TRANSCRIPT OF PROCEEDINGS

MAGISTRATES COURT

MCGRATH, Magistrate

MAG-00087418 of 2010(3)

ROBERT JAMES BLACK Complainant

and

REGINALD EDWARD DRAPER Defendant

ROCKHAMPTON

..DATE 29/09/2010

..DAY 1

I, STEPHANIE ATTARD, Director of the State Reporting Bureau and Courts Corporate Services, and the officer in charge of the State Reporting Bureau transcripts, do hereby certify that the abovementioned transcript, pages 1 to 35, is a transcript held in the official records of the State Reporting Bureau.

Dated this 13th day of DECEMBER 2010

Stephanie Attard
Director
State Reporting Bureau and Courts Corporate Services

ADAM RICHARD LOCK APPOINTED AS RECORDER

BENCH: Thank you. I have before me a complaint under the Integrated Planning Act. The complainant is Robert James Black. The defendant named is Reginald Edward Draper. Would you announce your appearances?

MR DEVLIN: Yes, good morning, Ralph Devlin, of Senior Counsel, your Honour, instructed by the Department of Environment and Resource Management. I'm for the prosecution.

BENCH: Thank you, Mr Devlin.

MR SHERIDAN: Good morning, your Honour, my name's Sheridan, spelt S-H-E-R-I-D-A-N, initials P D, of counsel. I appear for the defendant Mr Draper.

BENCH: Thank you, Mr Sheridan. Mr - gentlemen, there was a plea of guilty entered on the 10th of August; is that the case?

MR DEVLIN: Yes, your Honour.

MR SHERIDAN: Yes, your Honour.

BENCH: Yes.

MR DEVLIN: Now, as to the complaint itself, your Honour, I hand up an amended complaint for the record. You'll see that an area of clearing has been in the main amended downwards.

BENCH: So really the complaint changes in the particulars, does it?

MR DEVLIN: It does, only as to particulars, your Honour, so - and my learned friend has notice of that.

MR SHERIDAN: That’s by consent, your Honour.

BENCH: Yes, thank you.

MR DEVLIN: So I formally seek leave to amend the complaint in those matters.

BENCH: Leave is granted and the complaint will be amended in those terms.

MR DEVLIN: Thank you, your Honour. I'm in a position now to hand-up the - a statement of facts, which I'll read some of into the record.

BENCH: Thank you. That statement of facts will be Exhibit 1.

ADMITTED AND MARKED "EXHIBIT 1"

MR DEVLIN: Thank you. Your Honour, I'm happy to step you through it. If you'd like to read it first, of course, I'm in your hands, but I'm happy to step you through it.

BENCH: Well, I'll hear from you as I read it, Mr Devlin.

MR DEVLIN: Thank you. Your Honour, at paragraph 3 the assessable development in question was operation work being the clearing of native vegetation on freehold land. Paragraph 5, the defendant cleared a total of 255 hectares of vegetation; 226 of it was endangered regional ecosystem, which the prosecution says is extremely significant, three hectares of "of concern" regional ecosystem and 26 hectares of least concern regional ecosystem.

Your Honour, the defendant was born in 1968, so he's approximately 41 years old. He has no convictions, no previous convictions. He is a grazier. The property is situated at Dingo approximately 120 kilometres west of Emerald, and the defendant is the registered owner of the property known as "Orange Grove".

The property was leased in December 2008 for agistment of cattle to Robert John Lucas, a man called Barren Cloth, for 10 years with an option to renew the lease for another 10 years. The allegation is that between April and July 2009, clearing was done. The statement of facts sets out the nature of endangered regional ecosystems, of concern regional ecosystems and least concern, and they're to be found at section 22 LA, LB, LC of the Vegetation Management Act.

The following endangered regional ecosystems were involved, and that's at paragraph 14 over on page 4, 11.3.1, acacia harpophylla or casuarina cristata open forest on alluvial planes; 11.4.9, Acacia harpophylla shrubby open forest to woodland; 11.9.1, Acacia harpophylla, Eucalyptus cambageana open forest to woodland; 11.9.4, Semi-evergreen vine thicket on fine grain sedimentary rocks; 11.9.5, Acacia harpophylla and/or Casuarina cristata open forest on fine-grained sedimentary rocks.

The impacts of the clearing of the vegetation on animal populations - sorry, on vegetation populations states as follows from the principal botanist of the Queensland Herbarium: "The clearing has had a significant adverse impact on regional ecosystems in the area and on flora values associated with the property at the bioregional, subregional and local levels. Secondly, the unlawful clearing occurs in the Isaac-Comet down subregion, which is the 11th most cleared of Queensland's 119 subregions, with 78 per cent of the subregion cleared.

Therefore, the adverse impacts of further clearing will be very significant at the subregion scale. Thirdly, the unlawful clearing adds to the issues of continued clearing in

those areas such as habitat fragmentation, habitat loss, weed invasion, soil loss, loss of nutrient cycling, increased greenhouse gases and a range of other effects."

There is also a report in the effect of the clearing on populations of endangered bridled nailtail wallaby and the vulnerable black-breasted button quail that reside in patches of brigalow habitat in the region. Dr Jeffrey Smith produced that report. It probably hasn't been specifically surveyed, it was a desktop survey. It's not known whether the species are present now in the unlawfully cleared area, however the report opined that the closest known population of nailtail wallaby is 20 to 40 kilometres away from Orange Grove; the closest known population of black-breasted button quails, at Marlborough, to the east, and a reduction of the vegetation of the type that was there is likely to result in a loss of essential habitat required for maintaining population movement and viability of both species generally.

The matter was discovered after 2nd of July 2009. The remote sensing data identified the destruction of the habitat between, as I said before, April and July '09 on the 3rd of July '09. DERM officers attended at Orange Grove and conducted an inspection, saw extensive vegetation clearing, two large Caterpillar bulldozers equipped with a large scrub pulling chain, an Atlas Copco air compressor trailer, a Hino fuel tanker and a Toyota LandCruiser were located adjacent to an area of recently cleared vegetation.

The driver of the heavy machinery was a man called Edmiston, who appeared before your Honour a short time ago. Edmiston stated that the defendant had referred him to a document titled "Property Vegetation Management Plan", dated August 2004, and he actually produced that. The report seemed to indicate the areas cleared or to be cleared was apparently produced for the purpose of acquiring a permit.

According to Edmiston, the defendant gave him that document as well as all directions and assured Edmiston on more than one occasion that there was a valid permit in place. There was none, of course. A stop work compliance notice was issued on the spot and on the 17th of August the officers attended again under warrant and seized the global positioning system provided by the defendant to Edmiston during - to use during the clearing.

On the 27th of July he was invited to an interview, and subsequently exercised his right not to be interviewed. On the 12th of August Edmiston agreed to be interviewed. He admitted that he understood the vegetation clearing. He was paid consideration in the amount of $73,000 for the clearing; that he was told that a permit had been issued, that he'd used his own machinery, together with another operator, and that the defendant gave him the GPS with the coordinates for the clearing already set.

He also provided a written statement which gave additional information that the defendant assisted him to physically mark

out the areas to be cleared, that he did ask numerous times whether there was a permit, that the defendant drove around Orange Grove and showed him the areas he wanted cleared, and the vegetation was a patch of rough brigalow country.

A search of DERM databases revealed that there was no vegetation and clearing permit or PNAV in existence for the property. The searches revealed that the defendant had submitted a PVMP in 2004 as part of a development application that was subsequently refused, so there can be no doubt he knew what his responsibilities were.

The - he failed in a ballot to clearfell 1135 hectares of vegetation on the property. The defendant also applied to the Queensland Rural Adjustment Authority for compensation for an area affected by the Vegetation Management Act legislation. That was done in - on 10 January 2007, and he was awarded $35,100 in compensation for the adverse effect of not being able to clear his land.

There is an intention to make a PMAV in relation to the clearing on the property. That will declare certain areas to be protected as remnant native vegetation. A PMAV that is imposed as a result of unlawful clearing is designed to protect native regrowth that was illegally removed, and it'll be unlikely to be removed until such time as the relevant area returns naturally to a status of native vegetation similar to how it might otherwise have been. Your Honour, I can assist you with some photographs and so on. I'll hand up to you a set of maps. That's aerial photography, firstly.

BENCH: That'll be Exhibit 2.

ADMITTED AND MARKED "EXHIBIT 2"

MR DEVLIN: And a bundle of - another map showing the endangered area, and a bundle of photographs which I'll step you through.

BENCH: Exhibit 3.

ADMITTED AND MARKED "EXHIBIT 3"

MR DEVLIN: Your Honour, could we first go to Exhibit 2? There is a map A called pre-clearing 22 April 2009. It's from satellite imagery, and your Honour can see a very large-----

BENCH: I've only got maps - sorry, Mr Devlin. I've only got maps B and C here.

MR DEVLIN: Sorry?

BENCH: I've only got maps B and C.

MR DEVLIN: Thank you. Could I have them back, please? Yes, essentially, there's no difference between map A and map B. [indistinct] same satellite imagery, your Honour.

BENCH: Yes, thank you.

MR DEVLIN: Your Honour can see an area of greenery there, dated 22 April 2009. The blue hatching is the clearing that

was done up to the point where the clearing has stopped, so the vegetation within the oblong area was saved, as it were, but the machinery was going around the outside of the area methodically clearing the vegetation. Then your Honour can see the result of the clearing in the map C document, dated 11th of July 2009, bearing in mind the officers came there very early July and put the stop work order on. So the blue hatching there shows the area of actual clearing.

Your Honour can see the extent of the proposed clearing. One can infer that the entire area was to be cleared, but it was stopped. If your Honour then goes to Exhibit 3, I've had the investigator mark the location of the photographs, so your Honour will see the first three photographs are numbered 1, and they're taken from the edge of the clearing, looking across a band of clearing, to the remaining vegetation off in the distance. That's where - roughly where the heavy equipment was found working with the chains. Your Honour can see that photo. And a further photo of the felled timber with the chain in the photograph, in fact, both photographs marked 1. You can see the location from the map.

Location 2, there are two photographs. That, again, looks across the corner, bottom corner of the clearing, and gives you some sense of the surviving vegetation, and bearing in mind the pink colouring is the, as you see the legend down below, remnant vegetation containing endangered regional ecosystems. So it was a significant set of works.

And then photograph 3 is taken from the edge of the clearing work, looking back and again giving you some idea of the nature of the endangered vegetation in that area, or the nature of the vegetation, generally, in that area.

I'll now hand up some submissions on penalty. Let me say, at the outset, that the Department regards this as one of the most serious, if not the most serious, example for a number of particular reasons.

BENCH: Mr Devlin, Mr Edminston was sentenced under, in part, section 13A, was he, as [indistinct]?

MR DEVLIN: Yes, he was. He was fined $20,000, and your Honour indicated that but for his cooperation, it would've been 40.

BENCH: Yes.

MR DEVLIN: Your Honour, the - paragraph 3 of these submissions, I don't know that you've marked them as an exhibit yet.

BENCH: They'll be Exhibit 4.

ADMITTED AND MARKED "EXHIBIT 4"

MR DEVLIN: Thank you. Paragraph 4 - sorry, paragraph 3, the maximum penalty for this offence is $166,500. The prosecution submits, paragraph 5, that the appropriate range in this instance is 120 to 130 thousand dollars, which is a large proportion of the maximum available, and I would indicate why it makes that submission.

Firstly, the range reflects the seriousness of the offence and the significant aggravating circumstances. Prior to clearing, this was one of the largest patches of endangered remnant vegetation and endangered regional ecosystem vegetation left in Queensland. Because the defendant has no prior convictions, the prosecution does not seek the recording of a conviction, although that is a matter entirely for your own discretion.

The - I then set out the principles at work in terms of the work of the Department and the work that the Sustainable Planning Act and the Vegetation Management Act have to do. In effect, paragraph 8, these two acts provide - between them, provide a system whereby permits may be granted for certain clearing activities. They're issued only after an assessment. That includes consideration for ecologically sustainable land use and the protection of biodiversity, and the clearing of vegetation without obtaining a development permit deprives the Department of the opportunity to take into account the appropriate factors and to achieve the purposes of both pieces of legislation.

Paragraph 10, there is a specific process of obtaining an authority, and that process has been in force for 10 years. All persons should be aware of the requirements, as the Courts - these Magistrates Courts have said on a number of occasions, but in this case, the defendant was undoubtedly aware.

The volume of clearing of the endangered vegetation is palpable from the documentary exhibits tendered, Exhibits 2 and 3, in particular. The environmental impacts of the illegal clearing on biodiversity, particularly in relation to vegetation and two particular species that I've already referred to. Those impacts have been referred to. And the intention and knowledge of the defendant is an aggravating factor.

Going to paragraph 18, a report by Henricus Dillewaard, D-I-L-L-E-W-A-A-R-D, principal botanist, refers to significant adverse impact. Paragraph 20 - now, that's reference again to Dr Jeffrey Smith that I've already referred to. Paragraph 21, in December 2007, before this clearing was done, DERM officer carried out mapping of the area identifying properties in the Brigalow Belt bioregion that have at least 1,000 hectares of any remnant brigalow ecosystems considered suitable for bridled nailtail wallabies, and Orange Grove was identified as one of those properties.

There's also a report received in 2003 and time of impacts of land clearing on Australian wildlife, by Dr Hal Cotter, a very well credentialed expert in this area, and Dr Cotter speaks of the clearing leading to fragmentation into smaller sub-populations, of certain species. Once lost, such populations cannot be replaced by new immigrants of the same species, because the patches are too isolated, and the quality of their habitat in remnants typically declines, with their size leading to increased predation, or reduced breeding.

In relation to the wallaby itself, mammals are especially sensitive to the effects of habitat reduction, and the report stressed the importance of retaining an undisturbed vegetation area, which has now been placed in jeopardy by this clearing.

Paragraph 25, a very aggravating feature in this case is that it was unequivocally conveyed to the defendant on at least two occasions that the relevant area could not be cleared without a permit. He made a double application which was refused in 2005, therefore he's well aware that the clearing was not permitted, and in 2007 he made application for it and received compensation, and in spite of that, he commissioned that $73,000, a massive clearing.

In his favour is a plea of guilty, and that he has no prior convictions, and I've set out the aggravating features, the fact that the majority of it was endangered remnant. The detrimental impact to the animals that I've mentioned. His awareness that he shouldn't be doing it. The fact that he got his compensation, and that there was a deliberate intention that can be inferred to disregard the legislative framework. Even the misleading of Mr Edmiston is [indistinct].

Your Honour, the Courts, on recent times, have been referred to section 60B of the Vegetation Management Act, I have a copy of the Act, but it is set out there in full, and that's the guide, it's by no means a black and white instruction to Courts, that would not be appropriate. But it is a guide for deciding penalty. Endanger regional ecosystem, 30 penalty units per hectare. [indistinct] ecosystem, 18 penalty units. And in any event, when you add up the - I'm sorry, I missed the 24 penalty units, of concern is not involved there at paragraph B on page 8.

So if we do the calculation now by using the guide, the maximum, according to the guide, adds up to $732,000, well in excess of the available maximum of the Integrated Planning Act. So using that as a rule of thumb, the prosecution submits that that the penalty in this case should be close to the maximum, and I'll take you in detail to how that's been handled by a couple of Courts here in Rockhampton, not your Honour though, and in Mackay, just in recent times. But the staring point is Dewar, so I hand up three decisions, a decision of her Honour, Judge Bradley, in Dewar. A decision of Magistrate Hennessy, here in Rockhampton, in Henderson. And the decision of Acting Magistrate Muirhead in Mackay, the matter of Petts.

Dewar is the only District Court authority to date. There's [indistinct] appellate authority insofar as it assists the Court here. That involved a clearing of only 27 hectares of endangered, and three hectares of, of concern near Tully. Her Honour upheld the fining of the Magistrate, that a global penalty of $45,000 was appropriate, and then that was split between the three brothers who were three defendants.

Importantly, her Honour affirmed the use of the legislated sentencing guide as a guide to Magistrates Courts. In particular, section 60B of the Vegetation Management Act. She also commented on the commercial aspect of the clearing, and that offenders stood to gain from it. Also commented on the adverse affects the clearing had on the local ecology, and in that case, there were reports outlining the damage the clearing had on the surrounding natural habitat, as is the case here. And finally, her Honour commented on the need for significant penalties for offences like this, and of the importance of general and personal deterrence. These things are returned to your Honour in the decision then that follow.

In Girdie v. Henderson, 10th of November last year here in Rockhampton, Magistrate Hennessy reinforced the use of the decision in Dewar, and perhaps if I just take your Honour to that. Well, maybe it's best to just go to the summary and the outline first, and then I'll take you to some specifics.

Similar area, total area, was involved, a little bit more than in this matter, 274.5 hectares, but for endangered regional ecosystem, only roughly, just over a fifth it is, 53.7 hectares was involved, and 246 hectares of, "of concern." Magistrate Hennessy accepted the submission of the Prosecutor that where the penalty guide suggests a penalty significantly above the maximum penalty available, the appropriate starting point is the maximum penalty, and then you look for discounting factors.

And if take you then to that specific decision, your Honour, because it's, in some ways, of great assistance to this Court, I would respectfully submit. In the decision, page 2, the mitigation factors were the early plea and co-operation, in the first paragraph, consent for officers to enter, and admissions made.

Significantly, at lines 19, 20, her Honour took into account that the defendant in that case, Henderson, had applied for a permit, but had second guess that decision and proceeded before the receipt of the permit, which ended up not being forthcoming. So in a sense it was clearly done in expectation that he would be successful, and he wasn't. He was of good character and didn't have any criminal history.

At lines 38 to 40, her Honour took into account there was no immediate or direct commercial gain, but eventually some gain would be achieved by an increase of production, first off. Over on page 3, her Honour recognised at line 30 that there had been harm caused to the florae faunae, and biodiversity in

the area, and a significant unquantified increase in the value of the property.

Line 48, the offence the offence was detected by way of satellite imagery. Then on page 4, at line 11, her Honour took into account that the defendant in that case did demonstrate some good faith in the system, by applying for a permit, and presuming that it would be granted, but that turned out not to be so. And the fact that the defendant proceeded without a permit deprived the Department the opportunity to take into account the particular vegetation in the area, and what would be appropriate to be cleared, and what would not be.

At line 39 her Honour referred to the need for general deterrence, as indeed did Judge Bradley in the Dewar case. And at line 49, that personal deterrence is not a major factor in that case, because the process itself would be deterrence enough. Over on page 5, lines 1 to 5, the calculation in that case on the Vegetation Management Act was $450,000, so significantly less, because of the significantly less area of endangered.

So the calculation under the Veg Management Act here is $300,000 in advance of an accident calculated there, and the maximum available under the old penalty units under $75, being a hundred, is $40,000 at $124,875, so that's a pointed distinction also. Her Honour remarked at line 21 that the Courts regard these types of clearings as very serious. At line 35, her Honour considered that a fine at the higher end of the scale was appropriate.

Now, what her Honour did at page 6 line 15, she considered that in the circumstances of that case, a 25 per cent discount for mitigation of the maximum of $124,000 was appropriate. I think the prosecution suggested 20 per cent. And that's how her Honour arrived at $90,000.

I'll just take you back to the - and I think I've only done a brief summary of Petts in the outline. On page 11 of the outline, Acting Magistrate Muirhead decided that matter on the 13th of May 2010. Petts was fined $94,000 with no conviction recorded and no conviction recorded, and costs of $11,460. Can I step you then through that rather briefly?

From the third paragraph, your Honour can see that the defendant unlawfully cleared a total of 584 hectares of native vegetation, but all of it was not of concern. In the fourth paragraph on the first page, the maximum again was $124,875. The defence contended for a range of 45 to 90,000. The prosecution contended for 90.

Over the next page, his Honour turns his mind to the way it would calculate out under the Veg Management Act, and that one calculated out to a similar total here, $788,400. Down a few lines, down a couple of paragraphs, the defendant in that case was 46 years of age, of good character, no previous, so a similar age to the current defendant. Cooperation to some extent. It was submitted that the defendant was an unsophisticated man and was somewhat ignorant of the laws. This was a case where the trees were [indistinct].

But his Honour continued, "However, in that regard, I agree with the remarks of his Honour Magistrate Morgan in the matter of DERM v. Winks," where he stated in effect that anybody who proceeded to clear without getting a permit after this 10 years period when all of this has been in place would be at the very least very grossly negligent. And this was a finding that the defendant was ignorant of his obligations, unlike the current matter.

At page 3, his Honour in the middle of the page referred to aggravating features, the sheer brazenness of it, that the matter came to the attention of the Department by the view of satellite imagery. Well, it was a combination here, it was a combination of information received and then resort to satellite imagery. Next paragraph, his Honour took into account that the value of the property had been significantly increased. There was some difference of opinion about whether it was a hundred thousand dollars contended to - contended for by the prosecution or $64,000.

Over on page 4, as in Henderson's case, his Honour referred to in the first paragraph, "the clear potential for future gain," the third paragraph, last two lines, "the stock bearing capacity of the property to increase for 255 head of cattle to 300 head," per a particular unit, I forget which unit it was that was used. Adverse environmental effects were referred to. His Honour, a couple of paragraphs down, had resort to the decision in Door and the remarks of Judge Bradley about significant penalties for general and personal deterrence being needed.

Over on page 5, taking all those matters into account, third paragraph, his Honour considered that a penalty close to the maximum available would be appropriate. The starting point, the next paragraph, should be the maximum and work downwards in view of the guide in the Veg Management Act.

Over at the middle of page 6, his Honour came to the view that a discount of less than 33.5 per cent should be allowed. Second last paragraph, "I consider that a discount of approximately 25 per cent of the maximum should be allowed, so his Honour came to the same formula, as did Magistrate Hennessy, and that ended up being a fine of $94,000.

To return to the written submissions, then, your Honour, page 12 under the heading, "Conclusions." "The volume of the clearing is aggravating the environmental impacts" - "is an aggravating factor." The defendant's deliberate disregard is an added dimension over and above the decision in Petts and Henderson, I would respectfully submit.

There's not a hint of a suggestion of ignorance, and indeed, he was compensated and nevertheless went ahead, and that in my respectful submission, taking into account that the maximum is now $166,000, a range of 120 to $130,000, allowing for mitigating factors, is well and truly open to this Court. There is a need for personal deterrence in this case. There is a need for general deterrence generally for landholders who might be likeminded. Unless I can assist your Honour any further, those are my submissions.

BENCH: Mr Devlin, do you want to say anything about sort of residual benefit to Mr Draper as a result of this activity?

MR DEVLIN: I would simply content myself with this. There hasn't been a valuation done, so your Honour's not dealing with any specific figure, but your Honour can see the sheer size of the proposed development, and your Honour can infer that the purpose was to make the land more productive for grazing activities. You can infer that from the leasing of the property to others in 2007 and therefore the making available of more - potentially significant more grazing land, that is, 226 hectares of grazing land, so the Court can infer that the overall intention was to increase the productivity of the land by the removal of that predominantly endangered vegetation. I can't be any more specific than that.

BENCH: Yes, very well.

MR DEVLIN: Thank you, your Honour.

BENCH: Mr Sheridan, your client maintains his plea of guilty to the complaint in its amended form?

MR SHERIDAN: Yes, your Honour, we - he does. I just - and I'll - so your Honour doesn't get too lost, I will endeavour at least to structure my submissions following in basic order and in answer to Mr Devlin, but before I do, I just want to set out by saying that it appears from the recently decided cases, and if I can just, before I set sail altogether, just refer your Honour back to the matter of Black v. Petts, which was a decision of Acting Magistrate Muirhead in Mackay in May this year, there's this reference that seems to be creeping in that, and I'll quote from his Honour.

"I agree with the remarks," and I'm on page 2, and it's the bottom of the sixth and beginning of the seventh paragraph, "I agree with the remarks of his Honour Magistrate Morgan in the matter of the Department of Environment and Resource Management v. Winks where he stated (referring to the defendant not being fully aware of his obligations under the legislation)," then he quotes.

"His Honour Morgan says, 'That, coupled with what appears to me to be open public debate for the last 10 years or so, and open public discussion about the fact that land holders are not at liberty to clear their land on, even if it be freehold land, would indicate to me that Mr Winks was ignorant of that. It would indicate to me that it'" - sorry, that should be if-----

BENCH: If, I think-----

MR SHERIDAN: "That if Mr Winks was ignorant of that, he has been very grossly negligent in that regard." I just want to address your Honour on this error that seems to be creeping in in all of these decisions. The Vegetation Management Act came in about 10 years, that's correct. It did not ban clearing vegetation on freehold land. Oh, if it were that easy. But that is not what it did. It made unlawful clearing of certain types of vegetation on freehold land, and that is where many landholders, and as I'll develop my submissions further, the defendant before you today has the difficulty. It's just not that simple. And this idea that all clearing was banned and anyone who clears is just ignorant of the law, or should know about it because it's been going from 10 - for 10 years is just plain wrong.

We can see, this morning, the difficulty, not - I'll just, if I can - I'll just hand these up. What-----

BENCH: That'll be Exhibit 5, Mr Sheridan.

ADMITTED AND MARKED "EXHIBIT 5"

MR SHERIDAN: Five, your Honour? Thank you.

BENCH: Yes.

MR SHERIDAN: There's another map behind it. Will that be - can that be 5 as well, or be called 6?

BENCH: Yes.

MR SHERIDAN: It's a different map.

BENCH: Oh, they can - they're joined together, so I'd be happy to treat it as Exhibit 5.

MR SHERIDAN: Yes. What that map there is a Vegetation Management Act regional ecosystem and remnant map version 6. You will see there the date. You'll see it was requested by counsel, comes off the website. It's a simple process. One just goes to the website, enters the lot and plan number, and then in a very short time, a matter of minutes, actually, these maps are emailed back to the computer.

You'll see the defendant's property, Orange Grove, is centred in that map, and it's surrounded by a dark line. You'll see that that - if your Honour wants to have a look at Exhibit 2, which is a satellite image of the same property, you'll see that those - Exhibit 2 and Exhibit - Exhibit 2 is the aerial - is the satellite image with overlay. You'll see those - Exhibit 2 is a satellite image. Exhibit 3 is a - or a regional ecosystem map, and you'll see the different colours on that regional ecosystem map.

And if I can take your Honour to the panel down on the right-hand side, paragraph 1 begins "A remnant", paragraph 2, "Define map", paragraph 3, "Regional ecosystem line work has been compiled with a scale of one to one hundred thousand, except in designated areas where a compilation scale of one to fifty thousand is available." Line work should be used as a guide only, positional, accuracy of RE, which is regional ecosystem, data mapped at - scale of one to 100,000 is plus or minus 100 metres. Extent of remnant regional ecosystem as at 2006 depicted on this map is based on rectified - and on it goes, says where it comes from.

Then if you'll - the next paragraph is a one liner, and if you go down that, "Disclaimer: while every care is taken to ensure the accuracy of this product, the Department of Environment and Resource Management map info makes no representations or warranties about its accuracy, reliability, completeness, suitability for any particular purpose, and disclaims all responsibility and reliability," and on it goes.

Now, if you skip the next paragraph, all data sets, and then the next one. "Additional information is required for the purpose of land clearing or assessment of a regional ecosystem map or a PMAV application. Refer to information, go to a website or contact the Department."

Now, the significance of these maps, your Honour, is this map, as far as what you're actually allowed to clear, is the law. You'll see these white - see, if I take your Honour back to the centre of that map, the areas that are white are non-remnant. So within that map, if we look at a broad classification, you're allowed to clear the non-remnant. But if you go into the colours, that's an offence. So if it's white, it's non-remnant, and you're allowed to clear it, but if it's any colour, that's non-remnant, and you're not, and if you do that, you'll find yourself in the defendant's position today.

And the reason it's the law is because, for instance, a remnant endangered ecosystem is defined as, and this is in the schedule of the Act, "A remnant endangered regional ecosystem for an area within - in Queensland within a regional ecosystem map," so this property falls within that. Means part of an endangered regional ecosystem mapped as a remnant endangered regional ecosystem on a map. So the endangered vegetation is determined and defined by what is on that map.

What may or may not be on the ground is of no consequence, and

that's the law. Now, whist the disclaimers down there, and the accuracy - make it extraordinarily difficult, when that is what you go on to determine which is remnant and which is not. And this is the situation, partly, that the defendant found himself in. It did not matter what he saw on the ground. It is only by looking at an area that he was going to clear that it had been logged in the past and it wasn't remnant, and thought he was allowed to clear it because it was non-remnant. That does not matter. It is how it appears on the map.

And just - and I won't go to it in detail now, but the second map, your Honour, I just want to take you to that briefly and hold the thought in your mind. The second map is Vegetation Management Act essential habitat map version 3.0.

You will see, on the front - if I take you back to the first map, the regional ecosystem map, you'll see, down the left-hand side, the legend panel, then you'll have a diagonally hatched rectangle, Vegetation Management Act essential habitat. You'll see, on this - on the subject land, there is no land on this property that has been characterised in that way, and then if your Honour goes over to the second map, the essential habitat, you will see, similarly, that there is no land that has been categorised in that way.

And in order to categorise land in that way must be subject to a declaration under the Act. There is no - section 16, "The Minister may prepare a declaration that a stated area is an area of high nature conservation value or an area vulnerable to land degradation." So there's nothing in either of these matters that supports the contention that this is, in any way, essential habitat. It's not set out as such on the map, and there's no evidence of any declaration.

Now, the reason why I've - one of the reasons why I've given your Honour those maps is to illustrate, firstly, the falsity of this idea that seems to be creeping in that you can't clear on freehold land. As I said before, oh, if it were that easy. No-one would get into trouble. You just wouldn't start a bulldozer. You'd know.

But that map shows what you're allowed to do or not to do. It does say, in the bottom, this is not to be used for land clearing. You've got to contact the Department. But you see, the difficulty, even the Department, with all due respect to them, have found themselves in in assessing the amount that was unlawfully cleared in this matter, if there was - there's a report by an expert, Mr Dillewaard, that was disclosed to the defendant. It's not in evidence, but Mr Dillewaard is a remote sensing scientist with the Department.

He made a second assessment of this matter, which has led to, as I understand it, the reduction in the particulars - the amendment of particulars. You'll see the particulars as originally charged were for some 466 hectares of unlawful clearing, now to be reduced to a total of 255.

What's not set out, and I will now, that according to

Mr Dillewaard, the Departmental expert who's assessed the clearing, although [indistinct] produced - there's different people who produced Exhibits 2 and 3. Mr Dillewaard had conducted a second - second assessment on a property scale. So after the charge was brought, there was some discussion between the defence and the prosecution and a second assessment was undertaken by Mr Dillewaard at a property scale.

So Mr Dillewaard has come up with these numbers, that on the entire property during this period, there was 726 hectares cleared altogether, and of that 726, 559 were deemed not assessable, which is there was no offence attached to them, which are the white areas, as I have pointed out in the regional ecosystem map, and that left 255 hectares as unlawful, and that was the basis of the amendment this morning.

And I just want to address your Honour on this further idea, that everyone should know what this law's about after 10 years. It's not as simple, as I've already submitted, but it gets even better when your Honour considers this: since the Vegetation Management Act was enacted in 1999, it's been subjected to 17 reprints, 23 amending Acts, 497 amendments and 179 of those have been retrospective. So it is, for someone who practices in this area, an extraordinarily difficult task to try and find out what is the law at a time when clearing took place.

When it first started, you were allowed to clear anything but endangered. Then, in 2004, the Act was amended such that the other categories came in as well, and now it's down to the point where even what was non-remnant vegetation, but - and this is a very confusing and contradictory part of the legislation, that even though it's submitted that clearing endangered vegetation is a heinous crime, it is possible, now, to have a category of vegetation called endangered regrowth, which is a difficult concept to come to terms with, if clearing endangered vegetation destroys it, but then apparently, it's sometimes a phoenix, like, from the ashes, it can rise again and then must be protected. But that's the legislation, and that's what people have to deal with.

So as I said, it's no point in taking note or trying to take note and trying to navigate your way around your property using that map, when at any given time, even if you manage to fire the lines, it's plus or minus 100 metres of difference. You could be in, you could be out. And when you couple that with the difficulty that, obviously, the prosecution have in determining exactly what was unlawfully cleared and what wasn't.

Now, the defendant produced, or got an experienced consultant to produce, a property vegetation management plan for part of a ballot application. Now, what happened - and I'm - please don't hang me on this. August 2004, that document's dated, but at about that time, clearing - there were - clearing was - of non-remnant vegetation was effectively stopped, but there

was a ballot or a raffle process set up by the Department whereby if you had land that was clearable, and through a process of elimination and assessment, that land was able to be cleared, covered all the performance requirements and didn't cause any degradation, then you could put that land into a ballot, and they had certain amounts of land available to be cleared in certain bioregions, and all the applications went in, and they - they call it a ballot, but the difference between a ballot and a raffle, to me, is a distinction without a difference, but in any event, some were chosen from that up to the amount that was available to be cleared in the bioregion.

And from that property vegetation management plan, there was - in respect of the regional ecosystem, the Department was made aware, from that plan, at page 6, that the application covers areas which are currently mapped as containing endangered regional ecosystem, however, this was a result of incorrect mapping. And it's set out the - what the map said it was, and then, in the opinion of the consultant, what they said it was.

And there are, for instance, clearing drainage lines, the consultants inform the Department that no such clearing was proposed, and then further said the areas contained in the regional ecosystem map do not allow for the remnant extent within drainage sub-basins to be calculated with any degree of accuracy.

But as I said, that map, Exhibit 5, is the law. It can be amended, but - and whether it was amended in this case, I can't submit, but it appears that there hasn't been any amendment since the regional ecosystem map was put together.

Now, with respect to the - this compensation question, people who missed out on the ballot, as Mr Draper did, were - there was $150 million made available by the government to compensate those who suffered loss, because they couldn't clear certain areas of their land anymore. The maximum assistance was $100,000 per property owner. The same consultant made an application to the Queensland - get the name right, Queensland Rural and Regional Adjustment Authority, I think, QRAA, in any event. QRAA, under this scheme, granted Mr Draper $35,100, on the proviso that he contribute $64,900 of his own money. So whilst it may be compensation, it wasn't provided unless he put with that double his own money, and the purpose of that was to control regrowth, which is the non-remnant vegetation, the vegetation in the white, to build a dam, and that was all doled out, as it were, upon the completion of various milestones.

Now, it was under that program that the clearing took place. It's not as if in complete ignorance of the law and in defiance, Mr Draper set about clearing the land as he saw fit. He did his best with the - with clearing the non-remnant, and he's unfortunately strayed into some remnant, according to the map.

The area on Exhibit 2, the rectangular area referred to by

Senior Counsel - is your Honour with me, the blue hatched-----

BENCH: Yes.

MR SHERIDAN: On Exhibit 2 now. Just want you to put - is your Honour familiar with these images at all?

BENCH: Well, I've had limited experience, Mr-----

MR SHERIDAN: Well, the dark green's obviously trees, and the red is not tree country, and the less cover, the more reflectance, the hotter the bounce back, and so - yes, basically - if I could just take you up the - what is the eastern boundary on that rectangular block, you'll see an area there where the clearing has stopped, the blue stopped. It's sort of like a circular sort of an area, where the - see on the eastern boundary.

BENCH: Yes.

MR SHERIDAN: Where it stops, and that patch of the middle of it is a red colour, which corresponds with the red colour through the fence next door. We can infer, from that, that that area in there where the clearing stopped, that is red, was clear, there was no vegetation there.

If your Honour then goes over to Exhibit 3, and your Honour has a look at the corresponding spot, see how on that regional ecosystem map, what was it, RE clearing, version 5, that that area, which, on the image, is to be clear country is all the same colour and comes up as endangered vegetation on the RE clearing. It's not a definitive area by any means, but it's just an example of the difficulty of interpreting what's going on on the ground compared to looking down and trying to make sense of it when you're actually on the ground, because it's the way that the law is written, and the way that it's interpreted in the equipment the Department has is fine, but defendants have to get out there on the ground with a bulldozer and work out where they can go lawfully and where they can't, and as - given the magnitude of the penalties that are sought today, it's a very serious error to make.

So I just want to - and it was - it's in - referred to by Senior Counsel the impact on the clearing, and he's referred to, in his submissions, a number of expert reports. The - this one I want to address you on is the report of Dillewaard, which is provided to defence, and this is - Mr Dillewaard's purpose was to assess the impact of the unlawful clearing on the flora values.

Now, again, this is a desktop assessment. The only inspection or the only material from the on the ground inspection that he relied on was those of the investigating officers who took photographs and GPS points. He then assessed the impact based on - the impact based on what he could see from the remote sensing equipment and his - the data that was available.

Just from page 5 there, I'll just show your Honour where it

starts to go wrong. On page 5 is the heading "Habitats for EDR flora taxa", and I can't help your Honour as to what that means, but the rare species cerbera dumicola has been found in very close proximity on an adjacent property, and the following rare or threatened species have been recorded in the vicinity of the lot plan in question. That's as good as it gets. There's some somewhere that - and as I go through these reports, even though the summary that Senior Counsel has provided in his submissions is perhaps correct, when you dissect them and find out what these experts actually determine, none of this relates directly to the plan in question, and in my submission, to infer these sorts of effects when it will obviously have a significant determination on your Honour's decision of penalty is wrong.

Then on page 8, Mr Dillewaard said a revised map of the regional ecosystems found on the lot plan in question has been completed previously by Queensland Herbarium staff. So the defendant had one regional ecosystem map to go on when he was doing his clearing, and he's been assessed, and the offence has been assessed, and now the impact of the offence has been assessed by way of a revised map.

And again, that cerbera dumicola, at page 12, "The rare species cerbera dumicola has been found on a property immediately to the north of the lot plan in question and very close to its boundary. Also" - I'm over on page 13, "Also, the following rare or threatened species have been recorded within a 20 kilometre distance of the lot plan." So it's getting further away from the subject.

Then on page 13, "No records of rare or threatened flora species listed under the Nature Conservation Act were found in Departmental databases accessed as part of this assessment that intersected with the lot plan in question." After 12 pages of telling us that we've found stuff elsewhere but not here, then finally, no records were found - have been found on it.

The expert, Mr Dillewaard, then goes on, at page 15, to assess the regional - the individual endangered regional ecosystem cleared or impacted by the unlawful clearing, it says, at page 15. Regional ecosystem 11.3.1. Remnant area unlawfully cleared, approximately 110 hectares. This area equates to approximately 0.14 - 0.14 per cent of the remaining extent of this regional ecosystem in existence.

Ecosystem 1149, .08 per cent of the remaining extent. 11.9.1, 0.05 per cent. Regional ecosystem 11.1.4, 0.3 per cent. Regional ecosystem 11.9.5, "None of this regional ecosystem was cleared. It is, however, present in the remnant track partially cleared by the unlawful clearing, and is likely to be adverse affected through edge effects, reduction in track size."

The opening sentence in that paragraph says none of it was cleared, so it is beyond me how an effect of not clearing it is to reduce the size of the track. Regional ecosystem

11.3.2, the area equates to approximately .01 per cent. Regional ecosystem 11.3.25, probably no regional ecosystem 11.3.25 was unlawfully cleared as observed on the aerial photographs. Ecosystem 11.5.9, the area equates to approximately .01 per cent of the remaining extent.

Then flora values, "It is not known whether any rare and threatened species were present in the unlawfully cleared area," so then it comes down from saying it's not known - none are recorded on the property of the whole, and it's not known if any of those flora were present in the cleared area.

Your Honour, the submission on that, when we've gone through it, is that as far as that report goes, and that's been relied on by the prosecution as evidence of the impact on native flora of the clearing, that is the report that's behind that submission, and as I've pointed out to your Honour, that report should be given no weight at all. The best it says that we think there's some somewhere, but not on here.

If we have a look, then, at the impact on the fauna which was referred to, there's a report produced by Dr Smith, and it opens, "Clearing a habitat of fauna is not congruent with the spirit of the Nature Conservation Act 1994." No intention in this report to say that the effect on-----

MR DEVLIN: Your Honour, to save a bit of time, I'm objecting to the selective quoting from the reports, so I'll be tendering them, but I'm objecting to these submissions which are selective in the way they've - are being quoted to the Court. I'm happy to tender both reports, so your Honour can see for yourself which bits aren't read.

BENCH: Thank you.

MR DEVLIN: [indistinct] exception to this style of advocacy. It is unbecoming.

MR SHERIDAN: You could've tendered them when you were referring to them.

MR DEVLIN: Happy to tender them.

MR SHERIDAN: I'm just quoting the bits you left out.

BENCH: The report of Mr Dillewaard will be Exhibit 6.

ADMITTED AND MARKED "EXHIBIT 6"

BENCH: And the report of Dr Smith will be Exhibit 7.

ADMITTED AND MARKED "EXHIBIT 7"

MR DEVLIN: For example, your Honour, the last quotation made on Mr Dillewaard's report, my friend stopped quoting before the sentence, "However it is highly likely that rare species were present on the property." That is an expert opinion. If my friend wants to come here and pillory expert opinion, he should come here with his own expert opinion, and we can have an argument about it in front of your Honour.

BENCH: You should have.

MR SHERIDAN: In response to that, your Honour, I'll just refer your Honour back to Senior Counsel's submissions on paragraph 18, sub-paragraphs (a), (b) and (c). If we go down to Dr Smith's report, paragraph 2, in particular reduction of habitat, endangered bridled nailtail wallaby, that paragraph begins, and again, the second last line, "This species is largely restricted to patches of habitat in this region. The closest known population occurring at Taunton National Park, some 20 kilometres from the property."

Again, that last paragraph, second last line begins with, "Species is largely restricted to patches of brigalow habitat and connectivity proximity of patches is essential to maintaining population movement." If that's a suggestion that this is essential habitat, it's at odds with the essential habitat map and the regional ecosystem map.

Now, if we go over to page 5 of that, your Honour, you'll see that the data we I used was the field inspection report prepared by the complainant. Examined some maps and did a - at paragraph 3, a desktop analysis using the Wildnet Database.

If you go down to the second last paragraph beginning with "WildNet Database." "The WildNet Database is still in a process of collating and getting data. So it is possible the information given is not complete." Then seven and a-half lines of disclaimers. So what it does, it predicates this report using the WildNet Database. That's good. Helpfully, he does, as an expert should, point out the faults that using this has, but then produces a report relying on it, then that comes into submissions as to the seriousness of the offence.

We then have a number of pages of the Nature Conservation Act. Not charged with any offence under the Nature Conservation Act. In any event, in his opening, Dr Smith says that clearing habitat of fauna is not congruent with the sprit of the Nature Conservation Act, and that's as high as it gets. And, given the nature of that report, it's my submission that it should be given no weight, either.

Paragraph 2, of Senior Counsel's submissions he makes reference to the Cogger report, impacts of land clearing on Australian Wildlife in Queensland, authored by Cogger and others, dated 2003, and any submission I make on that report

is that it's not been disclosed to the [indistinct] not before the Court. Therefore the following paragraphs down to paragraph 24 should not be taken into account by the Court.

I've dealt with the fact that this grant of money - it's a stretch to call it compensation, and your Honour was asked to draw an inference that the clearing resulted in commercial gain, given that he's spent a large amount of his own money clearing, and there's no evidence of a commercial gain at all, as there were in those other cases I'd ask your Honour to discount that suggestion as well.

And there's reference to a lease. There was a lease entered into for 10 years. Cattle were moved on to the property. Prior to him actually clearing, my instructions are that that lease was about to be determined and the property's completely de-stocked and that that lease is not operational. There are no cattle on the property and he's receiving no rent under the lease.

If we go to the penalty guide, section 60D, subsection (2) states, "Subsection (1) - the purpose of this section is to provide a guide for a Court in deciding the penalty to impose on a person for a vegetation clearing offence." Subsection (2) "without affecting the maximum penalty the Court may impose. Under the Planning Act for the offence, the Court may take the following levels of penalty to be appropriate in the absence of circumstances of mitigation.

Now, there are mitigating circumstances here. Now, in my submission, your Honour's discretion to have a regard to that section is not enlivened in circumstances where there are circumstances of mitigation.

It commenced on the 28th of March 2003. And it has been in operation since then. I have some - a schedule to finalise prosecutions that I'll hand up to your Honour.

BENCH: Yes, thank you. Exhibit 7.

ADMITTED AND MARKED "EXHIBIT 7"

MR SHERIDAN: Seven.

UNIDENTIFIED SPEAKER: [indistinct].

MR SHERIDAN: Schedule to finalise prosecutions. Don't throw things, Senior Counsel, it's very [indistinct]. Now, your Honour, you see this is a list that was produced by the-----

BENCH: There's two documents there, there is.

MR SHERIDAN: There's two, oh, yes. Yes, your Honour.

BENCH: Mmm.

MR SHERIDAN: There's a freehold and there's a Land Act.

BENCH: All right. Well, the freehold will be - sorry, the Land Act will be Exhibit 7, and the freehold will be Exhibit 8.

ADMITTED AND MARKED "EXHIBIT 8"

MR SHERIDAN: Now, there is a difference - the freehold prosecution's obviously on the IPA. The VMA prosecution's are on freehold land, and Land Act ones are on pastoral leasehold and various leasehold land. It's - the offence is the same; essentially clearing vegetation without a permit.

If your Honour just goes over to page 5 of 8 in the finalised prosecutions. I've got my copy marked, I'm not sure if I have. If I do it - how'd I do it-----

BENCH: Mmm.

MR SHERIDAN: Is your copy marked?

BENCH: Mmm-hmm.

MR SHERIDAN: You'll see the 28th of March 2003, section 60B began by Act number 10 of 2003, so we take the bottom on that page 5 of 8, which is a matter of Brolan, which was determined in the Pittsworth Magistrates Court on the 11th of March 2003, and the one above it, Gough, which was determined on the 8th of May 2003, section 60B was inserted in the Vegetation Management Act between those two. So from - and goes up the page in ascending order, and then column number on the left.

The one's 24 onwards right to the front page, which ends up 53 are matters that have been determined after section 50B [sic] came into operation.

And you will see that this page 5 of 8, from 25 to 31, and there's a column, "Area Cleared.", they were very small areas; nothing over 50 on that page. If your Honour then goes backwards to page 4 of 8, there is nothing - there's a 52, but if you set a top one, which is Walker, from the St George Magistrates Court on the 3rd of August 2004, which is after the commencement of that section 60B, there's 878 hectares there cleared, and you'll see there is a break up underneath it, 313 OC, which is of concern, 546 NOC, which is not of concern, which is now known as leased concern.

If your Honour goes to page 3 of 8, the next one up, the next large one is number 41. Brett Tiemas, I think it is, 200 hectares, which was a combination of endangered of concern and

not of concern. And if you go on to - go on page 2 of 8, you'll see the matter of Keith Glasgow, 37 hectares of endangered, 207 hectares of not of concern. Your Honour, will see the fines in these matters that I've taken you through since section 60B started, there was much less than the matters referred to today, and the penalties sought in today's matter.

We see then, on the front page, number 51, the matter of Thrift, at Charleville, 1,000 hectare not of concern, fined eight and a-half thousand dollars, and then the top matter, Keating, 853 hectares, and a fine of $8,000. Then it stops. The matters that have been determined since are not provided to anyone anymore by the prosecution; that is the only way that one can get any sort of comparative idea of the sort of fines that have been meted out in the past and the circumstances surrounding prosecutions.

Otherwise, in order to find out what fines have been levied for these matters, one would have to troll every Magistrates Court in the state, and then one would not, given that the complainant and the defendant are usually an actual person, would not know what they're looking for.

By way of comparison, in Exhibit 8, page 1 of 6, down the bottom, Acton, Graham William, Moray Downs, was in this Court before Magistrate Hennessy, the 13th of October 2004. If you have a look at the area cleared, 11,830 hectares. If you go down further, 1,821 hectares of endangered, and the fine in that matter was $100,000.

If I could just make submissions on the case of Gordon Penney, that matter had a lengthy history, and the District Court authority relied upon - the Court, her Honour Bradley DCJ, it was an appeal against conviction and sentence. You will note at the bottom of the front page, counsel for the Crown was Mr Gurley and the appellants appeared on their own behalf.

If you have a look at paragraph 5, her Honour says, "The brothers" - that's the brothers [indistinct] - "were represented by counsel in the Magistrates Court, but were not legally represented in their appeal to this Court, although David J Walter of EnviroWild prepared the notice of appeal and the lengthy written submission running well to over a hundred pages."

Paragraph 6, unfortunately, in the notice of appeal not - been having been prepared by someone with legal qualifications are long, some 10 pages, and confusing as are the written submissions. During the appeal, however, the brothers confirmed that they were each appealing against both their convictions and the penalties imposed on them.

Now her Honour then discusses the use of section 60B, vegetate - the penalty guide. At paragraph 9 on page 7 - sorry, paragraph 29 on page 7, she refers to 28 March '03, "Both the Land Act and the Vegetation Management Act was amended to include penalty guides for Courts dealing with offences such

as those committed by the brothers. Guides indicate - dictate levels of penalties based on the number of hectares involved and the nature of the ecosystem affected. The sentencing Magistrate concluded that the guides had no application because they were enacted after the commission of the offence." So the argument about the use of section 60B here was about retrospectivity, and her Honour concluded the Magistrate is clearly wrong in reaching that conclusion, and she refers to the case of R v. Trong, in the Court of Appeal.

So that was the argument about section 60B as far as we could see it there. It was argued on appeal that 60B was not applicable because the offences were committed before it became law. She said they're wrong.

Again, in Gordon Penney, in that same case, there was a commercial aspect. There's no evidence of a commercial gain here, although it's been submitted that you infer it. The matter of Henderson, it was agreed in that matter, and I have distinguished this from the present case, it was agreed in that matter there was harm to cause to flora and fauna. There was an increase in value. There has been no such agreements here. There was no evidence of an increase in value other than your Honour's been asked to infer.

There's another case referred to, Morgan, in Beaudesert, and at page - pages - page 6, line 35 to 40, it was held there that, "Endangered vegetation was impossible or extremely slow to regenerate." That's not the definition of endangered vegetation. It's endangered because there is less than 10 per cent of it in a bioregion at the time of assessment. It's the amount that is there. It's not whether it will grow back or not.

Again, that quote, "Not at liberty to clear their land." As I said at the outset, oh if it were that simple. In Black and Petts, there was 584 hectares cleared, which is twice the amount before the Court now and it was done over a period of four years. This is over a period of a month, and the use of that - those exhibits that I've handed up, the completed schedules, Exhibit 7 and 8, you'd recall a much clearer picture of the way in which sentencing has been carried out since the advent of section 60B, is in my submission, extremely selective now that the Department is not in the habit of providing the Court with all that information when it's readily at hand, and it's only in their hands.

The use of 60B, once it goes past the maximum is worse than meaningless. What happens, they use 60B, and in this case you've been shown by 60B we come up with a number of $732,000, which immediately makes the maximum of 166 look small. The maximum penalty for any offence should be restricted for the worst possible cases. If the legislature wanted to increase the penalties to those levels, it could have done so. It has not.

And if I can just go to Mr Draper himself, I have for your Honour to consider the financial statement of Mr Draper for the year 30th of June 2009, and some other documents which I've provided to senior counsel, and there is one more, your Honour. There's one here which I was given by Mr Draper this morning which is - he's got a part-time job at a sawmill, that's his latest payslip, I don't have a copy of that, your Honour.

BENCH: Have you seen that, Mr Devlin?

MR DEVLIN: Yes.

BENCH: All right. The financial statement for the year ending the 30th of June 2009 will be Exhibit 9.

ADMITTED AND MARKED "EXHIBIT 9"

MR SHERIDAN: Thank you, your Honour. Mr Draper-----

BENCH: And the pay advice will be Exhibit 10.

ADMITTED AND MARKED "EXHIBIT 10"

MR SHERIDAN: You'll see from that financial statement, your Honour, over at page - sorry, they're not numbered, I think I've tabbed the taxable tab there.

BENCH: Yes.

MR SHERIDAN: You'll see last year Mr Draper's taxable income was $18,924. And there's another tab there where I've tabbed a summary of account details from the Australian Government Child Support Agency.

BENCH: Yes.

MR SHERIDAN: In the amount of 5,206. Mr Draper has three children aged 13, nine and five, he's separated from his wife and is going through divorce and property settlement proceedings. The only asset he has is the subject land. He owns no cattle.

Now, if you see the other Suncorp Bank statement that I've tabbed, your Honour, that's a cheque account. You'll see that's in arrears in the amount of $20,000 odd. And you will see the last page is a loan statement, loan account statement. And you'll see the - the loan purposes property development, and you'll see that that loan is in arrears. As at 30 September he owed an amount of $216,000.

So his only income at the moment is that part-time job at the sawmill, and I think from memory, the year to date figure is 4,900 or $5,300 for the year. He works about 16 hours a week there.

BENCH: $5,700.

MR SHERIDAN: 5,700, thank you, your Honour. So whatever fine your Honour determines is going to have extreme ramifications - or extreme financial hardship for both Mr Draper. And he's living at Orange Grove on his own, and surviving by way of the funds generated from that part-time sawmill job. And of course, and I know this occurs in every single instance where a father and provider is fined, the hardship will trickle down for Mr Draper, his estranged wife and children.

This is not a situation at all like the Land Act case that I showed you of someone of the apparent means of Mr Acton where he could, and he did, clear 11,000 acres of vegetation without a permit, including 1800 acres - 1800 - 11,000 hectares - 1800 hectares of endangered and paid a fine of $100,000.

This will have extreme ramifications whichever way you go. As for a penalty, if you do follow the decisions that have been coming from Magistrates Courts in these matters in the last year or so, and I say they've been wrong, simply because I say section 60B doesn't - the discretion to - and you're not even using it, the discretion to use it as a touchstone or some sort of a relativity, doesn't arise in circumstances where there's factors of mitigation.

Even if it does, if your Honour's against me on that, it is at best misleading. All it does is provide an inflated touchstone or end of relativity, which as I've said, makes the maximum fine allowed look very small. And as I submitted before, the maximum - the maximum penalty for any offence should be reserved for the worst possible cases, and this is not one of those. Unless I can assist your Honour, those are my submissions.

BENCH: No, thank you. Mr Devlin, we know the [indistinct] of section 48 of the Penalties and Sentences Act which provides for the imposition of fines, and the factors that must be taken into account in determining what's an appropriate fine, having regard to, I guess to put it simply, the capacity to pay that fine by a defendant.

I think there's been some recent [indistinct], one by Judge McGill I'm aware of, and I think last week Judge Newton made some comment about it too.

MR DEVLIN: I'm unaware of those decisions.

BENCH: Yes. They're in the situation of people who commit the sort of high range drink driving offences were there's a fine - is quite significant but it's appropriate to fine them when their capacity to pay a fine is practically negligible.

The only penalty provision under this Act is of course a fine, isn't it?

MR SHERIDAN: Yes.

BENCH: What did you wish to say in reply?

MR DEVLIN: I've got a lot in reply, your Honour, I'm afraid. Firstly, your Honour, I haven't heard a single submission to the effect on behalf of Mr Draper that he's sorry. Not a single expression of remorse. Instead, the Department who discovered the clearing has been attacked for its selectiveness in the way it's presented this case, and quite unfairly.

I'll start at the beginning. It is suggested that there was a falsity of the idea that you can't clear on freehold land, but there was the submission made that the Vegetation Management Act made unlawful clearing of certain types of vegetation. Well, that submission does not deal with the mis-statements made to Edmiston that the prosecution relies upon that there were permits in existence. It does not deal with the receipt of compensation in whatever form when that refusal was given in 2005 as a consequence, and it does not deal with - does not make any suggestion that the defendant had any regard to any official sources before the clearing had effect.

And indeed, the document which has been tendered, the additional map, my learned friend referred specifically to a provision which says, "Check with the Department." There's not a single suggestion that this man checked with anybody before he went ahead and incurred $73,000 in expenses for the clearing. So this is a man that doesn't have the capacity to pay apparently, but he was prepared to pay Mr Edmiston $73,000 to effect clearing, which your Honour can assume and can - sorry, infer, that he didn't do for his health.

Now, that was one of the submissions made that there was - it was made twice, that there was no evidence that you could infer of commercial gain. Well then, what was the purpose of the clearing? There's no other suggestion made to you as to what the purpose was. Plainly, that submission made twice is a nonsense. Of course the Court can infer commercial gain, particularly from those matters that I have outlined, in particular, that this client was quite prepared to pay Mr Edmiston $73,000. And you can see from the pattern of the clearing, that a much larger clearing was intended, but it was stopped when it was discovered.

To suggest that the $35,000 grant was to perform improvements, it wasn't suggested that, for example, Mr Draper did not receive the $35,000, so it must be the case that he did put $64,000 with it in order to perform improvements on his property. So somewhere in the last couple of years, Mr Draper's got his hands on $73,000 and $64,000.

If my friend has omitted to make the submission that he did not find the $64,000, therefore did not receive the $35,000 grant, let him say so in the clearest of terms. But sleight of hand submissions are unhelpful to the Court.

The way that it currently stands is that the prosecution alleges they received the $35,000. My learned friend submits that the $35,000 had strings attached, namely 64,000 strings. Let him tell you, by way of correction, if he likes, that he didn't receive the $35,000.

MR SHERIDAN: I've not submitted that.

MR DEVLIN: Correct; which means he must have put his $64,000 with it to perform such improvement, as controlling regrowth and building a dam.

MR SHERIDAN: Yes, of course he did.

MR DEVLIN: Well, there you go. My friend now confirms from the Bar table the Mr Draper found $64,000 to do his improvements. It is not known what the property is valued at. It is simply not put before you. His lack of liquidity has been put before you. But it's also been put before you that the value of the property is his asset. And you're not told what the value of that asset is. In other words, what is its value to withstand indebtedness to pay a fine in the ordinary course of events? That's the position everybody finds themselves in that come before the Court charged with a serious offence.

And the prosecution makes no bones about it. This is a deliberate, serious offence. If your Honour would like me to address you on the recent authorities that are clearly concerning you, I would welcome that opportunity. But I'm not aware of those submissions - those decisions at this point.

Your Honour, I interrupted my friend when he took issue - and this is another example of lack of insight as is communicated by counsel on behalf of his client, to suggest, on behalf of his client, that there was no impact or potential impact on flora and fauna, is indicative of a complete and utter lack of insight. And your Honour is entitled to take that into account. I have tendered the two reports that had been referred to, and your Honour can make up your own mind as to whether the criticisms are valid by my learned friend, or completely unfounded, and your Honour, I would submit, will conclude that what he's said at paragraphs 15 and 16 of the outline is a completely true rendering of what those reports say about impacts and potential impacts and likely impacts.

What my learned friend has done is repeatedly selectively quote, and repeatedly - before I got to my feet, he stopped at a point before the expert said on each occasion, "It is likely, however, that there are impacts, et cetera." Anyway, your Honour can see those now, because I've tendered them, those Exhibits 6 and 7.

Your Honour, to submit that the use of the section is not - section 60B of the Vegetation Management Act is not enlivened because where matters of mitigation are relevant is just plainly a nonsense. I'd ask your Honour to look at the terms of section 60B, and it simply says - sub 2, and it's set out page 8 of the second outline on penalty, page 8 of the submission on penalty, "Without affecting the maximum penalty the Court may impose under the Planning Act for the offence, the Court may take the following levels of penalty to be appropriate in the absence of circumstances of mitigation. In other words, without mitigation you can look at that as a starting point and as a guide.

Then at sub 3, which my friend did not refer you to, this section does not limit the matters to which the Court may have regard in deciding the penalty. And this shows the utter bankruptcy of the legal submissions being made by my learned friend. And I say that advisedly. I've been around these Courts a very long time, and to have such a ham-fisted rendering of section 60B is, to say the least, dismaying. And a selective quoting of the section, not to assist the Court, but to somehow persuade the Court that the submissions of the prosecution themselves are bankrupt as to what use can be made of section 60B.

Your brother and sister Magistrates have seen fit to apply it as some kind of guide. If they are wrong, they have not been corrected in any other place. If her Honour Judge Bradley is wrong, she has not been corrected. I made it very clear in the submissions on Dawe that in the submission of the prosecution that is a binding decision on your Honour. For my learned friend to attempt to skirt around Dawe by making this remarkable submission that it was only about the retrospective application of the guide, again, is a complete nonsense. It's about whether the guide is applicable at all in the process that you, this Court and Judge Bradley had to embark upon.

Whether it was retrospective or not is utterly irrelevant to what the task is before your Honour. As for Petts, where they've - the area was twice the amount cleared over four years or whether this was half the amount cleared over a single month is utterly irrelevant. In fact it probably goes against the defendant, rather than for him, and to submit that the recent decisions, which refer to the applicability of the Vegetation Management Act guide are wrong, flies in the face of this, that this Court is bound by Judge Bradley's view of the matter, and might be persuaded by the fact that brother and sister Magistrates have seen fit to take that approach in the matter.

They are my matters of reply, but I do ask for the opportunity, if your Honour has certain decisions in mind that are concerning your Honour about the ability of this man to pay a fine, then I would seek the opportunity to address your Honour on those matters, whether that be done in writing at another time is entirely a matter for your Honour, but I'm quite happy to go and look at the matter if it's going to assist the Court.

But there's one other matter. You have been handed schedules, Exhibits 9 - sorry, Exhibits 7 and 8 - I only have in front of me Exhibit 8 by the look of it, the freehold one. If I can take your Honour to that, because it was the one most extensively referred to. If I take your Honour to page 4 of 8, a fine of $10,000, your Honour will note the vegetation status was of concern and not of concern. Your Honour will note that he clearing was of 878 hectares between March and July of 2001; that's two years before the Vegetation Management Act was enacted, 2003, I think.

It's not known whether the Vegetation Management Act section 60B was referred to at all. The decision in Dawe has been the matter which has led to this approach by the prosecution, and Dawe was decided in 2004, in August 2004. It is entirely appropriate the prosecution bring that authority to your attention. You will note, too, that in the matter of Walker the defendant claimed ignorance of the laws after making inquiries with the department six months before proclamation and being told that remnant vegetation didn't require a permit. That's what the Court accepted as the facts.

The prosecution has fairly and squarely said, and there's been not a word in contradiction on this, in my friend's submissions, has fairly and squarely said this is a most deliberate act. A calculated act. A commercial act. An act that was to cost the man $73,000, after there has been specific refusal of the right to clear.

If I can take your Honour then to Glasgow, on page 2 of 8, $10,000 fine on an area of 37 hectares of endangered and not of concern, 207 hectares. In sentencing, the Magistrate took into account the defendant had contacted Natural Resources prior to clearing, but did not hold that he had acted knowingly.

My friend doesn't refer you to that. He refers you to the level of the fine, which might be explained by the circumstances accepted by the Court. And finally, the matter of Keating, not of concern is the vegetation involved. He didn't mention that, I don't think. The defendant cleared areas in breach of two conditions; mechanical clearing where only chemical was allowed, I take it, and clearing cypress trees 19 centimetres diameter over bark. So obviously there were two conditions of a permit he had.

And the defendant had tried to comply with the permit, but did not adequately supervise the actions of a contractor. I appreciate that it's there for your Honour to see, but would be helpful if my friend had taken you to the facts underpinning the fine, if he wants to make such a big point about comparable sentences on that schedule.

And as for whether the Department has acted in some way by sleight of hand, by not making other decisions available, then your Honour has, and he has the matter of Dawe, in which a certain approach has been made - taken, I mean; the matter of

Henderson, the matter of Petts, he's been supplied with the matter of Winks, which is Mr Morgan's decision, and he's been supplied, I take it, with the decision of your Honour in the matter of Edmiston, which proceeded on a certain basis.

Now, your Honour, that's what I call providing comparable decisions and nailing up the prosecution's attitude to penalty in this case. That is the way it's always been done, and I completely resent the implication here that me in Senior Counsel, or somebody who instructs me has engaged in some kind of sleight of hand in the way you, the Court, your Honour, has been informed of other, what the Crown says, are comparable decisions.

That is our duty to this Court. We have not shirked that duty. We have fulfilled that duty. And I take great exception for the snide comments that were made that somehow since 2006 results in these matters have been withheld.

The Department is very specific about what it says is the appropriate penalty to be applied in today's circumstances. It has put before the Court a methodology, and the District Court has said it is a correct methodology.

I'm sorry I have been lengthy in reply, your Honour, but I cannot let the record remain uncorrected on matters of advocacy of such a nature as I have just witnessed.

BENCH: Gentlemen, for - I think in the circumstances I would invite you to, if you wish, make some submissions on those cases. I will get the citation for you both before you leave today, and - from a logistical point of view it's probably simpler if you both each supply some brief written submissions.

MR DEVLIN: Thank you, your Honour. I'm happy to do that.

BENCH: And I don't know whether you want to appear at the time of sentence by telephone or whether you want to return. There's still another matter, Mr Devlin, that other matter that you argued before me in June.

MR DEVLIN: Yes.

BENCH: I finally got the transcript last week, so I'm in the process of writing that, and I would hope to be able to able to deliver that at about the same time as I sentence this one.

MR DEVLIN: Thank you, your Honour. The - I might add that the - it is an appeal to the - no it must be a review, a judicial review to the Supreme Court-----

BENCH: Of Collins.

MR DEVLIN: -----in Collins-----

BENCH: Yes.

MR DEVLIN: -----is also pending. It may - may or may not be of assistance to your Honour.

BENCH: Yes. I sort of kept track of that, Mr Devlin, and I saw that it was listed before Justice Boddice in-----

MR DEVLIN: Yes.

BENCH: -----in - in, sort of, any way you put it.

MR DEVLIN: Well, I don't think - with respect, your Honour, I don't think either party would blame you for that.

BENCH: Mmm.

MR DEVLIN: Because it's the first time that it's been-----

BENCH: Mmm.

MR DEVLIN: -----due to be decided by - in some respects-----

BENCH: Mmm.

MR DEVLIN: -----by a superior Court.

BENCH: Yes. I - in any event, if it's not delivered by Justice Boddice by the time I finish writing this, I'll simply deliver it and what flows from it flows from it.

MR DEVLIN: Yes. Okay.

BENCH: So is it appropriate for me to simply adjourn these proceedings to a date to be fixed?

MR DEVLIN: Yes, your Honour.

BENCH: And I'll - might be simpler if you just provide to the registry here in Rockhampton any of those written submissions.

MR DEVLIN: Thank you, your Honour.

BENCH: I'll have my clerk give you the citation for those two authorities and then we'll go from there.

MR DEVLIN: Thank you, your Honour.

BENCH: Thank you both for your attendance and your assistance today.

MR SHERIDAN: Thank you, your Honour.

BENCH: Thank you. Adjourn the Court.

THE COURT ADJOURNED