that it's stating that its purposes are to establish a number of, effectively, criteria, which will then find their way into the assessment process because it talks about providing codes for the purpose of assessment of development applications under the Integrated Planning Act, is that there are a number of purposes that are sought to be protected.

One of them, as it was enacted, was simply this; that it was a sufficient criteria for refusal of such a development application that the application was to clear the regional endangered eco systems or some part of it. That, in itself, would be enough to be a purpose to which the Act says it was meant to protect that sort of eco system, but under section 3 there are a number of other purposes which would need to be considered for the purpose of deciding whether a development would be approved or not and I've taken your Honour to those particular provisions.

Those other purposes or criteria are clearly applicable whether or not the application relates to remnant endangered regional eco system and the Act, from time to time it was enacted - it came into effect, the time it was proclaimed to have effect as law, included separate definitions of the other sub-categories - if that's the right way to term it, of remnant vegetation. The not of concern and the of concern eco systems.

Our submission is that it is therefore of no relevant consequence that reference to "remnant of concern regional eco systems" was removed from schedule 3 before it became law and was proclaimed into effect.

All of that meant the only consequence of that was that there was then on criteria under the purposes of the Vegetation Management Act that regulated vegetation clearing to preserve that type of eco system as such. That is, to establish that it would be enough under a code to refuse a development application to say, "It's of-concern eco system". There would necessarily be other criteria that would need to be considered in relation to whether an application would be allowed in relation to clearing of such an eco system.

> *Therefore in our submission there is no warrant for a conclusion that the clearing of that type of vegetation - that is, clearing of of-concern eco system remnant vegetation, or any other vegetation as defined in the Vegetation Management Act without a development permit was lawful. And that's the effect of the argument that was run below and is run by the respondent here.*

30. Counsel then referred to the decision of Robin D.C.J. in *Elliott v. Brisbane City Council.*[8] Essentially he submitted that his Honour's observations in that case were on any view *obiter dicta*, and properly understood were no more than his Honour's recording a submission made by one of the parties to the appeal.

31. Counsel for the respondent, in his oral argument, submitted that when one has regard to the history of the legislation and permissible extrinsic material "a strong picture emerges that the clearing of of concern and not of concern regional ecosystems was not assessable development for the purposes of the Integrated Planning Act during the offence period."[9]

32. He then referred to the *Vegetation Management Act 1999* as it was when it was assented to in December, 1999. The purposes of the *Act* were then said to be, *inter alia*, the regulation of the clearing of vegetation on freehold land to preserve "remnant endangered regional ecosystems" and "remnant of concern regional ecosystems."[10] Counsel observed that there was, at this time, no reference in this part of the *Act* to "remnant not of concern regional ecosystems."

33. Counsel then submitted that Part 10 of the *Vegetation Management Act 1999* made various amendments to the *Integrated Planning Act 1997,* including inserting the new clause 3A in Schedule 8 ("Assessable Development".) He continued:[11]

> *...your Honour will see that although it begins with the general words, operational word that is the clearing of native vegetation on freehold land, there are a number of exemptions identified and its sufficient at the moment to note that in exemption C, the reference to those two forms of regional ecosystem, and only those two it might be added, was repeated consistently with section 3 of the Act. Your Honour should also note at page 47*[12] *the definition of routine management. It means the clearing of native vegetation for - or in three circumstances and the circumstance that is immediately relevant to this appeal is, B, that is not remnant vegetation. So to the extent*

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8. [2002] Q.P.E.L.R. 425.

9. Transcript, page 29.

10. Section 3(1)(a)(i) and (ii).

11. Transcript, pages 29 - 30.

12. That is, of the pamphlet copy of the Act.

that it has been submitted that all that needed to be proved below was that there had been a clearing of native vegetation and that is the primary submission of the appellant, the submission is quite false because unless the vegetation is remnant vegetation it's effectively deemed to be clearing for routine management purposes.

Some of these legislative provisions, your Honour, don't reveal the best drafting in the world but it is clear, in our submission, that if you read the definition of routine management with the part or item 3A back on page 45, that the submission that we've just made that the clearing of non-remnant vegetation is deemed to be exempt is sound. ....

34. Counsel then referred to the amending Act of 2000, which omitted from section 3 of the *Act* as one of the purposes of the *Act*, the regulation of the clearing of vegetation on freehold land to preserve remnant of concern regional ecosystems. He then referred to the explanatory notes relating to the amending Act and suggested that they served "a very useful purpose in this case to clarify any ambiguity." He continued:[13]

With the objective of the Bill the reader is told that the Bill provides for the amendment of the Vegetation Management Act in order to clarify matters raised during recent public forums on vegetation management. And reasons for the Bill, the Premier and Minister made a commitment at public forums to remove references to "of concern regional ecosystems" from the Vegetation Management Act unless financial assistance was forthcoming from the Commonwealth. The Commonwealth has not made any commitment to a financial assistance package, as a consequence the Queensland Government has moved to honour the Premier's commitment.

And over the page, page 2, the heading, ways in which the policy objective is to be achieved. The policy objectives will be achieved by removing the preservation of "of concern regional ecosystems from the purpose of the Act." And may I respectfully remind your Honour that not of concern regional ecosystems were never in section 3 of the Act during any of the periods that your Honour is concerned with even though it was a prosecution case below that part of the respondent's land contained vegetation of that particular category.

35. Counsel then referred to the Minister's second reading speech, and then to the 2004 amending Act[14] which inserted a new section 3 ("Purpose of the Act".) Counsel observed:[15]

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13. Transcript, page 30.

14. This *Act* came into force after the period the subject of the charges against the respondent.

15. Transcript pages 1-31 and 1-32.

> *.... section 3 in the form that applied during the offence period is omitted and a new section is inserted and your Honour will see that now the new section in subsection 1A seeks to conserve the three types of regional eco-system which were the subject matter of the particulars in the complaint below and if your honour goes now to tab 16, the explanatory notes of that bill the relevant pages appear and your Honour will see that the objective of the bill contains the statement that its purpose is to phase out broad scale clearing and to protect of concern regional eco-systems. Something that wasn't a feature of the legislation during the offence period.*

36. Counsel then referred to the *Integrated Planning Regulation 1998*. The second schedule of those regulations is headed "Referral Agencies and Jurisdiction." Counsel observed that, as prescribed by that schedule, for applications involving "operational work that is the clearing of native vegetation and assessable development under schedule 8 of the Act" the referral agency is "The chief executive administering the *Vegetation Management Act 1999*," the type of referral agency is said to be "concurrence," and the "Referral jurisdiction" is said to be "The purposes of the *Vegetation Management Act 1999*." Counsel observed:[16]

> *... the referral agency is the Chief Executive administering the Vegetation Management Act and your Honour will see that the jurisdiction of the Chief Executive is limited to the purpose of the Vegetation Management Act, which relevantly through the offence period did not include the conservation by either of concern or not of concern remnant regional eco-systems.*

37. Counsel then referred to section 20 of *Vegetation Management Act 1999* which provides that if a regional vegetation management plan is not made for a region (as, counsel told me,[17] was the case in this matter,) then

> *..... the part of the State policy identified as a code for the clearing of vegetation is -*
>
> *(a) a code for IDAS for a development application for land in the region; and*
>
> *(b) an applicable code for the clearing of vegetation in the region.*

38. Counsel then referred to the *State Policy for Vegetation Management on Freehold Land*[18] which provides:

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16. Transcript, page 1-32.

17. And I accept.

18. Dated September, 2000.

Appendix 2: Code for the clearing of vegetation

Purposes of the Code

The purposes of the Code are:

1. The protection of remnant endangered regional ecosystems;

.....

39. Counsel observed[19] that the Code, whilst seeking to protect remnant endangered regional ecosystems (consistently, he submitted, with the legislative scheme) does not apply to "the protection of regional eco systems of a different category." He contrasted that with the May, 2004 *Regional Vegetation Management Code for Broadscale Clearing Southern Brigalow Region (Brigalow Belt Bioregion)*[20] which reflects the amendments made in 2004 to the *Vegetation Management Act 1999* and sets out the now statutory purpose of regulating the clearing of vegetation in a way that conserves remnant endangered regional ecosystems, remnant of concern regional ecosystems, and remnant not of concern regional ecosystems.

40. Counsel then referred to section 3.5.13(4) of the *Integrated Planning Act 1997* and to the Court of Appeal decision in *Reservilt Pty. Ltd. v. Maroochy Shire Council and Anor.*[21] Having discussed that case counsel continued:[22]

> *And the point that we seek to make is that in the present case, because there was no Code, we submit that applied to the not of concern and the "of concern" regional eco systems. Even if there were a Code assessable application made of the application, it would need to be approved, because the assessment manager couldn't be satisfied that there was non-compliance with the Code. There simply wasn't a Code to assess it against. And that reinforces the notion that the "of concern" and "not of concern" regional ecosystems were not intended to be assessable development during that offence period.*
>
> *.... we submit that, at worst for the respondent, there is ambiguity here as to whether or not assessable development for the purposes of the Integrated Planning Act during the period in question, extended to regional eco systems which the VMA did not intend to protect. It seems very odd that it should. And your Honour would be aware that decisions of high authority established*

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19. Transcript, page 1-34.

20. Counsel asserted that this Code applies to the subject land.

21. 123 L.G.E.R.A. 233

22. Transcript, page 1-35.

the principal that planning provision should be strictly construed, unless they are going to defeat the purpose of the legislation.[23] *But in this case it's the other way around. The appellant contends for an interpretation which is - lies outside the stated purposes of the Vegetation Management Act during the period of the offences that were alleged.*

41. Counsel submitted that consideration of paragraph 3A of schedule 8 of the *Integrated Planning Act 1997* lead to the conclusion that:

> *.... The obvious intention of that item is that if a case comes within one of the exemptions, the person who intends to carry on the clearing doesn't need to take any step at all. It is not a situation where the Act has in mind that you apply to find out whether you come within an exemption. Rather, the way the Act is intended to operate is you read the schedule and if you come within an exemption or if you think you come within an exemption, then you proceed to clear; albeit that if there was some contests about that, that might need to be resolved later by Court.*
>
> *But there is no provision in the Integrated Planning Act for the making of an application to find out in principle, as it were, whether you come within an exempt category. Unsatisfactory as it may seem, the way in which the Act is intended to operate is you only need to apply if you are assessable development, and you are not assessable development in a clearing case, if you come within one of those exemptions. So the prosecution had to negative all of those exemptions, including negativing that there was clearing occurring in non-remnant vegetation. .....*

Conclusions

42. The charge alleged a breach of section 4.3.1.(1) of the *Integrated Planning Act 1997*. That section reads:

> ***4.3.1.(1)*** *A person must not start assessable development unless there is an effective development permit for the development.*

43. Clearly, the proper understanding of the expression "assessable development" is critical to a resolution of the dispute between the parties in this case.

44. It will be remembered that the "Dictionary" (i.e., Schedule 10 of the *Integrated*

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23. Counsel referred me to *Scott v. Cawsey* 1907 C.L.R. 132; *Stevens v. Kabushki Kaisha Sony Computer Entertainment and Others* 2005 224 C.L.R. 193; *Beckwith v. The Queen* 1976 C.L.R. 569 and *The King v. Adams* 1935 53 C.L.R. 563

Planning Act 1997) defines "assessable development" as being development specified in schedule 8, part 1 of that *Act*.

45. Schedule 8, Part 1 is headed "Assessable Development." Paragraph 3A of the schedule is the one which the appellant relied on in this prosecution. It reads:

> *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-*
>
> *(i) an area of high nature conservation; and*
> *(ii) an area vulnerable to land degradation; and*
> *(iii) a remnant endangered regional ecosystem shown on a regional ecosystem map; or*
>
> ....

46. "Operational work" is defined in section 1.3.5. Part of that definition is-

> *(f) clearing vegetation on freehold land.*

47. The "Dictionary" provides that "Clear," when used in respect of vegetation-

> *(a) means remove or cut down, ringbark, push over, poison or destroy the vegetation in any way.*

48. "Native vegetation" is defined in the "Dictionary" as-

> *(a) a native tree; or*
> *(b) a native plant, other than a grass or mangrove.*

49. Taking these various definitions alone, one can understand the force of the appellant's submission that all the appellant had to prove was that the respondent had native vegetation on freehold land cleared without a permit, and that other matters were irrelevant other than in respect of considerations relating to the penalty to be imposed.

50. Indeed it seems to me it must be said that the language of the *Act* is clear, and that is a strong reason why the Court should give effect to the natural and clear meaning of the words.

51. On the other hand, in my view the *Integrated Planning Act 1997* is critically "social" legislation intended to achieve a balance between a number of competing

considerations relevant to development, planning, and conservation in the State. The purpose is set out in section 1.2.1 thus:

> *The purpose of this Act is to seek to achieve ecological sustainability by -*
>
> *(a) coordinating and integrating planning at the local, regional and State levels; and*
>
> *(b) managing the process by which development occurs; and*
>
> *(c) managing the effects of development on the environment (including managing the use of premises).*

52. "Ecological sustainability" is defined[24] as:

> *.... a balance that integrates -*
>
> *(a) protection of ecological processes and natural systems at local, regional, State and wider levels; and*
>
> *(b) economic development; and*
>
> *(c) maintenance of the cultural, economic, physical and social wellbeing of people and communities.*

53. Of course the *Act* deals with many matters other than the clearing of land.

54. On the other hand, the purpose of the *Vegetation Management Act 1999* is specifically "to regulate the clearing of vegetation on freehold land ...."[25]

55. In the circumstances, it seems to me to be the case that, in order to understand properly the intention of the Parliament in construing the *Integrated Planning Act 1997* so far as the clearing of vegetation is concerned one must have regard to the provisions of the *Vegetation Management Act 1999*.

56. Such an approach means reading more into the words of section 4.3.1(1) and paragraph 3A of Part 1 of Schedule 8 than a literal reading would warrant. In my view section 14A(1) of the *Acts Interpretation Act 1954*, together with such cases as *Cooper Brookes (Wollongong) Proprietary Limited v. The Commissioner of Taxation for the Commonwealth of Australia* justify such an approach.

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24. Section 1.3.3. See also section 1.3.6 for an explanation of some of the terms used in this definition.

25. Section 3(1).

57. I think there is force in counsel for the respondent's submission that a literal construction of section 4.3.1(1) and paragraph 3A of Part 1 of Schedule 8 would lead to some surprising results when one considers the provisions of the *Integrated Planning Regulation 1998* and the *State Policy for Vegetation Management on Freehold Land*. That conclusion alone permits reference to extrinsic material in order to understand better the Parliament's intention.[26]

58. In my view, I should accept the respondent's submission that, on its proper construction, at the time of the offence alleged against the respondent, regional ecosystems other than remnant endangered regional ecosystem were not intended to be protected by the two *Acts*.

59. I think there is support for this view in the reasons of his Honour Judge Robin, sitting as a judge of the Planning and Environment Court, in *Elliott v. Brisbane City Council and Another*.[27] The observations of his Honour were clearly *obiter dicta*,[28] but in my opinion his Honour's view is entitled to significant respect, given especially his long experience in the Planning and Environment Court.

60. It follows that her Honour was correct, on the findings of fact made by her, in her conclusion that the first complaint should be dismissed.

61. I therefore order:

a. The appeal is dismissed;
b. Order the appellant pay the respondent's costs of the appeal to be assessed.

H. W. H. Botting, D.C.J.

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26. See section 14B(1) of the *Acts Interpretation Act 1954*.

27. [2002] Q.P.E.L.R. 425, 429.

28. On the other hand, I cannot accept the appellant's submission that his Honour was doing no more than reciting a submission made by one of the parties.