

# Transcript of Proceedings

MAGISTRATES COURT

CORNACK, Magistrate

MAG-183067/05 (2)

DALB-MAG-796/06

DEPARTMENT OF NATURAL RESOURCES

Complainant

and

RICHARD TUDOR KNIGHTS

Defendant

DALBY

..DATE 02/11/06

..DAY 3

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THE COURT RESUMED

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MICHAEL FRANCIS OLSEN, CONTINUING CROSS-EXAMINATION

BENCH: Yes, Mr Sheridan.

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MR SHERIDAN: Thank you, your Honour. Your Honour, could the witness be shown Exhibit 24, specifically map JRA09?

BENCH: Twenty-four?

MR SHERIDAN: Yes, 24 was the certificate that covered-----

BENCH: The certificate and there were some maps. So it might be all of that.

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MR SHERIDAN: Yes. JRA09 is the one that I am looking at specifically.

BENCH: I'll give the witness all of those maps and the two certificates. Sorry they are not in order?-- Thank you.

MR SHERIDAN: And Exhibit 18, please, your Honour?-- Actually, I think I might have messed the order up yesterday, your Honour.

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BENCH: Exhibit 18.

MR SHERIDAN: Now, Dr Olsen, JRA09 purports to be a map depicting regional ecosystem clearing as at version 3.2 certified change?-- Yes.

All right. In the panel at the bottom below the of concern and endangered RE coloured tabs, on the second line, we see Landsat Image Acquisition AEST 19.08.2003?-- Yes.

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Do you see that?-- Yes.

Now, I just want you to look at the - Exhibit 18, which is the map on your left there in the witness box?-- Yes.

And I just want you to look at the - in the top centre of that instruction, if you like, headed 2003 Regional Ecosystem Map, based on 2003 Landsat Imagery?-- Yes.

Now, your inspection was conducted in August 2005?-- That's correct. Yes.

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Oh, sorry. Was it August?-- Yes, August 2005.

Yes. Your report states-----?-- About the 15th, 16th of August, I think were the dates.

-----16th - and your report stated August 2005?-- Yes.

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Both the draft report and the final report. That's correct, isn't it?-- Yes. The final report was sent via email, almost at the end of August, from recollection. Yes.

How long between writing the draft report and the final report? What period of time?-- The one that we were discussing yesterday, that had appendix 5 attached that would have been within - literally, a few days of-----

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I see?-- -----returning from the field.

Yes?-- And it is probably in the - it would have been in the last week of August that I submitted the final.

So the inspection, the draft and final report were all-----?-- Within a period of about, say, three weeks, to two weeks.

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But all during the month of August 2005?-- Yes.

Yes?-- Yes.

Now, this JRA09, that you have before you now?-- Yes.

Do you see on the bottom, "Prepared by J Anderson. Date 14.09.2006"?-- Yes.

And this - the map at your left - Exhibit 18 - do you see-----?-- That was - yes.

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Do you see in the top there, "2003 Regional Ecosystem based on 2003 Landsat Imagery"?-- Yes.

And then underneath, "Date 27th of October 2006"?-- That's - yes. That would have been the date it was retrieved from the automated system, I would imagine. That's the date stamp.

All right. You understand how these maps are produced?-- Yes.

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Right. So this map would be current as at the day it was retrieved and produced. Is that what you are saying?-- Yes. If you put in the request with your lot and plan to the automated system through the EPA website -that date and time stamp is when that is transmitted-----

Okay?-- -----on an e-mail typically.

Oh, I see. Yes?-- Yes.

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So this map is at - this was then received 27th of October 2006?-- Yes.

So this map, in your expert opinion, would be current as at that date?-- That would be correct.

Yes. Okay?-- That's my understanding of it.

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Now, I just want to - when you did your inspection and assessment in 2005, we spoke yesterday - I put it to you that your inspection and assessment of the regional ecosystems turned the regional ecosystem maps, as far as the remnant endangered area - and we talked about the 6.4.1?-- Yes.

It was only five per cent on the maps?-- Yes.

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And after your assessment, you assessed it to be 80 to 90. Is that correct?-- In the area that was cleared. That's correct, yes.

Yes. I just want to draw-----?-- In that part of the polygon that was - that I inspected-----

Yes?-- -----it - those parts were part of much larger - in that document you - we discussed yesterday by author - senior author John Neldner it explains the cookie-cutter operation.

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Yes?-- So that proportionality is derived from sometimes tens of thousands of hectares in one polygon.

I see?-- And that is why you get the proportionality remaining the same-----

I see?-- -----after that cookie-cutter process is undertaken.

I just want to draw your map - your attention to the map JRA09 which is on your right, there. This large yellow area that's - that is the southern block, if we can we call it, of the subject property?-- Yes.

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There's a large area there that is depicted in yellow that is a - that is remnant of concern regional ecosystem. Is that correct?-- That is correct. Yes.

BENCH: What was that one?

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MR SHERIDAN: JRA09.

BENCH: Nine, there's the large yellow-----

MR SHERIDAN: Yes. Large area of yellow, which, according to the legend is remnant of concern.

That's correct, isn't it?-- Yes. That would be the dominant regional ecosystem in that area. That's correct.

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But this map doesn't show the dominant and sub-dominant, does it?-- No. No. Sorry-----

No. Hang on - just-----?-- -----with respect, it shows the dominant one, by default. Yes. Yes. It would show the first one listed.

I see?-- Yes.

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But there is no numbers on this - there is no regional ecosystem numbers on this map?-- On JRA09?

09?-- No.

No?-- That's - no, no. There are no labels on those polygons.

No labels?-- That's correct.

10

So it is impossible to determine, in any of the regional ecosystems that are purportedly depicted by this map, what the constituents of those polygons are, isn't it?-- Not on JRA09, no.

No?-- That is correct.

If we have a look now, at the map on your left, which is Exhibit 18; the 2003, that was current as 27th of October 2006 that large area that is depicted in yellow as remnant of concern is depicted in this map as remnant not of concern, isn't it, in green?-- That is correct. Yes.

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Can you explain how a map that was produced - JRA09 - on the 14.09.2006, can be so fundamentally different to the map that was produced on the 27th of October 2006?-- I can't, because I didn't produce the maps. So - yes. I don't - can't - I don't know the reason for the-----

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You're an expert at looking at these-----?-- Yes.

-----and interpreting regional ecosystem maps?-- Yes.

Can you explain why such a stark difference would occur in two maps that are apparently produced such a short period apart?-- The only - or one of the explanations could be that the status of one of the regional ecosystems depicted on the 27th of October map, has changed from not of concern, to of concern. But that could explain-----

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It has changed from of concern-----?-- From not of concern on the 27th of October to of concern-----

-----on the 19th of September?-- -----on JRA09.

Prior-----?-- But these status - oh, sorry. It was just prior to-----

This is the first one; the 19th - the JRA09 was prepared and checked-----?-- I see. Sorry, yes. 21st of the 11th.

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-----on the 14th of September 2006?-- It was based on the mapping on November 2002. Is that - is that - am I reading that correctly, sorry.

Where are you reading that from?-- The 21st of 11th 2002. It says version 3.2 certified change.

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Yes?-- Currency 21st of 11th.

Yes?-- Well, perhaps the converse occurred. The of concern regional ecosystem, its status changed to not of concern-----

Not of concern?-- -----or the assessment of the regional ecosystems in those polygons altered.

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Status can change from one map to another, just like that?-- Status can change, depending on when changes go through and they are changed on the regulations. They have got to be changed through an Act of Parliament, but the status of the regional ecosystems do change from - regularly, from time to time. That's correct. So that could explain the difference in the status of the regional ecosystems depicted here.

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Changes over time, through map versions; would a landholder be aware of that?-- Not necessarily, no.

So-----?-- I'm not aware of the processes of notification. Yes.

That's fine. Now, just back to your assessment of the regional ecosystems-----?-- Yes.

You - the change in the assessment that you made, as a result of your inspection, that was never - those findings were never communicated by you, at least, to the EPA, who make the regional ecosystem maps?-- The data was presented in the standard format for map amendment requests. That was never submitted to the Queensland Herbarium. No.

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Why not?-- Not that I am aware.

It was never submitted by you?-- It was never submitted by me, no.

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And you are not aware if it was ever submitted by the Department of Natural Resources?-- I am unaware if it was.

Would it be normal practice that such a stark - if that is the right word - or such a significant change to the regional ecosystem between the way it was mapped when you conducted your inspection and then what - the way you assessed it, should not that have been transferred - transmitted to the EPA so that the map could be updated?-- If there was a dramatic difference in the regional ecosystems, but the regional ecosystem that I assessed, being on those clay sub-states - the clay plains, was the regional ecosystem that was depicted at the time on the current certified mapping.

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That-----?-- That's 6.4.1. The smaller inclusions or proportions of 6.4.2 and 6.4.3 - and given that the status

because - and I am talking eight or 80 hectares. It's straighter than 800 hectares and even if it was all not of concern, it's still 800 hectares of remnant vegetation and the areas that I looked at specifically were - regional ecosystems were a component of that original polygon, the pre-clearing polygon.

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But you changed the depiction in that regional ecosystem map of 5 per cent of 641 to over 80. Isn't that a significant-----?-- In the areas that I investigated, yes.

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Isn't that a significant change, though?-- Not necessarily if you understand the way these maps are created. It's just that those proportions and those clay plain proportions of that polygon, which were specifically the areas that were cleared, it was the clay plains were cleared, not any alluvial plains or tertiary sand plains, land zone 5. That's what I saw was 6.4.1, as dominated by regional ecosystem 6.4.1 which was part of that original polygon.

20

But given that yesterday when we compared the field sheets from Neldner, the standard procedure, the standard operating procedure?-- You showed me a form, a - one page of a form, yes.

Yes, which you agreed beared no resemblance to the forms that you use?-- Or the ones that the Queensland Herbarium use either.

Wouldn't it be-----?-- The forms that the Queensland Herbarium use are the same as mine because they were the Queensland Herbarium's form.

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Isn't Neldner, you said, was the standard operating procedure and the basic fundamental document?-- Yes. Yes. They would use those forms for a different purpose of field assessment.

So wouldn't they - your findings and your assessment, even though you didn't refer to Neldner anywhere in your report as a source document, and the field sheets that you used to tabulate, if you like, or record your assessment were at odds with Neldner - wouldn't it be impossible for the EPA to update a regional ecosystem map based on your inspection and assessment?-- No, because they are the herbarium forms. They are the forms you submit for a map amendment request.

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So the herbarium use a different forms - different format, different field sheets to what appears in Neldner; is that what you're telling us?-- For a map amendment request, that - those forms are supplied by Peter Taylor who is responsible for map changes and the data from those is standardly incorporated into Corveg, C-O-R-V-E-G, which is the database for regional ecosystems across the state. And that is the standard data sheet for submission for map amendment requests to the Queensland Herbarium.

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So if I could just take you to page 6 of your statement which, I think is - yes, thank you. It's at page 5 of the draft report, I'm not sure what page it is in the final report.

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BENCH: Why? Don't you want the doctor to look on?

MR SHERIDAN: I beg your pardon, your Honour?

BENCH: Don't you want the doctor to look on where you're talking about? Is it a simple question?

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MR SHERIDAN: Yes, it's a simple question, your Honour.

BENCH: Okay.

MR SHERIDAN: You refer to - you say, on page 6, "Map 1 indicates the extent of pre-clearing regional ecosystems that were allegedly illegally cleared from areas mapped at remnant vegetation at the time of the alleged offence."?-- Yes.

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Map 1 is not included in-----?-- That's correct. Now, there was a [indistinct] and I didn't append the JPEG file of the mapping that was prepared by Reece - my apologies, your Honour, I've forgotten his surname - but I sat with the officer, the GIS officer, in the Toowoomba office, and we digitised those polygons but that wasn't - and obviously it was inappropriate, once the report had been tendered to, you know, do a - add in a supplementary map. But from - I understand that that map has been submitted in earlier evidence for the - at an earlier hearing, from what I understand.

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Well, there's nothing before the court, Doctor. This map 1 has never been disclosed to the defence?-- Well, it may not be labelled as "map 1" with the material that Reece prepared, your Honour.

BENCH: I don't think there has been a witness called "Reece," has there?

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MR SHERIDAN: No, your Honour?-- No, he was the fellow that prepared the mapping product that was to produce map 1.

This fellow called-----

BENCH: Is that being produced, Mr Wilson? Is it an Exhibit?

MR WILSON: No, I don't know, your Honour. I'll just have to-----

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BENCH: Well, if you don't know, it must not be, then.

MR WILSON: No. Well, can I take instructions on this from [indistinct]?



WITNESS: There was a problem with the electronic matching and to embed the - because it's a large file, your Honour - to embed in the report.

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BENCH: So you couldn't get it into your statement?-- No. Well, the statement didn't have any of the data or the photos. So, yeah.

MR SHERIDAN: So map 1 is referred to in your draft statement?

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BENCH: Hang on, we haven't heard from Mr Wilson yet.

MR SHERIDAN: I'm sorry.

MR WILSON: Yes, your Honour. Apparently it is made up as a working document but I'm unsure of its fate.

BENCH: So it has not been tendered?

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MR WILSON: I don't think so.

MR SHERIDAN: Thank you, your Honour.

So map 1 is referred to in the draft report and was referred to in the final report and-----?-- It was ultimately never embedded into the report; that is correct.

Well, why then did you refer to it in the statement that you swore on-----

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BENCH: Well, the doctor probably thought it was going to be in evidence some other way - that's what he said?-- That's correct, your Honour. Yes. Map 1, your Honour, was simply a delineation of the areas that were alleged to have been illegally cleared. I would have, I think, correctly, assumed that that would have been entered in evidence at some stage in the process.

MR SHERIDAN: And it was the basis of your report?-- It was at the basis of the areas that I survey in the field for my report. Yes, that's correct.

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Thank you. Excuse me a moment. I'll just take you to-----?-- If it would assist, it's the blue hatched areas on those other images you showed me. Yes.

Well, could we just go to your statement and I will get the witness to look on, please, your Honour.

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BENCH: The doctor's statement or his report? Because I don't have his statement.

MR SHERIDAN: I see.

BENCH: That's not an Exhibit.

MR SHERIDAN: No, perhaps the report, then.

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BENCH: But I don't know whether Dr Olsen has got his own statement.

Have you got both down there?-- I do have, your Honour. I don't have all of my report because I didn't print all the curriculum vitae and everything but I've got the text and the photographs.

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I don't think you're going to be asked any questions about that but you may be.

MR SHERIDAN: At page 5, under the heading Discussion and Conclusion - that's page 5 of your report?-- Yes. Yes.

Down the last paragraph?-- Yes.

The column, Alleged Clearing - Alleged Illegal Clearing-----?-- Yes.

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It goes into the penalty that might be appropriate should - well, it doesn't say "should the defendant be convicted," but the penalty that might be appropriate. That paragraph and those opinions there are beyond your area of expertise, aren't they?-- I wasn't trying to pre-empt the court's decisions. I was just illustrating that, perhaps, if it was worded better - even it was 800 hectares of not of concern regional ecosystem, it exceeded that.

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With respect, Doctor, that wasn't the question?-- Yes.

That paragraph and what it contains in respect of penalty are beyond your area of expertise?-- Yes, hence, why I referenced it to the DNRM data 2005.

DNRM data 2005. Which DNRM data 2005 is that?-- It was - I requested how the penalty is calculated.

Who sent it - who from?-- Mr Craig Elliott from the Department.

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And was it his instruction that you included that in your report?-- No, I did that on the basis of trying to provide to the court an idea of the quantum of the alleged clearing, yes.

And the penalty that might be imposed?-- Well, the relativity of it, yes. That's correct.

Why wasn't that paragraph, then, in your draft report?-- Because I didn't have that information at that stage. The same as appendix 5 was material I was wondering - for the Magistrates Court's jurisdiction. Again, that-----

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BENCH: Well, if you - to save you cross-examining any further, I wouldn't take that into account and that's inappropriate; it's not referenced to any other decided

authorities from any higher court and it's not relevant to a finding of guilt or otherwise, and really shouldn't have been there. So I don't think the doctor was being called as a counsel on a sentence, he was being called as an expert on something else. So if that saves some time you can disregard it.

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MR SHERIDAN: Yes, your Honour, it does. Excuse me, your Honour.

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If you could just recall the two notes that you had before you before?-- Yes.

They were Exhibit 24 and Exhibit 18. Do you still have them?-- Yes.

Isn't it the case that the map at Exhibit 18, the 2003 regional ecosystem map-----?-- Yes.

----- as compared to the map JRA09?-- Yes.

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Isn't it - given the absence of any regional ecosystem identifying codes on JRA09 as compared to the codes that appear on the map on your left, which is Exhibit 18?-- Yes.

Isn't it the case that Exhibit 18 would be a more reliable map than map JRA09?-- I'm not certain in what respect, because the polygons are identical. That - the remnant polygons are the same polygons.

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But there's no - on JRA09, there's no identification at all as to what-----?-- The same polygons are not labelled, that's correct.

Yes. And except for the fact one - the yellow, as we discussed before, is termed "remnant of concern" in JRA09 and then "remnant not of concern" in Exhibit 18, the 2003?-- That's correct.

That's all, thank you, your Honour.

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BENCH: Thank you. Any re-examination?

RE-EXAMINATION:

MR WILSON: Yes, your Honour, just a couple of things. Doctor, my friend mentioned page 101 in this methodology report?-- Yes.

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Have you got a copy of that report there?-- I don't, but I'm familiar with the document.

BENCH: I've got one up here, I think. Do you want this one?

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MR WILSON: Exhibit number 27?-- That was the first page of a series of forms. Thanks, your Honour. Yes, that's the first of a series of pages that follow through to page 107.

Now, my friend said that this one is different to the one on your report?-- Yes.

Can you extrapolate on that?-- The reason being that as we have type specimens to identify the first time one describes a plant, you also have a type site for a regional ecosystem, and this form and the many pages of that form are used precisely for that. It's not a form neither the Queensland Herbarium, any other practitioner, or I, would ever use in the field to do what they call, "catenary sites" which are - which is the data the Herbarium itself uses to assess and refine regional ecosystem mapping. So this is not an appropriate form for the purposes for which I gather data, or for which the herbarium gathers data, and this form is rarely filled out by the Queensland Herbarium or EPA officers in the field. It's just not an appropriate form for the sort of assessments and analysis you do in the field.

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Okay, thank you. Now, I'll just take you back, if we can look at JRA09 and Exhibit 18, again, which, I think, you still have in front of you, do you?-- No, I just handed that back.

BENCH: No, he gave them back.

MR WILSON: Sorry.

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WITNESS: Sorry, I was a bit pre-emptive there, your Honour. Thank you.

BENCH: You want Exhibit 18, as well? Is that what you said?

MR WILSON: Yes, please.

BENCH: Thanks.

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WITNESS: Yes?

MR WILSON: Now, my friend drew your attention to the changes from of concern to not of concern?-- Yes.

Yes. Now, did you investigate those areas?-- Only within the blue hatched areas. Yes, and the periphery of those blue hatched areas.

When you say the blue hatched areas, you mean the-----?-- On JRA09 there's a blue hatched area, which, in the legend, is identified as cleared areas not exempt.

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Okay. With those cleared areas, did their status change?-- Well, they're - on JRA09, some of them are coloured "of concern" on JRA09, and they're coloured "not of concern"

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on the 2003 regional ecosystem map, Exhibit 18. But my assessments-----

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Within their hatched areas-----?-- All of those hatched areas had a combination of clay plains and sand plains. So they were a combination of "not of concern" and "endangered" vegetation. There was a mosaic. So it was a combination of the two. I also found some areas of poplar box on clay plains, which is an of concern regional ecosystem. So it covered the full spectrum from endangered, of concern, and not of concern, but quite often, these systems are quite interdigitated.

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BENCH: Interdigitated?-- Yes, they're a little bit like fingers running one into the other and, hence, the difficulty of differentiating some of the internal variation at a bio-regional scale.

MR WILSON: I will just show - could the witness see - you said, there's 12, 13, 14, 15, 16.

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BENCH: Yes. You don't want 17, as well.

MR WILSON: 17.

BENCH: Could you please take them to the doctor. Thank you?-- I'll just hang on to them until we're done.

Yes, you had better hang on to them?-- Thanks.

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MR WILSON: Now, in relation to the hatched areas, can you tell the court if there has been any particular changes within those hatched areas, in relation to regional - RE status?-- Within the hatched areas, I certainly didn't find any evidence of regional ecosystem 11.3.28. That's a grassland ecosystem. Generally, you don't clear grasslands by knocking over trees. As I mentioned yesterday trees and grasslands are incompatible in the context of regional ecosystems.

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I'm talking more-----?-- So there was no - they were dominated by clay plains which are the endangered regional ecosystems 6.4.1.

Yes. Well, was there any changes in those series of regional ecosystem maps in relation to the hatched areas?-- Yes, and for Exhibit number 14, the grassland was removed from that polygon. Again, this is partly an artefact of the cookie-cutter method of yielding the remnant coverage from the pre-clearing coverage, and that's - the process is fairly clearly outlined in the John Neldner document. And obviously, there was the re-assessment because it was covered in woody vegetation with no grassland, and also the alluvium was removed. This is particularly in the south-eastern corner of the property. It's now land zone 4 and 5, which is what I observed in the field.

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I'm talking about the hatched areas?-- Yes, that was in the hatched areas in the south-east corner of the property.

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Okay?-- And that change is reflected throughout the other maps. The more recent mapping has land zones 4 and 5 with lesser areas of land zone 3 in the hatched areas. In the northern north-north-west of Ferntree Road, again, from what I detect here, the grasslands have been removed because it was fairly clearly on pre-clearing, and post-clearing it was woody vegetation, not grassland. So it was woody vegetation that was cleared, I think. That is reflected in those map changes.

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Okay?-- Once again, the component of grasslands may have been an artefact of pre-clearing on a much larger scale. It might have been a polygon that extended some tens, if not hundreds, of kilometres across alluvial plains and other landscapes.

Right. Thank you?-- I probably - to simplify that-----

MR SHERIDAN: Your Honour, I object. Your Honour, the witness hasn't been asked a question. He finished the answer to one question, and seems to be running off

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WITNESS: Sorry, I was just trying to simplify all that - the technical aspect of it. And that is, that the actual status hasn't changed on these maps in relation to those regional ecosystems.

MR SHERIDAN: I think the witness is talking to me, now, your Honour. I'm not sure whether he is answering a question from Mr Wilson, or what's happening.

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MR WILSON: Your Honour, he just clarified the answer. It was rather technical the first time. I was having difficulty-----

BENCH: Thank you?-- Sorry, your Honour, I was trying to make it simple in relation to the colours.

Just let Mr Wilson conduct his case, because you might say something he doesn't want you to - he's not asking you about, so?-- Certainly, your Honour.

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He's in charge.

MR WILSON: Yes, I was asking about the status. Could you just clarify that, again?-- Well, the status hasn't changed. It's the labels on the polygons have changed, as a consequence of those assessments.

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So the status was and-----?-- The status is still "endangered" and "of concern". None of these maps indicate the fact that there are "not of concern" dominated regional ecosystems in the heart of the subject land.

Your Honour, I was seeking to tender these documents as the maps. It might be convenient if I did them, now, so that if Mr Sheridan had any questions of the witness-----

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BENCH: Well, now is not convenient, because you've finished your re-examination.

MR WILSON: Okay. Well-----

BENCH: If you were going to invite Mr Sheridan to cross-examine, you would have done it at the close of your evidence-in-chief.

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MR WILSON: Okay.

BENCH: I thought we had an argument about those maps and you had withdrawn them.

MR WILSON: I did, your Honour. That doesn't mean to say that I can't seek to have them tendered again, does it?

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BENCH: What, you think I'm going to sit as an appeal court on my own earlier ruling?

MR WILSON: Well, I am going to seek them under a different provision.

BENCH: Okay, well, you had better do it now while this witness is here, in case Mr Sheridan wants to cross-examine this witness, if they go in.

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MR WILSON: Yes, your Honour.

BENCH: And of course, you will have to be prepared to recall each of your other witnesses if you are wanting them tendered. If Mr Sheridan is prejudiced, then he needs to cross-examine any of the others. So off you go with your application. It would have been better if you did all of the application in one go, though. Or if you thought I was wrong, if you rushed off to the Supreme Court to get some authoritative decision about it.

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MR WILSON: Well, your Honour, I'm just seeking to tender them under section 65, maps or charts, "Where in the proceeding, there is a question of territorial limits or situation of any area or place"-----

BENCH: Territorial limits? We're not on the high seas here. We're out at Bollon.

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MR WILSON: "Or situation of an area or place."

MR SHERIDAN: The situation of the area is not in question, your Honour.

BENCH: Well, no, this is about zoning, not about mapping.

MR WILSON: Well, the RE situation.

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BENCH: What's the section?

MR WILSON: 65-----

BENCH: I'll hear your submission, I'll hear Mr Sheridan's response. I'll make a ruling.

MR WILSON: 65 of the Evidence Act, your Honour.

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BENCH: Sorry, section?

MR WILSON: 65 of the Evidence Act.

BENCH: I see I should have taken double my blood pressure medication this morning.

MR WILSON: 65(2), "In any proceeding, a map, chart or plan purporting to be issued or published by any Department of the government or the State or any officer thereon who discharges the officer's function, shall upon its production be sufficient evidence of the matters stated or delineated thereon until the contrary is proved." 65, sub (2).

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BENCH: Okay, hand them back up here again. That's the end of your submission, is it? Do you want to have another look at these, Mr Sheridan, before you make your submissions?

MR SHERIDAN: Another look?

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BENCH: Yes, did you have a look yesterday?

MR SHERIDAN: Yes, briefly, your Honour.

BENCH: Okay.

MR SHERIDAN: But they have not been disclosed.

BENCH: Well, you had better tell me how I can admit into evidence a document that has got printed on the top in red, "Only For Use By Government"? How can that be used in a court?

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MR WILSON: Under section 65, your Honour, it's only as to the reliability of that map.

BENCH: Isn't there one that has got red on the top, "For Government Use Only"?

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MR SHERIDAN: Yes, your Honour, yes, but it's only-----

BENCH: No different.

MR WILSON: Your Honour, I would say that these maps are in evidence but not with the titles of RE 2.1 and RE 3. They're only for clarification. There's nothing new in them.



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BENCH: Well, it looks like a lot of new information to me.

MR SHERIDAN: Your Honour, these are the maps that we had the argument yesterday. They were withdrawn yesterday. They are - if they are, as my friend submits - one is marked, your Honour, they're both marked with Texta, as for or by whom I don't know. As my friend suggests, they're - I forget what he exactly said - no real use or-----

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BENCH: They're for clarification. They don't contain any new material.

MR SHERIDAN: For clarification. Well, they're of no probative value. On the back of it they appear to have been certified yesterday. They were not - they have not been disclosed to the defence. We do not have copies of them. I first saw them briefly yesterday. I have now seen them briefly today. They're more prejudicial than probative, and as your Honour said yesterday, if we are to continue in this matter, there is to be no more of these undisclosed documents to be tendered in evidence. As I see it now, it would be much more prejudice - my client would be prejudiced by the admission of these maps into evidence, and if they're just for clarification, they're of no probative value. In my submission, your Honour should rule them inadmissible.

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BENCH: What do you say about that section of the Evidence Act?

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MR SHERIDAN: Well, section 65(1) clearly doesn't apply. It does purport to be issued or published by a Department of the government or the State, by an officer in the discharge of his duty. And as far as being "sufficient evidence of the matters stated or delineated thereon until the contrary are proved," I go back - excuse me, your Honour. I will just get the statute. The Vegetation Management Act, in the schedule dictionary, defines a regional ecosystem map. That is what this document apparently purports to be. In schedule 10, a regional ecosystem map (1), "A regional ecosystem map means a map certified by the chief executive as the regional ecosystem map for a particular area, maintained by the Department for the purpose of showing for the area (i) remnant endangered regional ecosystems; and (ii) remnant of concern regional ecosystems; and (iii) remnant not of concern regional ecosystems and the numbers that reference regional ecosystems."

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Both these maps purport to delineate dominant and sub-dominant categories of regional ecosystems, remnant endangered regional ecosystems, and dominant and sub-dominant categories of remnant of concern regional ecosystems, remnant not of concern regional ecosystems, plantation forest and a dam or reservoir. In my submission, these maps do not comply with the definition of a regional ecosystem map as laid out in the schedule Definitions of the Vegetation Management Act, and are therefore unknown to law. As to the ramifications of a person

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who certifies them as a regional ecosystem map when, in fact, they don't comply with the definition of a map according to the Act, I can't comment.

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BENCH: Can you not screw them up, roll them up, so tight, because I need to have a look at them, thank you. Well, one of them would be a publicly available document but one wouldn't. The one that's marked "For Government Use Only" is not a publicly available map, is it? It's only for use, obviously, for government purposes?

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MR SHERIDAN: Aren't they both marked?

BENCH: No, only one is.

MR SHERIDAN: Right.

MR WILSON: That's true, your Honour, but even under that section 65, I would say that that doesn't matter. That just clarifies the situation.

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BENCH: How can it clarify it? If it says "For Government Use Only," it's not publicly available information and it's not a publicly available map. Why do you need two?

MR WILSON: Well, one is version 2.1, the other one is version 3.

BENCH: So?

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MR WILSON: So they're the relevant maps.

BENCH: What about all the other versions we've seen?

MR WILSON: Well, I'll deal with them-----

BENCH: 3.2, 2 point something else.

MR WILSON: Yes, I'll deal with that in my summing-up, your Honour, with those maps. The other thing I was going to say is, whether it's publicly available or not is not a - I mentioned in section 65 sub 2-----

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BENCH: Well, it can't be the proper map if it has got "For Government Use Only" on it, and someone is supposed to be able to work out what happens - what is happening in their area.

MR WILSON: Well-----

BENCH: Can they?

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MR WILSON: Well, I am not suggesting that it is for that purpose. I am saying, for the purpose of evidence, of what the regional ecosystem was.

BENCH: Well, that is only useful to me, if someone can find out what it is. If it says "For Government Use Only", it may only be a draft.

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MR WILSON: There is a-----

BENCH: So are you going to call whoever this Adrian Jefferies is?

MR WILSON: No, I wasn't planning to, your Honour.

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BENCH: I think your point about whether it is a regional ecosystem map is an interesting one, that needs to be decided in the case, Mr Sheridan, and I hear your objections to these documents. I am going to overrule your objection today, and admit them into evidence, but that doesn't mean I have formed a concluded view as to whether they provide any evidence that is of assistance to the prosecution in this case. Because if I find - I know you have made a submission that they are unlawful. While I don't think I am with you on that point so far - but they may not be - they may not constitute a regional ecosystem map, if they fail to comply with the legislation. So while I wouldn't say that they are illegal, they may not comply with the law. So if that is the case, then they won't be of any use to the prosecution. That's a matter to hear full submissions on, and for me to make decisions on. I would have thought that was an important point in this case, that shouldn't be determined just by me refusing to accept them into evidence. So I am going to admit them into evidence, and mark map 2.1 as Exhibit 27.

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ADMITTED AND MARKED "EXHIBIT 27"

BENCH: And map version 3 as Exhibit 28.

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ADMITTED AND MARKED "EXHIBIT 28"

MR SHERIDAN: Could we provided with copies of those, your Honour? They have never been disclosed.

BENCH: Yes. You certainly can. I make an order that you provide two copies of those today, after I have marked them. I will need colour copies.

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MR WILSON: Yes, your Honour.

BENCH: Otherwise, you can get someone to bring some over from whoever printed these out. Yes, Mr Wilson.

MR WILSON: Thank you, your Honour. Can we - do you want us to take those maps to get them photocopied?

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BENCH: No. I would have rather you had brought copies with you, because I have marked them as an exhibit, now.

MR WILSON: Okay.

BENCH: So I am not going to - if I give them to someone who is not an officer of the court, how have I got-----

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MR WILSON: Yes, okay.

BENCH: Are you going to give me an undertaking you will return them in exactly the same condition?

MR WILSON: I will, your Honour.

BENCH: Thank you. I would just like to take an adjournment. I have an administrative difficulty, and that will give you a chance to get that. Thank you.

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THE COURT ADJOURNED

THE COURT RESUMED

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BENCH: Thank you. You may be seated. I am sorry about that break. We just had a little problem at home, so we will just continue on.

MR SHERIDAN: Thank you.

MR WILSON: Thank you, your Honour. I made inquiries about getting copies of these maps. We just can't do it today. I apologise.

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BENCH: You must be hell-bent on paying all those costs you are paying. Well, do you need them full size? Can they be - because the whole of it doesn't - the section that applies to this prosecution is only what is on a A4 sheet.

MR SHERIDAN: Well, it would be good to get some sort of a copy of them, so I can have a look at them, your Honour.

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BENCH: Well, I don't know if there is a colour copier out in Dalby. There must be a colour copier somewhere, and there must be - you must be able to do a copy of those maps.

MR SHERIDAN: They appear to be copied yesterday, I think, your Honour. That's when they were certified. I don't know when they were done.

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BENCH: Well, there has got to be a colour photocopier that can colour photocopy those big sheets somewhere in Dalby in some government department.

MR WILSON: Well, apparently they have tried the council-----

BENCH: Anyway, I don't want to hear about it. I want to continue with the case. Did you have - did you make use of that time by looking at those things, or I suppose you couldn't because they were gone.

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MR SHERIDAN: Yes, your Honour.

MR WILSON: They were back here, and I offered, your Honour.

BENCH: Thank you.

MR SHERIDAN: Yes.

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MR WILSON: I did.

MR SHERIDAN: Yes, I know you did. Thirty seconds, your Honour. Beauty.

MR WILSON: A couple of minutes. About five minutes, okay?

Witness, could you look at JRA09?-- Yes.

And what's the currency date of the RE mapping in that document?-- 21.11.2002.

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Now, have you got Exhibit 14 and 18 there?-- 14, 18 - yes.

What are the currency dates of those documents?-- Exhibit number 14 says, "Plotted the 13th of November 2002." Exhibit number 18 was the 27th of October 2006.

Can you tell the court if there is any difference between the line work between Exhibit 14 and JRA09, on the southern subject block?

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BENCH: Well, he won't be able to do that unless Dr Olsen has seen them before and spent a lot of time checking it out?-- There's only a few polygons, your Honour, so - no, they're the same polygons. There's only five polygons in that area south-east of Ferntree Road.

Thank you?-- And they're the same polygons on Exhibit 18.

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Okay?-- Except for the cleared areas in that eastern southern area, of course.

Okay?-- So that's the - and I will just have a look at the labels. The labels have changed between Exhibit 14 and Exhibit 18 in that large area that has changed from yellow to green, with dominant community, 6.3.14, and as I mentioned

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previously, the change in colour, the status of regional ecosystem 6.3.14 would appear to have changed between the 13th of November 2002 and 27th of October 2006. Hence the change in colour. And that's the dominant regional ecosystem which is the one that - its status defines the colour depicted on the map.

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And why was that? At what period of time was that?-- Well, there's four years between these two, that I can see.

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Could you tell the court why the RE status might change over four years?

BENCH: Might? So we're dealing conjecture and possibilities?

MR WILSON: Why the - could you tell the court why the RE status did change over four years?-- The RE status is derived from comparison of pre-clearing extent to remnant extent, and it's based on a simple formula of 30 percent, 10 per cent, and 10,000 hectares. It's a spatial model. If, during map refinements, more of a particular regional ecosystem is found in the remnant coverage, it can change status, and it can go up or down. So it's purely a spatial model, your Honour. If they find more remnants, usually through finer scale mapping, it can breach the threshold of 30 per cent and go from of concern to not of concern, which appears to be the case for regional ecosystem 6.3.14 in that large central area.

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I've no further questions.

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BENCH: Okay. Well, I'm going to allow you as much cross-examination now as you would like, Mr Sheridan, seeing as there's a whole pile of new material being adduced during re-examination.

FURTHER CROSS-EXAMINATION:

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MR SHERIDAN: Dr Olsen, you said, "That the status of the dominant regional ecosystem defines its status on the map? Is that correct?-- Defines the colour that the individual polygons are depicted on the map. Yes.

Okay. So those, if you've got - my friend referred you to it, Exhibit 14?-- Yes.

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If you have a look down in the south-eastern corner?-- Yes.

We have 654/644/641?-- Yes.

And the 641 is the endangered regional ecosystem?-- Yes.

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And it makes up five per cent of that mixed polygon?-- Yes, in what would have been that polygon in the pre-clearing extent - yes.

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If what you just told the court is true, "The status of the dominant regional ecosystem defines the status on the map," shouldn't 654, being on this map, Exhibit 14, 80 per cent of that polygon - shouldn't that polygon be coloured in the relevant colour to 654 and not 641?-- The colour scheme used on these maps defaults to the highest status within those mixed or heterogenous polygons.

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Well, that's at odds with what you just told us before. I just want to confirm this?-- Sorry. I should have clarified. If there was a sub-dominant of a higher status, it would be indicated - yes.

So that is different now to the answer you just gave Mr Wilson?-- I was referring to the dominant regional ecosystem and it is the higher status-----

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The higher status. So it has only got-----?-- That is why if you have an endangered sub-dominant, that is the colour it is depicted, yes.

Sub-dominant. This sub-dominant - now, you understand the definition of regional ecosystems, don't you?-- Yes, as defined in the Act, yes.

As defined in the Act. Is the regional - is sub-dominant remnant endangered regional ecosystems defined in the Act?-- I would have to have a look at the Act. I am not-----

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All right. Are any sub-dominants of any those regional ecosystems defined in the Act?-- The regional ecosystems themselves are defined in the Act.

Yes?-- In the regulations.

The sub-dominant. This category of sub-dominant. Are you aware?-- I would have to have a look at the Act. I am not aware of that, no.

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So, all those regional ecosystem maps appear with the sub-dominant category, don't they?-- In recollection? Yes.

And you are an expert in these regional ecosystem maps?-- Yes, I use them-----

All the time?-- -----on a day-to-day basis.

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Is there anywhere else where this sub-dominant category appears other than these regional ecosystem maps?-- Well, it is extensively detailed in the text by John Neldner. There is quite a large section there on heterogenous polygons, minimum polygons that are mapped. So it is extensively discussed there in-----

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But you are unaware of whether they are actually - whether they are actually defined in the Act?-- Yes, I would have to check the Act. I am not as familiar with that.

It is a pretty important - I mean all these maps depict this sub-dominant, and it is a quite significant proportion of every one of these maps, isn't it?-- That is correct, yes. It provides the landholder with a trigger to indicate the status of the vegetation on their property. That is correct.

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Those maps that were just tendered - excuse me - was there any time in the inspection on your report when you didn't have regard to this version 3 regional ecosystem map, did you?-- No, I didn't have any regional ecosystem maps at the time of the inspections.

You didn't have any at all?-- No. Not during the inspection, no.

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Nothing further, your Honour.

BENCH: Okay. Re-examination arising out of that?

MR WILSON: No, your Honour.

BENCH: Thanks, Dr Olsen. That is the end of your evidence. If you could just leave all our Exhibits there, that would be very helpful?-- Thank you, your Honour.

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WITNESS EXCUSED

BENCH: Thank you. Any more witnesses?

MR WILSON: No, your Honour. That is the case for the prosecution.

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BENCH: Okay. Do you need to take some instructions?

MR SHERIDAN: Yes, please, your Honour.

BENCH: Okay. Well, you might need to have a look at that while you are taking instructions. So how long do you think it will take you? About fifteen minutes?

MR SHERIDAN: Yes, your Honour.

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BENCH: Because if you are going to call evidence, it would be good if we could get all the evidence done today. So if we get all the evidence done today, then we can make an assessment about whether we do submissions in writing which might allow everybody to ponder things, or do them orally.

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MR SHERIDAN: Orally, I think, your Honour.

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BENCH: Are you - if you call - oh, well, see what your instructions are when we come back in 15 minutes.

MR SHERIDAN: Your Honour, we will take instruction about that, your Honour.

BENCH: Okay. Thank you.

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THE COURT ADJOURNED

THE COURT RESUMED

MR SHERIDAN: The defence will neither call nor - will not be calling any evidence.

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BENCH: Okay, so-----

MR SHERIDAN: I have an application to make, your Honour.

BENCH: Yes?

MR SHERIDAN: A no-case submission.

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BENCH: Yes?

MR SHERIDAN: Yes, your Honour. I have some copies of the relevant legislation that I will be referring to, if that would assist.

BENCH: Thank you. Yes?

MR SHERIDAN: Your Honour, I am going to refer to some reported cases in the opening - the first part - your Honour, and I apologise for not having full copies of the-----

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BENCH: Don't worry.

MR SHERIDAN: Thank you, your Honour. The relevant law in a no-case submission is Mayne O'Sullivan 1955-----

BENCH: Yes, I am aware of that, thanks.

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MR SHERIDAN: Yes, your Honour. So this submission - the basis of this submission - there is - has been no evidence to prove an essential element of the alleged offence, and that the evidence has been so discredited as a result of cross-examination, and it is so manifestly unreliable, that no reasonable Tribunal could safely convict upon it. There is a - the first limb of the no-case submission is that the

complaint is out of time and therefore statute barred, and I just seek your Honour's direction in respect of a decision that I wish to refer to. That decision was made by Acting Magistrate Stenquist-----

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BENCH: Well, I understood - that was in another case, wasn't it?

MR SHERIDAN: Yes, your Honour.

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BENCH: I understood there was a case currently before an Appeal Court?

MR SHERIDAN: No, it is currently before your Honour.

BENCH: No, no, not that one. Acting Magistrate Stenquist made an order in respect of the point about out of time.

MR SHERIDAN: Yes, a preliminary point.

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BENCH: Another magistrate, sitting at Charleville or somewhere else nearby-----

MR SHERIDAN: Roma.

BENCH: Roma - made a decision directly opposite to that.

MR SHERIDAN: Yes.

BENCH: And I thought that decision had been taken on appeal.

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MR SHERIDAN: It had, your Honour, and I am not going to refer to that Roma decision which was - my learned friend and I have been in both of those matters. The decision that I was seeking to refer to, with your Honour's leave, was the decision of Acting Magistrate Stenquist in the matter of Simpson on the preliminary point. But that matter is still part heard before your Honour, and I was seeking your Honour's leave or instruction whether that was appropriate for me to refer to that decision on a preliminary point.

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BENCH: Well, I don't think I can be bound by the decision of another magistrate.

MR SHERIDAN: Oh, absolutely not, your Honour. I am not suggesting you are.

BENCH: So I don't think you should refer to the decision of the other magistrate if you can just argue the point on the law.

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MR SHERIDAN: Yes, your Honour, and that was-----

BENCH: That is what I prefer.

MR SHERIDAN: That was what I was intending to do because-----

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BENCH: Thank you.

MR SHERIDAN: -----the law is ventilated in that decision. Now, if I could take your Honour to the top of that bundle of legislation that I handed up. Section 68-----

BENCH: In the Vegetation Management Act?

MR SHERIDAN: Yes, your Honour. Page 53, "Proceedings," I think it is tabbed. Summary proceedings for offences: "A proceeding for an offence against this Act or for a vegetation clearing offence must be taken in a summary way under the Justices Act." Sub-section (2): "Subject to sub-section 4, proceeding for an offence against this Act must start" - and the relevant sub-section is (b), "within one year after the offence comes to the complainant's knowledge, but within five years after the offence is committed." If we then go down to sub-section (4), "If a magistrate considers it just and equitable in the circumstances, the court may, at any time, extend the time set under this section." Now there has been no application in respect of extension made before the prosecution has closed its case, so I will now go further.

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BENCH: Well, that would mean, strictly, I could make an extension order now, couldn't I?

MR SHERIDAN: There's been no application by the prosecution and they've closed their case, your Honour.

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BENCH: Thank you. Okay. Now, I hear your submission and I will try not interrupt any more.

MR SHERIDAN: That's okay, your Honour. It's likely to be quite complex, so I welcome your Honour's questions.

BENCH: Yes?

MR SHERIDAN: Yes, your Honour. The evidence of Mr Baumgartner, who inspected the property on 6 March 2003 and-----

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BENCH: Sorry, 6 February?

MR SHERIDAN: 6 March 2003. And the submission that I'm going to make in respect of the evidence that's before the court is made without the benefit of a transcript, so I'm relying on my recollection and the notes of my instructing solicitor, and I stand to be corrected if the transcript shows otherwise. He said that he detected anomalies with the regional ecosystem mapping satellite images and saw areas that had been cleared of vegetation, where the regional ecosystem mapping showed that there should have been vegetation. He said he asked the defendant about the vegetation and the defendant said he had cleared it and he didn't need a permit. Mr Baumgartner's evidence was that he was an authorised officer under the Integrated Planning Act, the Vegetation

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Management Act, and the Land Act, and he had been authorised since he had started employment with the Department of Natural Resources in 2000.

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BENCH: The Integrated Planning Act, the Land Act, and-----

MR SHERIDAN: Vegetation Management Act. He then reported the matter to the compliance unit on a date unknown and he didn't consider the matter to be of high importance. And if I can take your Honour then to the powers of an authorised officer? It's part 3, "enforcement investigation". It's at page 26 of the copy.

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BENCH: VMA?

MR SHERIDAN: Yes, your Honour. It should be - the tab there is "power". That's at part 3. The enforcement investigation and offence is 24. Appointment qualification of authorised officers just goes through - "the chief [indistinct] may appoint a person as an authorised officer". And function - if you go down to section 25, function and powers of authorised officers.

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BENCH: I'll just get rid of some paperwork.

MR SHERIDAN: Certainly, your Honour.

BENCH: Yes?

MR SHERIDAN: "The authorised officer has the functions of conducting investigations and inspections to monitor and enforce compliance with this Act, the vegetation clearing provisions, issuing compliance notices." Subsection 2: "An authorised officer has the powers given under this or another Act." Then if we have a look at subsection 4: "The powers of an authorised officer may be limited under a regulation, under a condition of an appointment, or by notice of the chief executive given to the authorised officer." And there was no evidence whether Mr Baumgartner's powers had been limited by those means. So in my submission, he was an authorised officer at the time he did the inspection, and that inspection and the evidence that he gave constitutes knowledge of the offence. And I note the complaint sworn by Mr Elliott. The averment in that complaint is that it is stated that: "The matter of this complaint came to the knowledge of this complainant on the 18th day of February 2005."

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Now, the issue of who the complainant is one where there has been quite some decision over the years, and I will provide your Honour now with at least some of the case law.

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BENCH: Oh, another one, thanks.

MR SHERIDAN: Pertaining to the issue. And in my submission, as Mr Baumgartner was an authorised officer under the Act, he had knowledge of the offence as at the day that he gave evidence, which was - sorry, the day that he inspected the

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property on 6 March 2003. To argue otherwise, that, for instance, Mr Elliott, because he was a compliance officer, had some other power under the Act that distinguished him from another authorised officer, would enable the complainant department to engage in complainant shopping, which means even though Authorised Officer Baumgartner had knowledge of the offence, in that he compared satellite images and he compared regional ecosystem maps, saw an anomaly on those maps, saw trees cleared in an area where he thought they shouldn't have been, took up with the defendant about it, then went and reported it to the compliance unit.

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For them to do as they've done, to ignore the knowledge of the offence that was gained by Mr Baumgartner on 6 March 2003, would enable the complainant department to do as they have done, and that is engage in complainant shopping, which, in my submission, means impugning the knowledge of the offence to an officer at a time that suited them, for the purposes of the prosecution. Now, Mr Elliott's averment that he came to the knowledge on 18 February 2005 - then the way the averment reads gives him one year from that date to swear the complaint. As of 6 March 2004, the time for the complaint had run out, but even so, Mr Elliott, as original investigator, takes up and avers on the complaint - that knowledge of the complaint came to him on the 18th day of February.

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In Fox Pine Proprietary Limited v Collings, a copy of which I have provided to your Honour-----

BENCH: Yes, that's a recent one, is it? Oh, well, fairly recent.

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MR SHERIDAN: Yes, your Honour, 2001. Holmes J, president of the Court of the Appeal, said: "It seems to me" - when this point was being decided-----

BENCH: She's not the president. She's the one who gave the decision.

MR SHERIDAN: Sorry, your Honour.

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BENCH: The president is-----

MR SHERIDAN: McMurdo.

BENCH: McMurdo J.

MR SHERIDAN: Sorry, your Honour. I had no idea who was president.

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BENCH: Holmes J wasn't even a permanent judge of the Court of Appeal when that decision was given, so I'm sure she would be impressed to think that she had been elevated that way. But, anyway, she was the one who gave the decision.

MR SHERIDAN: Yes, your Honour. Well-----

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BENCH: Where am I looking at? 1

MR SHERIDAN: In - I've got the exact reference.

BENCH: Oh, page 4?

MR SHERIDAN: Yes, I think so. Page 8, your Honour.

BENCH: Page 8? 10

MR SHERIDAN: The last page. Her Honour says, "It seems to me, there is a strong argument, given the words in section 170(3), in any event, that relevant knowledge is that of the complainant alone, but it's not necessary to consider that in this case." *Smith v Borg ex parte Smith* [1979] QR 380, "It was necessary to decide the point because on no view was any responsible officer of the department in possession of the requisite knowledge." That is the situation here also.

BENCH: I thought these were going to make it easy for me, not hard, those decisions. They didn't decide the point. 20

MR SHERIDAN: Yes, the point is there. Her Honour has made the point.

BENCH: She's saying there's a strong argument that any - it's the complainant who actually swears the complaint, their personal knowledge not the imputed knowledge to the government instrumentality. So, she's against you. 30

MR SHERIDAN: Yes, your Honour, but I'm distinguishing on this point. She refers to *Smith v Baldwin* because on no view was any responsible officer in the department in possession of the requisite knowledge. In my submission that is distinguishable because on this view, there was.

BENCH: Are they the only two cases about limitations on time?

MR SHERIDAN: No, your Honour, there is----- 40

BENCH: I thought there was a whole pile in the Commonwealth sphere?

MR SHERIDAN: In the Commonwealth sphere?

BENCH: Yes. It says, quite a few Commonwealth pieces of legislation.

MR SHERIDAN: There's *Morgan v Babcock and Wilcox*. 50

BENCH: *Morgan v Babcock*.

MR SHERIDAN: Which is [1929]-----

BENCH: Seeing I've got two counsel here, I won't have to go and look it up because you will help me, both of you.

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MR SHERIDAN: Yes, your Honour.

BENCH: A rare pleasure in the Magistrates Court.

MR SHERIDAN: Pardon, your Honour?

BENCH: It's a rare pleasure, I won't have to look it up myself. I can just rely on the cases that you two gentlemen supply me.

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MR SHERIDAN: So, in my submission the knowledge of the offence came to a responsible officer of the department, an authorised officer, Mr Baumgartner on 6 March 2003. In those circumstances, the complainant department had until 6 March 2004 in which to lodge a complaint. The complaint was not made until 18 February 2005. If your Honour is against me on that point, I move on to the second limb of the no case submission, which is that there is no evidence before the court of essential elements of this offence. The elements of this offence which is brought under section 4.3.1 of the Integrated Planning Act, is that the defendant started assessable development, namely, the clearing of native vegetation on freehold land without a development plan. In order to prove that complaint, the complainant must first prove that the development was assessable development and that there was no development permit.

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In order to determine what is assessable development, one must - and I think it would be very useful for your Honour in understanding, traverse the relevant provisions of the Integrated Planning Act because that is the statute which regulates the clearing of native vegetation of freehold land and provides the offence provisions. If I could provide to your Honour, the relevant legislation. The Integrated Planning Act and that was as was in force at the beginning of the offence period. I have provided to your Honour a copy of the Integrated Planning Regulation which was in force at the beginning of the offence period, and the Vegetation Management Act, as it was in force at its outset and as its been amended throughout the offence period.

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And as will become apparent, throughout the entire offence period, the clearing of, not of concern and of concern regional ecosystems without a development period was not an offence.

BENCH: The clearing of, not of concern-----

MR SHERIDAN: Yes.

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BENCH: -----ecosystems.

MR SHERIDAN: Not of concern and of concern.

BENCH: And of concern.

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MR SHERIDAN: Was not an offence. 1

BENCH: Was not an offence.

MR SHERIDAN: Was not an offence under law.

BENCH: It's only endangered.

MR SHERIDAN: Yes, your Honour. 10

BENCH: Only - how do you get to that?

MR SHERIDAN: Well, if your Honour takes the - the Integrated Planning Act is the mechanism for assessment and the grant of permits for clearing on freehold land, and it links in to the Vegetation Management Act via the Vegetation Management Regulation. I will take your Honour through - I have produced the relevant pages of the legislation and I will not attempt to as part of this - give your Honour a treatise on the Integrated Planning Act. I've just reproduced the relevant legislation as it applies to the offence. I will take your Honour to the second page of that material - the copies of the legislation I have handed up. 20

BENCH: Mmm-hmm.

MR SHERIDAN: It's the definitions there. The bottom one, "Operational work", if you go over the page and see "(f) clearing native vegetation on freehold land". Then go over to the next page to section 3.1----- 30

BENCH: Operational work includes clearing vegetation.

MR WILSON: Is this Schedule 8?

MR SHERIDAN: No, no, 3.1.2.

BENCH: Okay, then we go over to what, 3.1.2?

MR SHERIDAN: 3.1.2 subsection 1, "Under this Act all development is exempt development unless it is assessable development or self assessable development. Schedule 8 may identify exempt development that a planning scheme cannot make assessable or self assessable development". In the footnote there at 34 of that page, "Assessable development, self assessable development and exempt development are defined in schedule 10 in the dictionary". Over to the next page of that bundle of legislation, section 3.1.4 subsection (1), "When is a development permit necessary? A development permit is necessary for assessable development." 40 50

And the footnote there at 35, "It is an offence to carry out assessable development without a development permit, see section 4.3.1, carrying out assessable development without a permit", which is the section, the offence provision under which this charge is brought. Over the next page, "Approvals under this Act, 3.1.5 subsection (3), development permit,



authorises assessable development to occur". If we go over the next page, it's page 82, assessment manager, 3.1.7. "The assessment manager for an application is if the development is wholly within a local government area", which is not relevant for these purposes. Subparagraph (b), "If paragraph (a) does not apply", which in this situation it does. "(i) the entity prescribed under a regulation". The footnote there, 39 talks about private certifiers which is irrelevant here.

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Then we go down to section 3.1.A, referral agency, "If the application is referred to a referral agency under part 3, the referral agency has for assessing and deciding the application, the jurisdiction prescribed under a regulation." The next page, which is 111, which I have included for completeness more than anything, it talks about code assessment, which is when an - when development is assessable development, in some instances it is assessable against a code for its approval. And then over the next page, which is 112, section 3.5.5, it talks about impact assessment, which is a different form of assessment for development applications. The next page, 116, section 2.5.13.1, "This section applies to any part of the application requiring code assessment." And then over the page, 117, "The assessment manager may refuse the application, only if the assessment manager is satisfied development does not comply with the applicable code, and the compliance of the code cannot be achieved by imposing conditions." Then we go over to page 104, "Carrying out assessable development"-----

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MR WILSON: Excuse me, can you tell me the section?

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MR SHERIDAN: I'm reading it. Section 4.3.1(1), which is the offence provision under which this charge is brought, "A person must not start assessable development without a development permit for the development." So if you are - there are three on this there. One is a person - start assessable - start - sorry, there are four - an assessable development without a development permit.

If you go down the page - the next page, your Honour, which is page 312, schedule 8, which lists the forms of assessable development. The relevant one here is 3(a), "Carrying out operational work that is the clearing of native vegetation on freehold land, unless the clearing is necessary for essential management or necessary for routine management in: (1) an area that is outside high nature conservation value" - which is not relevant here - "(2) in an area vulnerable to land degradation" - which is not relevant here, and "(3) a remnant endangered regional ecosystem shown on a regional ecosystem map" - or it goes down to urban areas, which are - is irrelevant.

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Can we skip the next page 313 I've got here. I'm sorry, that shouldn't be in there. Oh, that's for completeness, the whole of schedule 8. Can we go over now to page 318 in those materials, which is the definitions for schedule 8. Halfway down the page, there's a definition of essential management.

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Essential management, which is exempt from - exempted except - is not assessable development means, "clearing native vegetation for establishing or maintaining a firebreak sufficient to protect the building, property, boundary or paddock; (c)for maintaining an existing fence, stockyard, fence, road, or other built infrastructure."

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Down at the bottom of that page, and the third definition: "Regional ecosystem means a regional ecosystem as defined under the Vegetation Management Act." So that's the first part in the Integrated Planning Act where we're directed to the Vegetation Management Act for the definitions. And I've got - they're following, your Honour. It will all come in order. The second one, "Regional ecosystem map is defined under the Vegetation Management Act." Remnant endangered regional ecosystem defined under the Vegetation Management Act. Remnant - in the Vegetation Management Act. Remnant vegetation, Vegetation Management Act. Routine Management means: "(a) Clearing native vegetation for establishing a necessary fence, road, or other built infrastructure of less than five hectares; (b)that is not remnant vegetation; (c)for supplying fodder for stock in drought conditions only."

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And you'll remember in evidence, several of the witnesses identified areas that were white - areas that were white on the regional ecosystem maps - or those that purported to be - as non-remnant vegetation. So that, then, in the schedule is where the clearing of remnant - non-remnant vegetation is authorised because it is termed there as being routine management. If we go to the next page of the Integrated Planning Act that I produced, which is page 321, we have the definition of assessable development, "Assessable development means development specified in schedule A, part 1" - or for a planning scheme, which is irrelevant to these situations.

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Then we have assessing authority. Subsection (a) of the definition of assessing authority, "(a)for development under a development permit, other than the development which paragraph (c) applies, the assessment manager giving the permit, or any concurrence agency for the application, each for the matters within their respective jurisdictions."

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Now, paragraph (c) talks about private certifiers again, but that's irrelevant for these purposes. If we go over the next page, 323, we have the definition of "clear for vegetation". It means, "remove, cut down, ringbark, push over, poison, or destroy the vegetation in any way, but does not include destroying standing vegetation by stock or lopping a tree, and removing or cutting down, ringbarking, pushing over, poisoning or destroying vegetation in any way as a forest practice."

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If you go to the next page, which is 324, there's a definition of what is a concurrent agency, which is, "For a development application, it's an entity prescribed under regulation as a concurrence agency for the application, or if the functions of the entity in relation to the application have been devolved or delegated to another entity, the other entity."

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If we go to page 326, the definition of destroy, "For vegetation, includes destroying it by burning, flooding or draining." If you go to the next page, which is 327, again, that's just development offence, management offence against section 4.3.1, which this is. If you go over to the next page, which is page 331, schedule 10, "Native vegetation means a native tree or native plant, other than a grass or mangrove."

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That's the definition of native vegetation. The next page in the bundle of legislation is the Integrated Planning Regulation, and your Honour will remember from pages previous, the regulation defines the jurisdiction of the assessing authority. Now, this regulation was as was in force on or before 6th of October 2000, and the beginning of the offence period was the 5th of October 2000. Can I take your Honour over to the second page, which is page 5, which tells us how to interpret the schedules in the Regulation. 3(a)(1) for section 3.1.7.1(a) of the Act, schedule 1A, Part 1, column 2, states the assessment manager for the application mentioned opposite the assessable development in column 1. Then down the next section, referral agencies and jurisdiction, which tells us, again, how to interpret the schedule.

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If you go over to the next page, which is 11 - page 11 - schedule 1, types of assessment for assessable development. If your Honour goes over to the next page, which is page 12, it's aspect of assessable development, "Operational work, that is, the clearing of native vegetation, if the assessment manager is the chief executive administering the Vegetation Management Act" - which in this case, it is the chief executive of the Department of Natural Resources and Mines, to whom development applications must go and be assessed, and if acceptable, be granted a permit.

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If we go over to the next page, which is page 13, schedule 1A, Part 1, "For assessable development within a local government area, operational work, that is, the clearing of vegetation, the assessment manager" - you'll see in the right hand column - "is the chief executive administering the Vegetation Management Act."

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That's not relevant here, because that's in a local government area, but I've referred to that for completeness in the schedule.

That's not relevant here, because that's another local government here, but I'll include that for completeness of the schedule.

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If you go over the page, which is page 14, in regard to the regulation. Again we see operational work, clearing of native vegetation, the assessment manager, chief executive administering the Vegetation Management Act. If you go to the next page, which is the beginning of schedule 2, none of those are relevant there but I've just included that so your Honour

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can see the column headings. Column 1: Application involving;  
2: Name of referral agency; 3: Type of referral agency;  
referral jurisdiction.

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If your Honour goes over the page, which is page 19, the left-hand column which is headed 8: "Operational work, that is the clearing of native vegetation and assessable development under schedule 8 of the Act," which we've determined this was, "the assessment manager" - or, sorry, on the right-hand side of that - on the far, right box of that bottom row which is the referral jurisdiction, we see the purposes of the Vegetation Management Act 1999. So that then is the jurisdiction that the Department of Natural Resources have to assess applications for clearing permits.

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So if I might summarise that as the how, if you have a look now at the Vegetation Management Act, that will show the why. The first page, the Vegetation Management Act 1999-----

MR WILSON: Excuse me. Which edition?

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MR SHERIDAN: I'm getting there. Act number 90 of 1999.

MR WILSON: Reprint number?

MR SHERIDAN: 90 of 1999.

MR WILSON: Reprint number?

BENCH: It's not reprinted.

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MR SHERIDAN: It's not reprint. That, as your Honour can see, was assented to on 21 December 1999, and that's my handwritten annotation there under, sections 1 and 2 commenced on the day, and I've included on the last two pages of that bundle, your Honour, the total of reprints and a list of legislation. "Sections 1 and 2 of the Vegetation Management Act were assented to and commenced on 21 December 1999. The remaining provisions commenced on 15 September 2000."

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If your Honour goes over the next page, and this is the Vegetation Management Act as initially enacted, we go down to the purposes of the Act, section 3 which you'll remember, the purposes of the Act define the jurisdiction by the Department of Natural Resources to assess land for permits for clearing vegetation. "The purposes of the Act are to regulate the clearing of vegetation on freehold land to preserve the following: (i) remnant endangered regional ecosystems; (ii) remnant of concern, regional ecosystems."

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Then we go over to the next page, which is the explanatory notes to the Vegetation Management Bill-----

BENCH: You didn't have a spare copy of this bundle for Mr Wilson?

MR SHERIDAN: No, sorry, your Honour, I don't.

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MR WILSON: I've got nothing, your Honour. I've got some stuff on the computer. I'm having trouble keeping up. That's why I'm asking for the sections and what - I might have to - the way it's going, I might have to ask for a transcript.

BENCH: You won't be getting a transcript, I'm sorry, Mr Wilson. That takes six weeks. Thank you.

MR SHERIDAN: It's his legislation, your Honour, I'm sorry. "Objectives of the Bill: Objectives"-----

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BENCH: Well, none of it is surprising. It's all the legislative framework of your prosecution, which I'm sure you're well familiar with. Your instructing solicitor doesn't have a copy of this?

MR SHERIDAN: No, your Honour, sorry.

BENCH: Okay. Michelle, could you just go and slip that through the photocopier. I'll ask you to stop your submissions while I get a photocopy.

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MR SHERIDAN: Thank you, your Honour.

MR WILSON: Thank you, your Honour.

THE COURT ADJOURNED

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THE COURT RESUMED

BENCH: Right. Well, we're about three-quarters of the way through, aren't we?

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MR SHERIDAN: Well, we go very quickly now, your Honour. I just had to set out, because it's a very complex Act, the Vegetation Management Act, and I just wanted to show the mechanism by which this all comes about and how it all works. So if we go to that page 1 of the explanatory notes, Objectives of the Bill. "The objectives of the Bill are to regulate the clearing of vegetation on freehold land in order to"-----

BENCH: Wait a minute. The Vegetation Management Act Amendment Bill. Is it the Vegetation Management Act Amendment Bill?

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MR SHERIDAN: No, no, the Vegetation Management Act, Act 90 of 1999.

BENCH: Yes.

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MR SHERIDAN: Page 2 is Part 1, Preliminary, which has the purposes of section 3.

BENCH: Yes.

MR SHERIDAN: Over the page to the explanatory notes to the Vegetation Management Bill.

BENCH: Yes.

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MR SHERIDAN: The objectives of the Bill are to regulate clearing of vegetation on freehold land in order to preserve remnant endangered and of concern regionally ecosystems in areas declared to be high nature conservation value [indistinct] relevant to this matter. If we go over the page then, Analysis of the Bill. It refers to clause 3 which became section 3. It sets out the purposes of the Act, that aim to regulate clearing of vegetation on freehold land and include the preservation of remnant endangered and of concern regional ecosystems.

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BENCH: Yes.

MR SHERIDAN: Then go over the page to the Vegetation Management Amendment Act 2000, which you'll see was assented to on 13 September and commenced at date of assent, which is two days before the provisions, if you notice in the Vegetation Management Act, Act number 90 of '99, schedule 1 and 2 commenced on 21 December, and the remaining provisions commenced on 15 September. So parts 1 and 2 of the Vegetation Management Act began on 21 September but all the rest did not commence until 15 September, which was two days after this amendment Act came in. If we go over to the next page, you'll see Amendment of Section 3. Section 3(1)(a)(ii) "Omit", which is the section that referred to remnant of concern regional eco-systems.

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Now, if we go over then to the explanatory notes to the Vegetation Management Amendment Bill, objective of the Bill: "The purpose of the Bill is to amend the Vegetation Management Act. The Bill provides the amendment of the Vegetation Management Act in order to clarify matters raised during recent public forums on vegetation management and to effect procedural matters following panel advice.

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Reasons for the Bill: The Premier and Minister made a commitment in public forums to remove references to of concern regional eco-systems 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."

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So what we had there was essentially a fight over money between the State and the Commonwealth. The VMA as it was initially put up, preserved through the purposes of the Act,

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remnant endangered and remnant of concern regional eco-systems. So if we go over then, ways in which policy objectives would be achieved. "The policy objectives would be achieved by-----"

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BENCH: No, I don't need to know that.

MR SHERIDAN: Yes, your Honour. Then we go over then to 3, "Clause 3 amends" - okay. If we go then to Vegetation Management Act reprint number 1 as enforced on 6 October 2000, which is one day after the beginning of the first offence period, we see then, the purpose of the Act. "The purposes of this Act are to regulate the clearing of vegetation on freehold land to remove the following: (i) remnant endangered regional eco-systems. So from that point, which is the commencement of the Act on 15 September, the only regional eco-system that was assessable development was remnant endangered.

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Now, that went through - if I can take your Honour over two pages to the Vegetation Management and Other Legislation Amendment Act 2004, Act number 1 of 2004.

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BENCH: Well, that doesn't concern me because it happened after the offence periods.

MR SHERIDAN: Yes, your Honour, but could I just show you where it changed? It changed right then. If you go to the next page, 3, "The purpose of the Act is to regulate the clearing of vegetation in a way that conserves the following: remnant endangered, remnant of concern, remnant not of concern." So for the entire period from 3 September 2000 to the passage of that Bill, which was assented to on 29 April, the only vegetation that one required a permit for was remnant endangered.

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So I've reproduced the explanatory notes there. It was a major election commitment of the government at that time, protection of concern on freehold land. That's the reasons for the Bill.

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BENCH: Well, that's - the "of concern" part is only about 10 per cent of the total claim.

MR SHERIDAN: Yes, your Honour. So that shows then that up until 21 May 2004 it was not an offence to clear anything but remnant endangered regional eco-system. From the way this particular charge is particularised, if we look at count 1, the total area of unlawful clearing was 177 hectares. Particular number 3, it was alleged that the cleared vegetation consisted of 166 hectares with 11 hectares being remnant of concern. The way that is particularised is duplicitous, but the 11 hectares remnant of concern is no - there's no offence known to law. The second count, 744 hectares in total, 683 remnant endangered, with 61 being remnant of concern, still inside the transition date, and no offence known to law.

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Now, even then the way the complaint was drawn in terms of particulars could have been better known. I'm not going to submit that the fact that it's not possible for your Honour to convict - it's not possible, I'm sorry, for the prosecution to prove beyond a reasonable doubt that the total area of unlawful clearing was 177, when as your Honour pointed out the amount of - not of concern, which is no offence, was only 11, but it is - makes it difficult to determine which, and how, those particulars pertained to the prosecution. I note those particulars as particularised in the charge were not amended by the prosecution to reflect any of the evidence that was given in the hearing of this matter. So now if I can move to dealing with the two counts. In respect of the remaining remnant endangered-----

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BENCH: So one minute. In relation to your no case, the first ground is, one, out of time.

MR SHERIDAN: Yes.

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BENCH: Two, it is - the point is the parts that are not of concern, it's not illegal.

MR SHERIDAN: Not a concern and of concern, no offence under the law.

BENCH: What about the wording of the complaint - of the complaint that it was - that the assessable development consisted simply of clearing native vegetation on freehold land without any reference to any of the provisions about endangered eco-systems.

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MR SHERIDAN: Well, that is - even though it is out of time, I'm not going to make a submission on that because-----

BENCH: Okay, thank you. Just checking. So that's your two points?

MR SHERIDAN: Yes, your Honour, on that.

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BENCH: Okay. Now, where are you going?

MR SHERIDAN: The remnant endangered. So what the prosecution had to do was, if we take out all the stuff that was unknown to law, what the prosecution had to do there is prove that the defendant cleared remnant endangered vegetation between those offence periods and of the areas that were particularised beyond reasonable doubt. If we - I can take your Honour to the evidence of Mr Baumgartner, the authorised officer who inspected the land on 6 March 2003, specifically Exhibit 7 at page 3 where Mr Baumgartner, in his report on his inspection for a clearing permit - that's at page 3 of that Exhibit 7, thank you, your Honour.

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BENCH: Page 3, yes.

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MR SHERIDAN: Under the heading Physical Description-----

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BENCH: Yes.

MR SHERIDAN: -----table 1, regional eco-systems summary. I won't go through all those numbers and all the scientific names, but importantly at the end of each description, Mr Baumgartner's assessment after his physical inspection of the land that was the subject of the permit application and, in my submission, that inspection was more detailed than any inspection that followed, and the only inspections that followed were Mr - Messrs Forcier and Elliott, and then Elliott and Olsen later on.

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In Mr Baumgartner's summary, the only regional eco-systems existed at the time he was there, and we must remember that was the 6th of March 2003, and that was at the end of - I'm sorry, the end - way past the first defence period, and roughly in the middle of the second defence period. Mr Baumgartner's assessment of the regional eco-systems that existed on the subject property at that time details no remnant endangered regional eco-systems at all. They were either of concern, not of concern, not of concern, not of concern, or not of concern.

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Mr Forcier's evidence was that he couldn't recall which RE map he had at the time of inspection. Whichever map he used at the time of the clearing, his evidence was also whichever map was used at the time of the clearing was relevant, and he said the defendant told him that the clearing was for fodder. Now, at Exhibit 9-----

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BENCH: Did we have a date for Exhibit 7?

MR SHERIDAN: The date for Exhibit 7 is - my copy has got 7th of the 12th 2003, your Honour. I'm not sure whether there ever was one marked. My instructing solicitor might have it down there.

BENCH: Okay. Anyway, I interrupted you.

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MR SHERIDAN: Yes.

MR WILSON: The field inspection is at the top of page 3.

BENCH: Thank you.

MR WILSON: 6th of March 2003.

MR SHERIDAN: 6th of March 2003 was the date of inspection. So as at that date, on the materials that Mr Baumgartner had which was a satellite image and a regional eco-system map on which he detected an anomaly and saw trees on the ground - we've been through that before, but that was the regional eco-system map that he used to assess the clearing permit. At Exhibit 9, there is no map grid on Exhibit 9.

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BENCH: There is no what?

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MR SHERIDAN: Map grid, overlaying grid. So then for all intents, it is impossible for anyone to scale off from a GPS point to the actual locations on that plan which is Exhibit 9. Exhibit 9 was not produced by Officer Forcier, and he used no survey plan at the time he conducted his initial inspection to gather evidence for a prosecution. The evidence of Officer Elliott was that Forcier recording the conversation and he was unaware of where the tape-recorded conversation came from. Elliott then went back and inspected the subject land with Dr Olsen.

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The witness, Elliott, produced about approximately 90 photographs as evidence of the areas that were cleared. When he was - photos of other investigations were disclosed to the defence that were not relevant to this matter. He produced an overview map as well but it had no grid, and he could not locate the position of the photos on the overview map. In cross-examination, in 81 of the 90 photographs, Mr Elliott could not be sure if they were of the subject property, or were they of areas where allegedly unlawful clearing had occurred.

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He did not check his GPS unit until after he had left the property, and in all the relevant photos which total from my count, nine, there appeared to be standing timber. Mr Elliott did not confirm the instructions that were apparently given by Officer Forcier to Officer Olsen as to what the purpose of his inspection were going to be, and he couldn't be sure of what Dr Olsen's instructions were, and the photos produced - those that were relevant, at least, did not correspond with any of Dr Olsen's reports.

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Exhibit 12, and this is Mr Elliott's evidence, in Exhibit 12, the white areas equal non-remnant, and they're not assessable development. The light ground areas equal - of concern; the maroon and pink areas were remnant endangered, dominant and sub-dominant respectively.

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BENCH: Exhibit 12, yes.

MR SHERIDAN: And the numbers in Mr Elliott's evidence designate the regional eco-system type and then below that, the proportion in percentages represented with a polygon. In that Exhibit 12, when cross-examined on it, Mr Elliott said 5 per cent of the polygon was endangered, and the rest is not, when asked what a five meant, the last one. It was also Mr Elliott's evidence that a certified map plotted should be reliable on the date plotted, and that a land-holder would be entitled to rely upon it, and that map changes could not be used retrospectively.

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He also gave evidence that he did not know what map he used at the time of the inspection with Dr Olsen. The evidence of Mr Gray who was a clearing contractor was that he was involved with fodder harvesting and regrowth pulling, and in cross-

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examination, he told the Court that all he really did was regrowth. The evidence of Mr Anderson, he'd produced no source documents for any of his work. He did produce a map, amongst his evidence, and I just forget which Exhibit it is, your Honour: it's the map JRA05. 1

It was under - covers certificate which is Exhibit 23. Mr Anderson based his assessment of the alleged unlawful clearing on version - map version 3.2, certified change. Now, there are a number of maps that purport to be regional eco-system maps before the Court, but the map on which Mr Anderson based his evidence which forms the particulars of the offence, which is apparently version 3.2 is not before the Court. 10

In my submission, on that fact alone the prosecution must fail because there is no evidence before the court of which map was the valid map at the time of the alleged offences and even if it had been determined that all the maps that had been presented to your Honour - that are in evidence before the court, sorry, if any of those were the relevant map Mr Anderson's evidence was based on version 3.2 which is not - and his evidence forms the particulars of both counts. 20

And as I've pointed out - and I think your Honour made the observation yesterday that the map JRA05 is not a regional ecosystem map. And as I've submitted previously in the schedule to the Vegetation Management Act are the definitions of a regional ecosystem map. Paragraph 1, "A `regional ecosystem map' means a map certified by the chief executives as the regional ecosystem map for a particular area and maintained by the department for the purpose of showing for the area rendered endangered regional ecosystems and remnant of concern regional ecosystems and remnant not-of-concern regional ecosystem and [indistinct] reference regional ecosystems." 30

Now, the map JRA05 that was produced by Mr Anderson which purports to be the areas that were based on version 3.2, a certified change, can not be construed as a regional ecosystem map because it fails the definition set out in the Act in (iv) in that it must depict numbers that reference regional ecosystems and it does not. When cross-examined on JRA02, the map JRA02, about the areas - some areas, small areas that appear to be pink before the clearing and after, specifically slides 9 and 10 on Exhibit 23, there was doubt - he admitted there was doubt about the area inside the polygon had actually all been cleared. 40

He admitted that he'd never inspected the area and can't be definite about the changes. Map JRA04, there was no original available without the hatching to enable the court to determine from that image, for itself, if clearing had actually occurred in the entire area under the polygon. All Mr Anderson's documents were provided without field data. Mr Anderson revealed that he had referred to ancillary reference data which was not disclosed to the defence nor was it before the court. 50

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When pressed on the fact that no regional ecosystem numbers had been included on map JRA05, Mr Anderson gave evidence that it does not matter what regional ecosystem type it is there, it's all endangered. And when asked why, on the Exhibits from 12 to 18, from memory the bundle of various regional ecosystem maps - when asked why they all included remnant - included sub-dominant categories of regional ecosystems and why the map he produced at JRA05 did not and whether it was known within the department that those maps were unlawful, he said it was and why he produced that, he said it wasn't a direction from DNR it was consultation with his peers.

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And he agreed that without the regional ecosystem numbers it was not possible to determine which regional ecosystems - some regional ecosystem had not been unlawfully cleared but he can't tell - you can't tell without the numbers. The regional ecosystem mapping that he used was accurate at a scale of 1:100,000 but was produced variously at scales from 1:30,000 and 1:40,000. He agreed that any inaccuracies in the data sets that he had used in the production and compilation of the documents that he - that were admitted under his certificate would have been adopted.

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Any of those inaccuracies in those data sets were adopted but not taken into account when he prepared the documents that were before the court. And he agreed that these maps were specifically made for the prosecution. And he admitted that the law doesn't recognise the dominant, sub-dominant categories. And in the schedule of the Vegetation Management Act, the schedule of definitions, at page 71 of the schedule "remnant, not-of-concern regional ecosystem" is defined, "remnant endangered regional ecosystem" is defined, and "remnant of-concern regional ecosystem" is defined and in that schedule of definitions there are no definitions for "sub-dominant," "dominant" categories.

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And in my submission, when one looks at the definition of a regional ecosystem map that is set out in the Vegetation Management Act every map that is before the court is unlawful, does not comply with the definition of a regional ecosystem map. The only one that passes the test of, at least the first three tests as far as having only rendered endangered regional ecosystem remnant of-concern and remnant not-of-concern, is the map JRA05, but it fails because it does not have the numbers of the regional ecosystem [indistinct] on it.

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So that any map that purports to be a regional ecosystem map must comply with the statutory definition for that map. The sub-categories of sub-dominant and dominant are simply unknown to law. And Mr Anderson agreed that as he had lumped areas that were on some other of those maps designated as some sub-dominant and that some of the percentage of the sub-dominant regional ecosystems were only - made up 5 per cent, it was possible that his map that showed areas that were remnant endangered may well include areas that only contained, in the original map, 5 per cent of their areas endangered regional

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ecosystem and now they were depicted as if the whole area was 100 per cent regional - endangered.

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He gave evidence that some mud maps had been prepared for a hearing mention. That they - and this isn't [indistinct] it's mine - sorry, it's my submission, they had never been - have never been disclosed. He admitted that there was a small chance that areas within the polygons may not have been cleared and the areas that had been delineated by his polygons made up the total area that was allegedly unlawfully cleared which, in map JRA05, and for the northern block which is particularised in count 1 was 186.7 hectares.

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He admitted that he placed - he'd had total reliance on his remote sensing equipment in the preparation of his documents that were before the court and it had been - there had been no field work and no independent peer review. And your Honour excluded site 21 from evidence. The evidence of Mr Voller who is a departmental employee who has experience with fodder feeding and the fodder exemptions, his evidence was that a sub-dominant category of regional ecosystem was less than 50 per cent and that dominant was greater than 50 per cent.

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And he agreed that to lump a 5 per cent - an area that showed a 5 per cent endangered regional ecosystem into an endangered regional ecosystem would be wrong. If we go to the evidence of Dr Olsen, the defence had disclosed what was - what became apparent yesterday was a draft report, then a final report, then a report that appeared to be by way of a statement that was disclosed to defence, and there was significant differences in those documents. He said that his report that he relied on regional ecosystem 2.1 and that his inspection was carried out in August 2005 which was almost four years after the first offence period and two years and two years after the second.

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There was no appropriate - the map regional ecosystem 2.1 is - on which Dr Olsen's report relies is not in evidence. His evidence was that the map JRA02 is not the same as used in the field inspection. And he said there were small patches which could be up to five hectares in the subject area which were uncleared. He said he didn't - although he said he relied on RE Map 2.1 he said - and he said he didn't use the RE map, he worked from first principles. He admitted that the status of ecosystems has changed, and then on the subject of his instructions, there was the Appendix 5 of the draft report, which was initially disposed to the defence, made no mention of part of his instructions being to independently re-assess the regional ecosystem mapping.

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In his statement that was sworn over a year after he compiled the draft report and what he termed the final report, the instructions appeared in his sworn statements, and they were quite specific. He understand the regional ecosystem 2.1 was current at the time of the first offence. The refers to a map 1 in his report, which was never disclosed to the defence, and then apparently, according to his evidence, was never

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produced, or it was produced by someone called Reece who was never called to give evidence.

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He agreed that his assessment had essentially turned the regional ecosystem mapping on its head, because in some areas where the regional ecosystem mapping showed five per cent of a remanent-endangered ecosystem, he'd reassessed it at 80 to 90. He agreed that there was significant difference between Exhibits 13 and 12, and significant difference between Exhibits 13 and 14.

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Exhibit 16 contains as well as a dominant subdominant categories of regional ecosystem, which I submit, are unknown to law as the further categories have cleared, and then further disturbed. The doctor agreed that that applied to non-remanent, but in my submission, that map and those categories as unknown to law as well. In respect of Exhibit 16 and 13, the doctor could not offer an explanation as to why those were different.

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In respect of the photos supplied with is report, photos 7, 16 and 17, his evidence was that those photos were not in the areas that are allegedly unlawfully cleared, and because the overview map supplied by Mr Elliot had no map grid, he could not pinpoint the location of his sites on the overview map. He said that he could point to it, but I note that Mr Elliot's photographs were referenced by co-ordinates in Australian Map Grid, whereas Dr Olsen's were referenced by latitude and longitude.

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That matters much, in my submission - matters little in my submission, because the map, if you'd call it that, had no grid on it at all, either in Australian map grid or latitude and longitude that would enable anyone with a scale ruler to - or any other aid - to determine from the photograph where the photograph was actually taken.

In Dr Olsen's report in Appendix 2, gave evidence of that. It contained all the reference material that he had in regard to any inspection, and his report. When asked why hadn't he - was he familiar with a document [indistinct] which is the standard procedure that the Environmental Protection Agency uses regional ecosystem maps, he insisted that even though it didn't appear in Appendix 2, he had actually used it.

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And even though it's a foundation document, if you will, for the preparation of regional ecosystem maps, and it was standard operating procedure for people - for him and his peers to use when making assessments of regional ecosystem, he had not listed it, and when challenged on that, his answer was to the effect that it's standard operating procedure, and therefore, he did not reference it. And he agreed that any assessment down without it, without regard to it or following it, would be invalid.

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He - his evidence was that his - that he'd refined the mapping, but he produced no map of a refined map - no map to

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show his refining. And when comparing the forms - the vegetation reporting forms in [indistinct], he agreed that the forms that he'd used had not been followed in the inspection [indistinct] and then gave evidence that the Environmental Protection Agency don't use those forms either.

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When shown Exhibits 24, JAR-09 and Exhibit 18, he was pointed to the difference between large areas in the southern block, which appears yellow, and appears remanent of concern in the map JRA-09, and comparing that - I'm sorry, JRA-09 is dated 14th of 9th 2006, which was one of Mr Anderson's maps, when compared with a map of the subject lot produce - plotted on 27 October 2006, which Mr Olsen agreed would be valid on that date, he could not exchange the difference between an area shaded yellow, remanent of concern in Mr Anderson's map, and an area shown in green not of concern, on the map of 27 October, 2006.

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The maps that were tendered in evidence today were not disclosed until the third day of a three-day trial. They are not relevant to any of the evidence that is before the Court. Anderson said he relied on version 3.2; that map has never been tendered. They are not - they have not been explained by any witnesses. As I've said, the same - my submission as to their lawfulness applies to every map that has been placed before the Court during this trial.

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In summary, the no case submission - there has been no evidence to prove essentially the alleged offence, that is, what regional - whether the development was actually a [indistinct] development, meaning, whether it was rendered endanger - whether any of it was rendered endangered regional ecosystem or not. There was - there is no evidence as to the regional ecosystem map that was applicable during the time of the alleged offence periods. None of the maps are lawful.

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And in my submission, the evidence that has been brought before the court has been so discredited as a result of cross-examination, and it is so manifestly unreliable that no reasonable Tribunal could safely convict upon it. Unless I can help your Honour any further?

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BENCH: You can, actually.

MR SHERIDAN: I can?

BENCH: Ordinarily, after the Crown case closes, before your client decides whether he's going to give or call evidence, he makes a no case submission; then if I find there is no case to answer, he doesn't have to choose, he just - he's happy. If I say there is a case for him to answer, then he uses his election to decide that he is then not going to call evidence. And then I have to decide whether the evidence is sufficient to convict him. In this case, I am just confused about - you did tell me your client's not going to give evidence anyway, so he's already made that election, so I shouldn't be - this should not be a no case to answer submission. You're just

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saying to me that there is not sufficient evidence to convict your client. Because he's already told me he's not going to give evidence, or are you trying to have two bites at the cherry here, by making this submission, and then making other submissions after I find whether or not there is a case for him to answer? Because if this is the substance of it, and your client is not going to give evidence, really, these are your submissions in totality.

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MR SHERIDAN: Yes, your Honour. I wouldn't stand up here and repeat these-----

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BENCH: But it's not really a no case to answer, is it?

MR SHERIDAN: If your Honour puts it that way, perhaps it isn't, because the - my understanding of it was one that when - as soon as the Crown closed its-----

BENCH: Well, if your client still wanted to maintain the right - if I find there is a case for him to answer, he may give evidence, yes, it's a no case to answer submission, because then, if I come back and say yes, there is a case for him to answer, if he wants to retract what he told you before, but he's not going to give evidence, and if I find there is a case for him to answer, if he's going to maintain the right to call or give evidence then, it's a no case to answer submission. If he's already decided he's not going to give evidence because he thinks he doesn't - for whatever reason, if he's already decided that, well, I'm going to make a ruling that these are not no case to answer submissions. These are your submissions that the Crown has failed to prove its case beyond reasonable doubt.

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MR SHERIDAN: Yes, your Honour.

BENCH: In that case, you might have other submissions you want to make.

MR SHERIDAN: No, your Honour.

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BENCH: This is it?

MR SHERIDAN: Excuse me. No, your Honour, we'd rely on these submissions that I've made. There is nothing further I can add to it.

BENCH: Okay. So these are your submissions to the effect that the Crown, the prosecuting authority, the complainant has failed to prove its case beyond reasonable doubt.

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MR SHERIDAN: Yes, your Honour.

BENCH: So it's a different test to no case to answer.

MR SHERIDAN: Yes, your Honour.

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BENCH: And so are there any other submissions you want to make?

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MR SHERIDAN: No, your Honour.

BENCH: Thank you. Yes, Mr Wilson?

MR WILSON: Thank you, your Honour.

BENCH: Do you think you'll be more than an hour?

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MR WILSON: I hope not. I could be a while though, your Honour. It's a bit hard to say.

BENCH: I'll just check with my clerk. Okay, so long as you're not more than an hour, we are going to hear your submissions through without breaking. That way, I can go away and consider my decision.

MR WILSON: Could we just have a small adjournment, please, your Honour?

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BENCH: Sure.

MR WILSON: Thank you.

THE COURT ADJOURNED

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THE COURT RESUMED

BENCH: Thank you. You may be seated. Yes, Mr Wilson?

MR WILSON: Thank you, your Honour. Your Honour, in relation to the - I'll deal with the first limb of his - we haven't proven our case, the complaint out of time and statute barred, the actual section in the Vegetation Management Act was subsection 3 of that provision. It's 68(3), "Despite the Planning Act, and subject to subsection (4), proceeding for a vegetation clearing offence must start within one year after the commission of the offence, or (b) within one year after the offence comes to the complainants knowledge, but within five years after the offence is committed." My friend pointed you to subsection 2 as being relevant. So just for your information.

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In relation to Mr Baumgartner being an authorised officer, all the cases in relation to this matter, and as you pointed out in Fox Pine v Collings, it comes to the knowledge of the complainant. Mr Baumgartner said at the time that there was a number of feasible explanations as to why the vegetation had changed and he didn't really think that much of it, and he was

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very clear on that. But even if he was, even if he hadn't been that way, it wouldn't put the complaint out of time because he is not the complainant.

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There is a number of cases that go to this and there is a very current one down the Coast, that went through the District Court. I think it's subject to appeal at the moment but it's Peebles, P-E-B-L-E-S.

BENCH: Sorry?

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MR WILSON: Peebles, P-E-B-L-E-S v Cross Realty. Yes, P-E-E-B-L-E-S v Cross Country Realty Pty Ltd. I can provide a copy of that before I leave, your Honour.

BENCH: Thank you.

MR WILSON: There's a number of cases in relation to this. There's - apart from the ones my friend mentioned. There's Woods v Beattie, WorkCover v Stone and Clement, WorkCover v Brooks, and Young v Tulloch which is a District Court decision. I can provide copies of those.

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BENCH: Thank you, that would be helpful.

MR WILSON: Thank you. But once again, I don't think that's going to - my submission is that it won't go anywhere because it's the knowledge of the complainant that's important. In relation to my friend's point about the complaint and summons, and how it stands at the moment, section 48 of the Justices Act provides that a complaint may be amended. "If at the hearing of a complaint, it appears to the Justices that there is a variance between such complaint summons or warrant and the evidence adduced at the hearing in support thereof". Then, "If an objection is taken for such defect or variance the Justices shall or if no objection is taken the Justices may make such order for the amendment of the complaint summons or warrant as appears to them necessary or desirable in the interests of justice."

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BENCH: Well, you didn't make any submission requesting that.

MR WILSON: I haven't-----

BENCH: You closed your case and you didn't ask for any amendment.

MR WILSON: No, your Honour, but I was just going to-----

BENCH: But that's not the correct procedure. Why should I call upon the defendant to respond to your case if you close your case wait to hear what they say and then formulate your request under section 48 based on their submissions.

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MR WILSON: It's nothing that's being disguised from you, your Honour. It's all in the certificate of Mr Anderson which was given to them months ago.

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BENCH: Your response to me, was non-responsive to my question.

MR WILSON: I beg your pardon, I'm sorry.

BENCH: You didn't respond to my question.

MR WILSON: I'm sorry. I misunderstood it.

BENCH: If you were seeking an amendment of the complaint, I would have thought you would have raised that as a formal issue before you closed your case, so that the defence knew what they had to answer. Because they have just made their submissions, their final submissions in the case. So now that you are on your feet, if I amend the complaint, they are deprived of a right to make any submissions.

MR WILSON: Yes, your Honour.

BENCH: So, why did you not make your submission before you closed your case and what are you now seeking?

MR WILSON: Well, your Honour, it says here, "Amendment can occur up until the time that the decision is handed down".

BENCH: Okay, well, what is your - I'm going to allow Mr Sheridan to respond, so how do you seek to amend your complaint?

MR WILSON: I would only seek to - I would seek to amend the complaint to bring it in line with the certificate under 66B of Mr Jeremy Anderson.

BENCH: How do you seek to amend your complaint?

MR WILSON: Okay. It's in the particulars, your Honour. It's just the amount of hectares.

BENCH: Yes.

MR WILSON: In the particulars, in the first charge. Particular number 2.

BENCH: Mmm-hmm.

MR WILSON: Where it says, 177 hectares.

BENCH: Mmm-hmm.

MR WILSON: That would change to 186.7.

BENCH: 186.7?

MR WILSON: In particular 3, the 166 would change to 143.

BENCH: One minute, charge 1, seek to amend 177 to 186, yes.

MR WILSON: Point 7.

BENCH: Mmm-Hmm.

MR WILSON: And in particular 3, the 166 hectare remnant endangered would come down to 143.

BENCH: Mmm-hmm, and what does the 11 become then?

MR WILSON: The 11 hectare would become 28.3 of concern and 15.4 not of concern.

BENCH: Mmm-hmm.

MR WILSON: Now if you were to hold that my friend's submission was correct in relation to the endangered, and those other ones of concern, or not of concern, not being subject to the charge, that brings that down from 166 to-----

BENCH: No, this is your application to amend your complaint.

MR WILSON: Yes, your Honour. Okay.

BENCH: So, your application is to amend it in that way.

MR WILSON: Okay. Then on the second charge, the 24th of August 2002, be changed to, 23rd of May.

BENCH: Sorry?

MR WILSON: And further that between - it's got the 24th of August 2002.

BENCH: Mmm-hmm.

MR WILSON: To change that to the 23rd of May 2003.

BENCH: Mmm-hmm.

MR WILSON: Then at particular 2, the 744 will change to 814.7.

BENCH: Mmm-hmm.

MR WILSON: The 683 remnant endangered would change to 571.3.

BENCH: Mmm-hmm.

MR WILSON: And the of concern would change from 61 hectares to 243.4 hectares. That's in line with certificate issued by Jeremy Anderson, your Honour.

BENCH: Why should I make those amendments?

MR WILSON: Well, your Honour, it's in accordance with the evidence that has come out during this hearing and-----

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BENCH: You had the certificate of Mr Anderson from the 14th of September 2006.

MR WILSON: Yes, your Honour.

BENCH: So, if you cannot seek that amendment prior to this point in time at the end of a three day trial, there is something very wrong.

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MR WILSON: Well, it's to bring the charges in line with the particulars.

BENCH: No, you are representing the complainant who is a public officer of a government department of Queensland. You have had knowledge that your complaint was wrong for more than a month for six or seven weeks before you started a three day trial, where you knew that you were going to ask for a fine of \$2 million if the defendant was convicted.

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MR WILSON: We certainly won't be asking for that.

BENCH: That is what you have lead in evidence. You have led in evidence a report suggesting that the appropriate fine is \$2 million. Despite this fact, despite the fact that you knew your complaint was wrong, you didn't bring an interlocutory application to amend the complaint. You didn't have a prepared typewritten amendment to the complaint at the commencement of the hearing, so that Mr Knight's barrister would know what case they were answering. You choose to make this application after I've heard submissions from the other side.

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MR WILSON: There is one other point, your Honour. We had a letter from them that they intended to adduce evidence in respect of this certificate and it was only now that I find out that they don't intend to adduce evidence in respect of this certificate under 66B sub 3.

BENCH: I'm surprised you raised that, given all the surprises you've given them.

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MR WILSON: Well, I'm not trying to be unkind. It's no problem, if I can put in that terms. It was only at that time it was clarified. My friend started - I thought it was a no case submission, your Honour. Then I find it's closed.'

BENCH: Well, even if it was a no case to answer submission, you should have made this application before he uttered one word of that. If you were prosecuting in an appropriate way.

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MR WILSON: Yes, your Honour, but-----

BENCH: Constantly, constantly through this trial, I've had to give Mr Sheridan the right to further cross examine because you want to raise new material in re-examination. Now, this application is brought. If there was to be a no case to

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answer submission, why would I waste an hour. Why would we all waste an hour hearing that, if you wanted to seek an amendment to your complaint.

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MR WILSON: Well, it's my submission, your Honour, that the defendant doesn't suffer any prejudice by this change.

BENCH: Okay, so your first application is an application to amend the complaint.

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MR WILSON: Yes, your Honour.

BENCH: Have you got anything else to say to support your application?

MR WILSON: Well, your Honour, the evidence has been adduced and that's in line with the evidence that's been adduced, in accordance with section 48 of the Justices Act. I rely on that section.

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BENCH: Thank you. Do you want to respond, Mr Sheridan?

MR SHERIDAN: Yes, your Honour. Again, I will be corrected by the transcript, but my recollection is at the outset, I questioned the particulars, in order to know what case we were to meet and my learned friend's response to that was, it may change as evidence comes out. We are referring to section 48, are we. Section 48, my friend refers to subsection (e), "If no such objection is taken the Justices may make such order for the amendment of the complaint summons or warrant as appears to them to be necessary or desirable in the interests of justice".

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The only submission I would make is that the prosecution has closed their case and I gave the prosecution an opportunity to - or at least raised the possibility that particulars may be in some way different and my learned friend's response was that it may change as the evidence comes out and I think I made reference to feeling the sand shifting under my feet and now, at the end - after he's closed his case and after I've made submissions, now he seeks to amend the particulars as your Honour pointed out to somehow involve the certificate that was sworn under the hand of Mr Anderson, in my submission, it's not desirable or necessary in the interests of justice for your Honour to do that.

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BENCH: I'm asked to amend a complaint at the end of a three day trial based on a certificate that has been available to the prosecution for almost two months. There was no application to amend the complaint at the commencement of the summary trial, despite the fact that both counsel knew the matter was going to be hotly contested and going to go for three days. I've got a submission from Mr Sheridan for the defendant, that the version 3.2 of the regional ecosystem plan is irrelevant based on the dates of the offences and the other evidence in the proceedings and the application to amend the

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complaint is based on calculations that have been carried out based on version 3.2 of the regional ecosystem map.

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The effect of the sought amendments is to increase the total area alleged of unlawful clearing, to decrease the area of remnant endangered vegetation, and to increase the amount of remnant not of concern vegetation. I have a submission from Mr Sheridan that the parts of the complaint that refer to remnant not of concern should not be included in the complaint, as they're not an offence known to law. I therefore decline to make a ruling at this stage on the application for an amendment, and if I'm persuaded by Mr Sheridan that the not of concern part is not an offence known to law, I will be making an amendment to the complaint to delete those words from the complaint. That's if the complaint survives the first round of scrutiny about whether it's out of time.

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So first, I have to make a decision about whether it's out of time; then I have to look at whether the portion of the charge about not of concern is an offence known to law. If that's not an offence known to law, I'll be deleting that from the charge. If I do that, I'll be therefore reducing the amount of remnant endangered in line with the application to amend, which reduces the remnant endangered, making the defendant's position better, because it's a reduction rather than an increase that's sought of the remnant endangered.

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And I make a consequential amendment to the paragraph 2 of the particulars about the total, because if I find that not of concern is not an offence known to law, the only part of the charge that will succeed is the remnant endangered, and then I'll consider whether the evidence is sufficient to convict Mr Knights of that offence. Yes, Mr Wilson.

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MR WILSON: Thank you, your Honour. Thank you for that. Your Honour, the three elements to be proved are the defendant, Richard Tudor Knights - this is the first element - did start assessable development, which is the second element, and three, without a development permit. The involvement of Richard Knights is evidenced by: his involvement with the development application, which is in evidence; by his signature on the application, which is contained in Exhibit 1; his correspondence with the Department on the same Exhibit; the fact that an inspection of the maps attached to the application in Exhibit 1 detail a proposed clearing that was almost identical to that cleared without a permit; the fact that the amount proposed to be paid for clearing on the application for the permit was very close to that actually paid for the clearing performed; the evidence of Nathan Gray, a reluctant witness, who said he was hired by Richard Knights to do the clearing on both occasions, [indistinct] described the second occasion as being fodder feeding, but couldn't describe how it was actually done. He also said that he was instructed in relation clearing by Richard Knights, and that he was paid by Richard Knights.

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Richard Knights' involvement is such that, if not the principal offender, his activity in giving instructions to the contractor Gray would constitute aiding, abetting, enabling, or counselling of the criminal code [indistinct]. In addition, Richard Knights is a major owner [indistinct] of the title, and section 67A of the VMA applies in respect of the second charge.

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BENCH: Section what?

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MR WILSON: 67A, which is responsibility for unauthorised clearing of vegetation, which you alluded to [indistinct] the other day. The occupier is liable for clearing. Now, he did start assessable development. In relation to charge one, the invoice from Gray's [indistinct] that was for clearing regrowth, what do we mean by that? He certainly didn't raise any issues of fodder feeding, or any other exemption. The law on what is cleared is found in the Vegetation Management Act, where the definition of "endangered," "of concern," and "not of regional concern" is described in the dictionary as - and they're basically the same - the remnant endangered regional ecosystem - a remnant endangered regional ecosystem for an area of Queensland within a regional ecosystem map means the part of an endangered regional ecosystem, mapped as a remnant endangered regional ecosystem on the map. So the mapping is what determines - is what - what is a remnant regional ecosystem.

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A remnant not of concern regional ecosystem is basically the same. A remnant not of concern regional ecosystem for an area of Queensland within a regional ecosystem map means that part of a not of concern regional ecosystem, mapped as a remnant not of concern regional ecosystem on the map. It's interesting when you read that first charge, a remnant endangered regional ecosystem map means the part of an endangered regional ecosystem, which might go somewhere towards solving the problem of dominant and subdominant that my friend, Mr Sheridan, alluded to.

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BENCH: How can reading the charge help me work out whether dominant and subdominant is-----

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MR WILSON: By-----

BENCH: -----appropriate legislative - within the legislative framework? How can reading the charge help me, Mr Wilson?

MR WILSON: The - when you say the first charge, I mean the regional ecosystem map is to show - make the point about being dominant and subdominant, whether that would come within the definition of regional-----

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BENCH: Well, can you please show me where it is within any legislative framework, what dominant and subdominant mean?

MR WILSON: Well, when you look at the definition, remnant endangered regional ecosystem for an area of Queensland,

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within a regional ecosystem map, means the part of an endangered regional ecosystem. So that part may be - I would suggest that part would be dominant or subdominant.

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BENCH: Well, where do those words, dominant and subdominant - why are they in the map at all?

MR WILSON: Well, whatever - what I've termed there and described is still remnant - they're - remnant endangered, whether they're dominant or subdominant is my submission. Clearly, the area mapped is - the map - the areas mapped of remnant vegetation subject of the charge were within the area cleared by Richard Knights. In not one of the number of RE maps tendered by the prosecution or defence in respect of the vegetation before the clearing is there any non-remnant shown for which Richard Knights is charged. You can see that in Exhibits 5, 6, 13, 14, 15 and 16. All these maps are consistent with the evidence of Jeremy Anderson and the section 66B statement. There's only RE vegetation maps from version 4 of September 2003, from where the cleared areas start to appear as non-remnant as a result of the clearing.

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There's been some confusion over these maps by looking back over a collection of maps, but the position of the landholder is being able to look at the relevant map at the time. To someone clearing property, the relevant map is the RE map that is current at the time. As Richard Knights cleared over several years, there were changes in the RE mapping, but even so, in the evidence of Jeremy Anderson, he said that he made allowances for that, and he gave him the lowest common denominator in respect of any RE status.

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In relation to charge 2, Richard Knights - it was - the evidence was that between the 23rd of May '03 to the 19th of August '06, Darryl Baumgartner wrote to Richard Knights on the 9th of October 2002, advising him of an amendment to the regional ecosystem map, and attaching a copy of both the original map and the updated map. Now, if you look at that - Exhibit 6, that is, your Honour - and those two maps attached to Exhibit 6 are also lodged - cleared by Mr Sheridan as some of those exhibits between 12 and 16.

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So he clearly knew, Mr Knights, of a letter written on the 9th of October 2002 by Darryl Baumgartner, "Queensland [indistinct] the request for regional ecosystem map qualification, submitted by BMO officer, [indistinct]. Changes have been made to the regional ecosystem map following assessment of this request. Attached is a hardcopy of the original coverage and the updated coverage. Updated information will be incorporated in the next released version of the Herbarium Regional Ecosystem Mapping. The data shown on the hardcopy map is 1999 data."

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So he was actually advised of what the regional ecosystem was in October 2002. The evidence of Jeremy Anderson was that there were changes - any changes of RE status, Richard Knights was given the advantage of the lowest common denominator.

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That is, where the REs and the charges were mapped at the lowest RE status, mapped at any time for the period of the offence, and totally excluded, if not mapped, as non-remnant at any time. It is my submission that the certificate of Jeremy Anderson, prepared under provision of 66B of the Vegetation Management Act 1999, was not challenged by any evidence to the contrary, in accordance under - I think it's 66B(3) - yes, 66B(3) - and he being an expert, your Honour, a great deal of weight to his evidence.

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Also, the issue was raised that he did not provide his source documents, and as an expert, you're not - my understanding is you're not required to provide your source documents. There's been no evidence to the contrary in respect of: 66B(d), the conclusions drawn from the remotely sensed image; section 66B subsection (e), the location of the area; 66B subsection (f), that the vegetation was cleared; and 66B(g), that the stated areas were areas of remnant vegetation actually derived from the RE map during the relevant periods.

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BENCH: Can someone give me that 66B?

MR WILSON: Yes, your Honour. Actually I've got the sections here that-----

BENCH: Is that in your bundle of material you handed up this morning? It's not, is it?

MR SHERIDAN: No, I don't think so, your Honour.

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BENCH: Have you got a spare copy?

MR WILSON: Yes, your Honour. I've got all the - I've got both parts here I can pull up for you.

BENCH: Thank you. Yes.

MR WILSON: Do you want me to run through that again, your Honour, or-----

BENCH: No, I just thought this, if you had it there - oh, this hasn't got 66 in it. I wanted 66B.

MR WILSON: I thought I had 66B in it, your Honour.

BENCH: I hand that back.

MR WILSON: You might want to - your Honour, they're the relevant sections for the-----

BENCH: I think I've already got them off Mr Sheridan. Well, I'll keep them up here. Have you got 66B?

MR WILSON: Yes, your Honour. That's the relevant legislation at the time of both offences.

BENCH: Thank you. Yes.

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MR WILSON: In relation to charge 2, Nathan Gray stated that the clearing was for fodder harvesting, as detailed on his invoice. However, he couldn't explain or wasn't willing to explain how fodder harvesting was done. The matter - the fact that Mr Gray stated that clearing for fodder harvesting is not enough in itself. As mentioned earlier, he was unable to or reluctant to describe how this fodder harvesting was carried out, so the stock could be fed the fodder. The evidence of Dr Olsen was strong and detailed how the method of clearing was not conducive to fodder feeding.

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He gave evidence that too big an area was cleared too quickly for fodder feeding. In addition, the majority of the vegetation cleared was not recognised fodder species. He pointed out the adjoining regional eco-systems had a much higher content of fodder species which was more suitable for that activity. These areas were not cleared. He also made a point that the soil types where the areas cleared were more suitable for the growing of grasses than the sandy country that contained the fodder feed.

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This ties in with the evidence of Peter Voller who gave evidence to the effect that Richard Knights had a strong interest in how land could be cleared under a fodder exemption. In addition, an examination of Exhibit 1 will show at page 16 of the application for a permit to clear-----

BENCH: Exhibit 1 is an out of date title deed that doesn't have any relevance to the proceedings.

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MR WILSON: Oh, I beg your pardon. The exhibit in respect of the departmental file.

BENCH: Exhibit 3.

MR WILSON: Exhibit 3; that's what I referred you to, your Honour, when I said that.

BENCH: Don't you keep an exhibit list down there?

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MR WILSON: I do, your Honour, but I've been trying to manage it all by myself. I have got the list, but I wrote the wrong number on the front. So that cost of 27,780 was very close to the 27,720 which was paid to the contractor. Jeremy Anderson stated in Exhibit 24 that 814.7 hectares was cleared. It is to be remembered that Jeremy Anderson made allowances in his evidence, he said, for areas that might have been non-assessable development.

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Without a development permit: there was no permit issued for the clearing, and this was proved by evidence of the refusal of his application together with Craig Elliott's unchallenged statement that he had searched departmental records, and he found no evidence of a permit having been issued. In relation to the GPS, the Vegetation Management Act and - both the Vegetation Management Act and IFA have provisions in relation

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to - first of all, it's under 66A of the Vegetation Management Act and each instrument, equipment or installation proscribed in the regulations that is used in accordance with any conditions proscribed in the regulation is taken in the absence of evidence to the contrary, to be accurate and precise and to have been used by an appropriately qualified person.

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Once again, it's got a provision. A party to the proceeding intending to challenge a matter mentioned in subsection 1(a) must give 28 days' notice with it. That's not relevant. There's a-----

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BENCH: Well, what's the regulation I need to look at?

MR WILSON: The regulation is vegetation regulations. 1(a), a definition, GPS means global positioning system, and (3), matters proscribed for a property vegetation management plan. For the definition of a property vegetation management plan, in the schedule of the Act, the following matters are proscribed, and at - at sub (2)(iii), the map grid of Australia 1994 co-ordinates and there's zone references for each point, acquired by a GPS or similar system of satellites that receives and processes information. I'd also point out to your Honour that Mr Knights refused to be interviewed, or give any explanation as to the - in relation to those matters.

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BENCH: So?

MR WILSON: Well, that's his right, but he-----

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BENCH: Well, also, why raise it?

MR WILSON: Well, there's a case, Weisen v Steiner, where a person is given the opportunity to answer a question and he did. I just can't remember that case but-----

BENCH: Why would Weisen v Steiner apply to this case?

MR WILSON: Well, these - because these are done on private property. The only person who is likely to have any knowledge is the person that actually resides there.

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BENCH: You haven't charged each and every owner and you haven't proved that Mr Knights is the only person who lives there, so Weisen v Steiner, it would be pretty dangerous to apply that to this situation, in a situation where all the land-owners are not before the Court and where there's no evidence about who lives there and there's no evidence about what Mr Knights' interest in the property was or what he did with the property.

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MR WILSON: Yes. There's a little bit of evidence. He's sent it to our [Indistinct].

BENCH: Marginal - a small amount of evidence?

MR WILSON: Yes. Well, there is some evidence. Just see if I can answer some of Mr Sheridan's - I mentioned Mr Baumgartner that time earlier. The other point I make that in that Exhibit, it shows that he actually called there between the second and the third charge, so if you hold with his knowledge-----

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BENCH: There's only two charges?

MR WILSON: I'm sorry, I beg your pardon, between the first and second charge, charge 1 and charge 2, but Mr Baumgartner's visit in that report which was Exhibit 7, because it's the 6th of - what was it. It's the 6th of March 2003, which was before the second lot of clearing occurred according to the-----

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BENCH: Well, not the charges as they are now.

MR WILSON: But on the evidence that was before the second lot of-----

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BENCH: Not on the charges as they are before the Court.

MR WILSON: Yes, I take that back.

BENCH: Thank you.

MR WILSON: He was there - his visit was prior to when the clearing occurred on the second occasion according to the evidence. In relation to the RE mapping, your Honour, it is my submission that Mr Anderson has provided all the necessary RE Mapping to prove in that certificate, and that certificate is unchallenged. The Exhibit 16 which my friend you to had further categories of clear, disturbed status. When one looks at the top, the disturbed came from the Charleville office. It is my submission that it doesn't purport to be a regional eco-system map. It's different title to all the other regional eco-system maps. It doesn't say anything about remnant regional eco-system map.

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It doesn't appear to be one issued under the hand of the chief executive, and that's perhaps why there's no other categories or cleared and disturbed in there. The Court should not treat that as a regional eco-system map which adds further confusion. In relation to my friend's submissions that only remnant endangered regional eco-systems are the subject of the Vegetation Management Act at certain times, it's my submission that the Act - the clearing not of concern, or of concern are caught under other headings, under the purposes of the Act, such as (c), maintain or increase bio-diversity, and (d), maintain ecological processes, and (e), allow for ecological sustainable land use. Unless I can assist the Court further, your Honour, those-----

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BENCH: No, thank you. I think - have you got any matters on law you want to quickly respond to?

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MR SHERIDAN: No, your Honour.

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BENCH: Well, you're going to print me out those decisions?

MR WILSON: Yes, I'll go across the road and do that. I'll go across the road and do that now, your Honour.

BENCH: Do you just need a printer?

MR WILSON: Yes, I've got it here. If it could be arranged here, it would be convenient.

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BENCH: I can probably get you a printer.

MR WILSON: Thanks.

BENCH: Well, I've got a lot to read and think about and if I could give a decision tomorrow, I would be happy to do that, but I am not sure I am going to get through all the material.

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MR WILSON: I've got a problem. I've got two young-----

BENCH: I know you have got a problem tomorrow.

MR WILSON: Yes.

BENCH: If it was tomorrow, I would make it a time - a short time that was convenient or - but I also don't know what we are going - so I don't, if we don't do it tomorrow, when we can do it. Are you - is your instructing solicitor from Toowoomba or Brisbane?

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MR SHERIDAN: Toowoomba, your Honour.

BENCH: Toowoomba.

MR SHERIDAN: But they have offices in Brisbane.

BENCH: Then, in any event, if we could find a day where you were available, you could appear uninstructed, just to get the decision.

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MR SHERIDAN: Yes, I could, your Honour.

MR WILSON: Your Honour, I am prepared to come tomorrow, but I would have to go home and come back with my children unattended at the main.

BENCH: Oh, no. I was suggesting, if we do it tomorrow, we do it in Brisbane.

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MR WILSON: Okay. Yes, I-----

MR SHERIDAN: That's suitable to us, your Honour.

MR WILSON: That would suit me too, your Honour.

BENCH: Okay. Well, can you leave your contact numbers with my clerk. If I can - if I can get everything read, including the decisions and come to a concluded view by tomorrow afternoon, I can give a decision in Brisbane about two tomorrow, if that suits

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MR SHERIDAN: Yes, your Honour.

BENCH: If I can't, I will endeavour to do it in Brisbane at a date to be fixed, within - before the end of the year, and - if it is not tomorrow, there is a possibility - you have got a problem on the 9th of November. Is that what you said?

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MR SHERIDAN: Yes, your Honour. I've got a part heard in Brisbane.

BENCH: So will that go all day?

MR SHERIDAN: I'd say so, your Honour. It may not, but I wouldn't commit to it.

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BENCH: Okay. The dates I might available is the 9th of November, in the afternoon in Brisbane, the 15th of November in the afternoon in Brisbane, the 24th of November in the afternoon in Brisbane, or the 7th or - 7th of December in the afternoon in Brisbane. So I will do my best to give my decision as soon as I can, because I know that you don't want to be waiting for a decision, but I will have to read the material carefully and make sure I don't fall into error. So can you leave your details and we will adjourn now, to a date to be fixed, either here in Dalby or in Brisbane? We - if I - there's no - I don't have to give it in Brisbane. I just thought that would be convenient to the parties. Alternatively, if you have to come back to Dalby and if Mr Purcell has to appear on the case in Dalby, we could - I could give my decision at the same time.

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MR SHERIDAN: I think the other case - the Simpson matter that Mr Purcell and I are in, your Honour had adjourned it for a date to be fixed in Brisbane as well.

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BENCH: As well. Yes. So either we can do them both in Brisbane, or if we come up with some other creative plan, we'll come up with some other-----

MR SHERIDAN: If your Honour is happy to travel to Brisbane, we are more than happy, because everyone, other than your Honour, is based down there. So if your Honour is good enough to go to Brisbane-----

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BENCH: What about your client? He's not in Brisbane, though.

MR WILSON: He's in Thailand. It's a big trip.

MR SHERIDAN: In the Simpson matter?

BENCH: No, this-----

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MR SHERIDAN: Our client's - instructing solicitor's clients appear - is prepared for his instructing solicitor to appear on his behalf in Brisbane.

BENCH: Okay. Thanks. Yes. So if you leave your details, I'll start reading and I'll get you a printer and - yes. Thank you.

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THE COURT ADJOURNED

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