SUPREME COURT OF QUEENSLAND

CITATION:	*Witheyman v Simpson* [2009] QCA 388
PARTIES:	**PETER ROBERT WITHEYMAN** (applicant/appellant) **v** **HARVEY SCOTT SIMPSON** (respondent)
FILE NO/S:	Appeal No 4021 of 2009 DC No 3536 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	15 December 2009
DELIVERED AT:	Brisbane
HEARING DATE:	28 September 2009
JUDGES:	Muir JA, Cullinane and Fryberg JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal granted;** **2. Appeal allowed; and** **3. Set aside so much of the order of the District Court made on 20 March 2009 as ordered the appellant pay the respondent's costs of the appeal and dismissed the appeal to that court and in lieu thereof order:** **a. appeal allowed;** **b. set aside so much of the orders made in the Magistrates Court on 19 January 2007 as ordered that the charge embodied in count one of the complaint be dismissed;** **c. remit the proceeding to the Magistrates Court to rehear and determine count one according to law.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – TREES AND VEGETATION – NATIVE VEGETATION – where respondent was charged with three offences including starting assessable development without an effective development permit in breach of s 4.3.1(1) *Integrated Planning Act* 1997 (Qld) – where respondent was acquitted of all three counts in the Magistrates Court and the applicant's appeal to the District Court was dismissed with costs – where applicant applied for leave to appeal against the District Court judge's

decision alleging the judge erred in holding that, on the findings of fact made by the learned Magistrate, the conclusion that the charge be dismissed was correct and in failing to conclude that 19.9 hectares of remnant endangered regional ecosystem had been cleared by the respondent

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – CONSIDERATION OF EXTRINSIC MATTERS – EXPLANATORY MEMORANDA, PARLIAMENTARY DEBATES AND MATERIALS ETC – where applicant also alleged the District Court judge erred in his construction of the *Integrated Planning Act* 1997 (Qld) ("the IPA") and *Vegetation Management Act* 1999 (Qld) ("VMA") by finding, by reference to extrinsic material, that s 4.3.1(1) and cl 3A, Part 1 of Schedule 8 of the IPA should not be given a literal construction and concluding that at relevant times regional ecosystems other than remnant endangered regional ecosystems were not intended to be protected by the IPA and VMA – whether, by removing s 3(1)(a)(ii) of the VMA, the Legislature intended that the VMA would no longer regulate clearing of vegetation on freehold land to preserve remnant of concern regional ecosystems

Acts Interpretation Act 1954 (Qld), s 14A, s 14B
Integrated Planning Act 1997 (Qld), s 1.3.5, s 3.1.1, s 3.5.4(2), s 3.5.4(3), s 3.5.13(4), s 4.3.1(1), Schedule 8, Schedule 10
Integrated Planning Regulation 1998 (Qld), Schedule 1A
Vegetation Management Act 1999 (Qld), s 3, s 11, s 12(1), s 20, s 66B, s 76(3), Schedule
Vegetation Management Amendment Act 2000 (Qld)
Vegetation Management and Other Legislation Amendment Act 2004 (Qld)

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 260 ALR 1; [2009] HCA 41, cited
Bropho v Western Australia (1990) 171 CLR 1; [1990] HCA 24, considered
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384; [1997] HCA 2, cited
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297; [1981] HCA 26, cited
Jones v Wrotham Park Estates [1980] AC 74, considered
Kingston v Keprose Pty Ltd (1987) 11 NSWLR 404, considered
Macarone v McKone; ex parte Macarone [1986] 1 Qd R 284, cited
Newcastle City Council v GIO General Ltd (1997) 191 CLR 85; [1997] HCA 53, considered
R v Young (1999) 46 NSWLR 681; [1999] NSWCCA 166, applied

Re Bolton; Ex parte Beane (1987) 162 CLR 514; [1987] HCA 12, cited
WACB v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 79 ALJR 94; [2004] HCA 50, cited

COUNSEL: D B Fraser QC, with D J Lang, for the applicant/appellant
D R Gore QC, with P D Sheridan, for the respondent

SOLICITORS: Crown Law for the applicant/appellant
P & E Law for the respondent

[1] **MUIR JA: Introduction**
The respondent was charged with three offences, including, between 25 January 2001 and 15 April 2004 at Hebel starting assessable development without an effective development permit for the development in breach of s 4.3.1(1) of the *Integrated Planning Act* 1997 (Qld) ("the IPA") (count 1). The offence was particularised as follows in the complaint and summons:

> "Particulars
>
> 1. The assessable development was operational work that was the clearing of native vegetation on freehold land.
> 2. The unlawful clearing was on land described as Lot 2 on Plan BEL5381, Parish of Byra, Shire of Balonne.
>
> …"

[2] On 19 January 2007 the respondent was acquitted by a magistrate of all three counts and on 22 January 2007 it was ordered that the applicant pay the respondent's costs fixed at $15,993.80. The applicant appealed to the District Court pursuant to s 222 of the *Justices Act* 1886 (Qld). In the course of the hearing, the appeal in respect of counts 2 and 3 was effectively abandoned. The learned judge who heard the appeal dismissed it with costs on 20 March 2009.

[3] The applicant applied for leave to appeal against the District Court judge's decision pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld). The application for leave to appeal alleged that the judge:

> "…erred in his construction of IPA and the VMA [the *Vegetation Management Act* 1999 (Qld)] … erred in failing to conclude that 19.9 hectares of remnant endangered regional ecosystem had been cleared by the Respondent … erred in holding that, on the findings of fact made by the learned Magistrate, the conclusion that the charge should be dismissed was correct …"

[4] The outline of argument of counsel for the applicant did little to dispel the opacity of these grounds. On the hearing senior counsel for the applicant confirmed that the issues for determination, should leave be granted, were:

(a) whether what was done by the respondent in the period specified in count 1 was "assessable development" requiring the consent of the Chief Executive under the IPA;

(b) whether the applicant had proved beyond reasonable doubt that the clearing of a 19 hectare parcel of the respondent's land during the specified period was clearing of native vegetation and thus constituted assessable development requiring a development permit.

The statutory scheme

[5] The resolution of the first issue for determination depends on the construction of the IPA, upon which the VMA has a bearing. Before considering the parties' respective contentions it is desirable to refer to the relevant provisions of both Acts which have particular relevance to this issue.

[6] Section 4.3.1 of the IPA makes it an offence for a person to "start assessable development without a development permit for the development".

[7] The dictionary in Schedule 10 to the IPA relevantly defined "assessable development" as development specified in Schedule 8, Part 1. Schedule 8, Part 1, relevantly provided:[1]

> "**PART 1 – ASSESSABLE DEVELOPMENT**
>
> **…**
>
> **3A.** Carrying out operational work that is the clearing of native vegetation on freehold land, unless the clearing is—
>
> (a) to the extent necessary to build a single residence and any reasonably associated building or structure; or
>
> (b) necessary for essential management; or
>
> (c) necessary for routine management in an area that is outside—
>
> (i) an area of high nature conservation value; and
>
> (ii) an area vulnerable to land degradation; and
>
> (iii) a remnant endangered regional ecosystem shown on a regional ecosystem map; or …"

[8] "Routine management"[2] means clearing native vegetation:

> "(a) for establishing a necessary fence, road or other built infrastructure that is on less than 5 ha; or
>
> (b) that is not remnant vegetation; or
>
> (c) for supplying fodder for stock, in drought conditions only."

[9] "Native vegetation" was defined in Schedule 10 to the IPA as meaning:

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

[10] "Operational work" relevantly means, "clearing vegetation on freehold land".[3]

[11] The definition of "remnant endangered regional ecosystem" is set out later.

[12] "Remnant vegetation" is defined in the schedule to the VMA as follows:[4]

> "1. 'Remnant vegetation', for an area of Queensland within a regional ecosystem map, means the vegetation mapped as being within remnant endangered regional ecosystems, remnant of concern regional ecosystems and remnant not of concern regional ecosystems shown on the map.
>
> 2. 'Remnant vegetation', for an area of Queensland within a remnant map, means the vegetation mapped as remnant vegetation on the map.

---

1 *Integrated Planning Act* 1997 (Qld), Schedule 8, Part 1. Unless otherwise provided, all references to the *Integrated Planning Act* 1997 (Qld) refer to Reprint 3D.

2 *Integrated Planning Act* 1997 (Qld), Schedule 8, Part 4.

3 *Integrated Planning Act* 1997 (Qld), Schedule 10 and s 1.3.5(f).

4 *Vegetation Management Act* 1999 (Qld) (Reprint 1A), Schedule.

3. 'Remnant vegetation', for an area of Queensland for which there is no regional ecosystem map or remnant map, means the vegetation, part of which forms the predominant canopy of the vegetation—
   (a) covering more than 50% of the undisturbed predominant canopy; and
   (b) averaging more than 70% of the vegetation's undisturbed height; and
   (c) composed of species characteristic of the vegetation's undisturbed predominant canopy."

[13] Part 4 of Schedule 8 of the IPA, in effect, gave the terms "regional ecosystem", "regional ecosystem map", "remnant endangered regional ecosystem" and "remnant map" their meanings under the VMA. Those terms were defined in the Schedule to the VMA[5] as follows:

"'**regional ecosystem**' means a vegetation community in a bioregion that is consistently associated with a particular combination of geology, landform and soil."

"'**regional ecosystem map**'—[6]

1. A 'regional ecosystem map' means a map—
   (a) certified by the chief executive as the regional ecosystem map for a particular area; and
   (b) 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
      (iv) numbers that reference regional ecosystems; and
      (v) declared areas of high nature conservation value; and
      (vi) declared areas vulnerable to land degradation.
2. A 'regional ecosystem map' includes any amendment to the map included in a schedule to the map and certified by the chief executive as an amendment to the map at the day the amendment is certified."

"'**remnant endangered regional ecosystem**'—

1. 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.
2. A 'remnant endangered regional ecosystem', for an area of Queensland for which there is no regional ecosystem map, means the part of an endangered regional ecosystem having vegetation, forming the predominant canopy—
   (a) covering more than 50% of the undisturbed predominant canopy; and
   (b) averaging more than 70% of the vegetation's undisturbed height; and
   (c) composed of species characteristic of the vegetation's undisturbed predominant canopy."

---

5 Reprint 1A.

6 Note definition was amended in 2003 by Act No. 10, s 75(3) and in 2004 by Act No. 1, s 28(3).

"'**remnant map**'—[7]

1. A 'remnant map' means a map—
   (a) certified by the chief executive as a remnant map for a particular area; and
   (b) maintained by the department for the purpose of showing, for the area—
      (i) areas of remnant vegetation; and
      (ii) declared areas of high nature conservation value; and
      (iii) declared areas vulnerable to land degradation.
2. A 'remnant map' includes any amendment to the map included in a schedule to the map and certified by the chief executive as an amendment to the map at the day the amendment is certified."

[14] Applications for development approval must be made in the approved form to "the assessment manager" under the *Integrated Planning Regulation* 1998 (Qld). The assessment manager, for a permit to clear native vegetation, was the Chief Executive administering the VMA.[8]

[15] Under s 3.5.4(2) of the IPA the assessment manager, relevantly, was required to assess any part of an application requiring a code assessment only against "(a) applicable codes …". "Code" was defined in Schedule 10 of the IPA as:

"… a document or part of a document identified as a code –
   (a) in a planning instrument; or
   (b) for IDAS in this Act or another Act; or
   (c) in a preliminary approval." (footnote deleted)

[16] IDAS is stated in Chapter 3, s 3.1.1 of the IPA to be "the system detailed in this chapter for integrating State and local government assessment and approval processes for development". (footnote deleted)

[17] Section 3.5.4(3) provided:[9]

"If the assessment manager is not a local government, the laws that are administered by, and the policies that are reasonably identifiable as policies applied by, the assessment manager and that are relevant to the application, are taken to be applicable codes in addition to the applicable codes mentioned in subsection (2)(a)."

[18] Section 20 of the original VMA provided:[10]

"**Regional vegetation management plans are codes for IDAS**

20.(1) If a regional vegetation management plan is made for a region, the part of the plan identified as a code for the clearing of vegetation is—
   (a) a code for IDAS for a development application for land in the region; and
   (b) an applicable code for the clearing of vegetation in the region.

(2) If a regional vegetation management plan is not made for a region, the part of the State policy identified as a code for the clearing of vegetation is—
   (a) a code for IDAS for a development application for land in the region; and
   (b) an applicable code for the clearing of vegetation in the region."

---

7 Note definition was amended in 2003 by Act No. 10, s 75(4) and in 2004 by Act No. 1, s 28(4).

8 *Integrated Planning Regulation* 1998 (Qld) (Reprint 2B), Schedule 1A, Part 1, Item 2.

9 *Integrated Planning Act* 1997 (Qld).

10 *Vegetation Management Act* 1999 (Qld) (As passed).

[19] Section 11 of the VMA required the Minister to "prepare and make regional vegetation management plans for vegetation management on freehold land in regions of the State". Such a plan was required to "include a code for the clearing of vegetation".[11]

[20] "State policy" was defined in the Schedule to the VMA to mean "the policy approved under section 10(3)".[12] That provision enabled the Governor in Council to approve the "policy for vegetation management on freehold land for the State" which the Minister was required by s 10(1) to prepare.

[21] The *State Policy for Vegetation Management on Freehold Land* published in September 2000 contained, in Appendix 2, a code for the clearing of vegetation. Insofar as regional ecosystems were concerned, the code was confined to remnant endangered regional ecosystems.

[22] Pursuant to s 3.5.13(4) of the IPA "[t]he assessment manager may refuse the application only if the assessment manager is satisfied … the development does not comply with the applicable code …". Counsel for the applicant submitted, and it was not contested, that at relevant times there was a code under which the requisite application by the respondent could have been assessed.

The applicant's contentions

[23] It was submitted on behalf of the applicant that the respondent started an assessable development without a development permit for the development and thus, on the face of it, the elements of count 1 were made out. The assessable development was alleged to be the clearing of native vegetation to which clause 3A(c) of Part 1 of Schedule 8 of the IPA did not apply as the clearing was not outside "a remnant endangered regional ecosystem shown on a regional ecosystem map". It was submitted that the Magistrate erred in failing to find the elements of count 1 proven beyond reasonable doubt on the evidence before her. The alleged error on the part of the District Court judge was his finding, by reference to extrinsic material, that s 4.3.1(1) of the IPA and clause 3A of Part 1 of Schedule 8 should not be given a literal construction and that at relevant times regional ecosystems other than remnant endangered regional ecosystems were not intended to be protected by the IPA and the VMA.

The respondent's contentions and the construction adopted at first instance and on appeal in the District Court

[24] The respondent argued successfully on appeal to the District Court that the construction of the IPA was affected by the VMA so that there was no obligation to obtain a development permit at relevant times.

[25] The respondent's argument was developed as follows. Section 3 of the VMA, which was assented to on 21 December 1999, provided:[13]

> "**3 Purposes of Act**
>
> **(1)** The purposes of this Act are to regulate the clearing of vegetation on freehold land to –
>
> (a) preserve the following –
>
> (i) remnant endangered regional ecosystems;

---

11 *Vegetation Management Act* 1999 (Qld), (As passed), s 12(1)(c). See also Reprint 1A of the Act as at 14 August 2001 in which ss 11 and 12 remain unamended.

12 *Vegetation Management Act* 1999 (Qld), (Reprint 1A).

13 *Vegetation Management Act* 1999 (Qld) (As passed), s 3.

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

(b) ensure that the clearing does not cause land degradation; and
(c) maintain or increase biodiversity; and
(d) maintain ecological processes; and
(e) allow for ecologically sustainable land use,

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

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

[26] Part 7 of the VMA as passed amended the IPA in a number of respects, including by inserting clause 3A in Schedule 8. The definition of "operational work" in s 1.3.5 of the IPA was amended to include "(f) clearing vegetation on freehold land".[14]

[27] Two days prior to the VMA coming into force on 15 September 2000, the *Vegetation Management Amendment Act* 2000 (Qld) was passed. It deleted s 3(1)(a)(ii) of the VMA. The reasons for the deletion were expressed in the explanatory notes to the amendment Act as follows:

> "**Reasons for the Bill**
> The Premier and Minister made a commitment at public forums to remove references to 'of concern' regional ecosystems from the *Vegetation Management Act 1999* unless financial assistance was forthcoming from the Commonwealth. The Commonwealth has not made any commitment to a financial assistance package. As a consequence, the Queensland Government has moved to honour the Premier's commitment.
> …
> **Ways in which the policy objective is to be achieved**
> The policy objectives will be achieved by removing the preservation of 'of concern' regional ecosystems from the purpose of the Act."

[28] It was explained in the Minister's second reading speech in respect of the amendment Act:

> "As a consequence of the Commonwealth's failure, the Queensland Government is forced to review the legislation. Amendments are required to ensure the burden for doing the right thing–for protecting important vegetation communities and managing land sustainably–does not fall unfairly on a few land-holders. The principal change made by the Vegetation Management Amendment Bill 2000 is to remove provisions that provide for the protection of 'of concern' or vulnerable regional ecosystems. These are ecosystems where between 70% to 90% of the original vegetation type has been cleared.
> With no Commonwealth funding support, **we regrettably have no choice but to remove mandatory protection for these areas** before the Vegetation Management Act is proclaimed. This action honours a commitment the Premier made at a Community Cabinet meeting in

---

14 *Vegetation Management Act* 1999 (Qld) (As passed), s 76(3).

> Roma. This amendment means that on freehold land, we will protect 'endangered' regional ecosystems–that is, those with 10% or less of their original vegetation remaining–but rely upon the regional vegetation planning process and regional vegetation planning committees to voluntarily extend protection, through a local planning process, beyond this level." (emphasis added)

[29] The VMA, amended by the *Vegetation Management and Other Legislation Amendment Act* 2004 (Qld) (the "2004 Amending Act") reintroduced as a purpose of the VMA, the regulation of clearing in a way that conserves "remnant of concern regional ecosystems" and added to the matters listed in s 3(1)(a) "remnant not of concern regional ecosystems".

[30] The explanatory notes to the 2004 Amending Act explain:

> "**Objective of the Bill**
> The purpose of the Bill is to phase out broadscale clearing of remnant vegetation in Queensland by 31 December 2006 under a transitional clearing cap, and to protect 'of concern' regional ecosystems, whilst allowing clearing for necessary ongoing purposes and management activities.
> …
> **Reasons for the Bill**
> A package of measures to phase out broadscale clearing of remnant vegetation by December 2006 was a key election commitment made by the Government. Major elements of this commitment include the protection of 'of concern' vegetation on freehold land,
> …
> **Ways in which the policy objectives are to be achieved**
> …
> Protecting 'of concern' remnant vegetation on freehold land; …"

[31] "Remnant not of concern regional ecosystem" and "remnant of concern regional ecosystem" are defined in the schedule to the VMA as follows:[15]

> '"**remnant not of concern regional ecosystem**'—
> 1. A 'remnant not of concern regional ecosystem', for an area of Queensland within a regional ecosystem map, means the part of a not of concern regional ecosystem mapped as a remnant not of concern regional ecosystem on the map.
> 2. A 'remnant not of concern regional ecosystem', for an area of Queensland for which there is no regional ecosystem map, means the part of a not of concern regional ecosystem having vegetation, forming the predominant canopy—
>   (a) covering more than 50% of the undisturbed predominant canopy; and
>   (b) averaging more than 70% of the vegetation's undisturbed height; and
>   (c) composed of species characteristic of the vegetation's undisturbed predominant canopy.
>
> '**remnant of concern regional ecosystem**'—
> 1. A 'remnant of concern regional ecosystem', for an area of Queensland within a regional ecosystem map, means the part of

---

15 *Vegetation Management Act* 1999 (Qld) (Reprint 1A), Schedule.

an of concern regional ecosystem mapped as a remnant of concern regional ecosystem on the map.

2. A 'remnant of concern regional ecosystem', for an area of Queensland for which there is no regional ecosystem map, means the part of an of concern regional ecosystem having vegetation, forming the predominant canopy—
   (a) covering more than 50% of the undisturbed predominant canopy; and
   (b) averaging more than 70% of the vegetation's undisturbed height; and
   (c) composed of species characteristic of the vegetation's undisturbed predominant canopy."

[32] The respondent contends that the deletion of "remnant of concern regional ecosystems" from s 3(1) demonstrated that the clearing of land which met that description did not require a permit. That was because the purposes of the VMA were expressly stated, in s 3, as the regulation of the clearing of vegetation on freehold land to preserve defined categories of land. Removal of one of those categories of land, so it was argued, necessarily meant that no provisions of the Act could apply to land within the category.

[33] It was submitted that the IPA and, in particular, clause 3A in Schedule 8 Part 1 should be given a purposive construction.[16] Reliance was placed also on s 14A(1) of the *Acts Interpretation Act* 1954 (Qld) and on the following observations in the reasons of Mason and Wilson JJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*:[17]

> "The rules, as D.C. Pearce says in *Statutory Interpretation*, p. 14, are no more than rules of common sense, designed to achieve this object. They are not rules of law. If the judge applies the literal rule it is because it gives emphasis to the factor which in the particular case he thinks is decisive. When he considers that the statute admits of no reasonable alternative construction it is because (a) the language is intractable or (b) although the language is not intractable, the operation of the statute, read literally, is not such as to indicate that it could not have been intended by the legislature.
>
> On the other hand, when the judge labels the operation of the statute as 'absurd', 'extraordinary', 'capricious', 'irrational' or 'obscure' he assigns a ground for concluding that the legislature could not have intended such an operation and that an alternative interpretation must be preferred. But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions."

[34] Additionally, it was submitted that the interpretation of the vegetation clearing provisions in the IPA needed to be undertaken by reference to the VMA (which effected the relevant amendments to the IPA) and by the historical context of their

---

16 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 and *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 264.

17 (1981) 147 CLR 297 at 320 – 321.

enactment. Reference was made in that regard to *Wall, Director-General of Environmental Protection Agency v Douglas Shire Council*.[18] The contention led to the submission that as "of concern" and "not of concern" regional ecosystems were not protected prior to the 2004 Amending Act, it would be contrary to the objectives intended to be served by both the VMA and the IPA to conclude that the clearing of "of concern" and "not of concern" vegetation was unlawful under the IPA.

[35] The final construction point raised on behalf of the respondent was that because s 4.3.1 of the IPA is a penal provision, any ambiguity or doubt in its construction should be resolved in favour of the respondent.[19]

Consideration of the respondent's construction argument

[36] Plainly, the intention of the Legislature in removing "remnant of concern regional ecosystems" from s 3(1)(a) of the VMA was that it would no longer be a purpose of the VMA to regulate the clearing of vegetation on freehold land to preserve "remnant of concern regional ecosystems". It is not apparent, however, that the Legislative intention, in addition to the removal of this purpose included removal from the Act's purposes the regulation of clearing on such land to meet objectives (b), (c), (d) and (e) in s 3(1). The words "the clearing" in s 3(1)(b) appear to relate back to "the clearing of vegetation on freehold land" in the introductory words of s 3(1) and the purposes in (c), (d) and (e) are not expressly confined in their application to freehold land within the ambit of s 3(1)(a): on the face of it they are of general application to freehold land.

[37] The above conclusions, of themselves, are sufficient to dispose of the respondent's construction argument: even after the deletion of sub-paragraph (ii) of s 3(1)(a) there was ample scope for the application of the VMA to "remnant of concern regional ecosystems" even though preservation of such ecosystems was no longer a purpose of the VMA. The respondent's argument does not improve when regard is had to relevant principles of statutory construction.

[38] Section 14A of the *Acts Interpretation Act* 1954 (Qld) requires that in interpreting an Act the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.

[39] Section 14B(1) of the *Acts Interpretation Act* 1954 (Qld) permits, in the interpretation of a provision of an Act, consideration being given to extrinsic material capable of assisting in the interpretation -

> "(a) if the provision is ambiguous or obscure – to provide an interpretation of it; or
>
> (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable – to provide an interpretation that avoids such a result; or
>
> (c) in any other case – to confirm the interpretation conveyed by the ordinary meaning of the provision."

[40] None of the provisions in the IPA under consideration are ambiguous or obscure. Nor will giving the provisions their ordinary meaning produce a result that is "manifestly absurd or … unreasonable". The giving of a purposive construction to statutory provisions does not mean that the language of the provisions can be ignored. As Mason and Wilson JJ observed in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*:[20]

---

18 (2008) 157 LGERA 327.

19 *Beckwith v The Queen* (1976) 135 CLR 569 at 576.

20 (1981) 147 CLR 297 at 320.

> "The fundamental object of statutory construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole. But in performing that task the courts look to the operation of the statute according to its terms and to legitimate aids to construction."

[41] In the joint judgment in *WACB v Minister for Immigration and Multicultural and Indigenous Affairs*,[21] their Honours observed that "In *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*[22], Gibbs CJ said that the canons of construction should not be treated so rigidly as to prevent the implementation of a realistic solution in the case of a drafting mistake". However, it was also remarked that Gibbs CJ went on to say that "where the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, it must be given its ordinary and grammatical meaning".[23]

[42] Neither s 14A nor the purposive approach to construction, authorises a departure from the grammatical or literal meaning of a statute, where that meaning gives effect to the purpose or object of the statute.[24] The court's role is one of construction not legislation.[25]

[43] The circumstances in which it is permissible for a court to add words to a statute as part of a process of construction are explored in the reasons of McHugh J in *Newcastle City Council v GIO General Ltd*,[26] where, after referring to a statement by Brennan CJ and himself in *IW v City of Perth*,[27] his Honour said:

> "Nevertheless, when the purpose of a legislative provision is clear, a court may be justified in giving the provision 'a strained construction' to achieve that purpose provided that the construction is neither unreasonable nor unnatural. If the target of a legislative provision is clear, the court's duty is to ensure that it is hit rather than to record that it has been missed. As a result, on rare occasions a court may be justified in treating a provision as containing additional words if those additional words will give effect to the legislative purpose. In *Jones v Wrotham Park Estates*, Lord Diplock said that three conditions must be met before a court can read words into legislation. First, the court must know the mischief with which the statute was dealing. Second, the court must be satisfied that by inadvertence Parliament had overlooked an eventuality which must be dealt with if the purpose of the legislation is to be achieved. Third, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect." (footnotes deleted)

[44] Lord Diplock's statement of principle had earlier been adopted and applied by McHugh JA in *Kingston v Keprose Pty Ltd*.[28]

[45] The part of McHugh JA's reasons in *Kingston v Keprose Pty Ltd* approving the relevant passage from the reasons of Lord Diplock in *Jones v Wrotham Park*

---

21 (2004) 79 ALJR 94 at 101.
22 (1981) 147 CLR 297 at 304.
23 (2004) 79 ALJR 94 at 102.
24 *Saraswati v The Queen* (1991) 172 CLR 1 at 21.
25 *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 109.
26 (1997) 191 CLR 85 at 113.
27 (1997) 191 CLR 1 at 12.
28 (1987) 11 NSWLR 404 at 422.

Estates[29] was referred to with approval in the joint reasons of the High Court in *Bropho v Western Australia*[30] and by Spigelman CJ and James J in *R v Young*.[31] Abadee and Barr JJ relevantly agreed with the reasons of both Spigelman CJ and James J.

[46] In *Jones v Wrotham Park Estates* Lord Diplock propounded the test referred to by McHugh J in the above passage from *Newcastle City Council v GIO General Ltd* after stressing that the task of the Court in making a purposive construction "remains one of construction; even where this involves reading into the Act words which are not expressly included in it"[32]. McHugh J, immediately prior to making the observations quoted above, said:[33]

> "Having identified the relevant extrinsic material and determined that it may be considered, the final question is, can the Court legitimately interpret s 40 to cover the policy in question in the present appeals?
>
> Extrinsic material cannot be used to construe a legislative provision unless the construction of the provision suggested by that material is one that is 'reasonably open'. Even if extrinsic material convincingly indicates the evil at which a section was aimed, it does not follow that the language of the section will always permit a construction that will remedy that evil. If the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances." (footnote deleted)

[47] Spigelman CJ, in *R v Young*, after referring to *Kingston v Keprose Pty Ltd*, *Bropho v Western Australia* and other authorities, said:[34]

> "As I understand the recent cases, they are not authority for the proposition that a court is entitled, upon satisfaction of the three conditions postulated by Lord Diplock, to perfect the parliamentary intention by inserting words in a statute. The court may construe words in the statute to apply to a particular situation or to operate in a particular way, even if the words used would not, on a literal construction, so apply or operate. However, the words which actually appear in the statute must be reasonably open to such a construction. Construction must be text based."

[48] His Honour later elaborated on these propositions as follows:[35]

> "Where the words actually used are not reasonably capable of being construed in the manner contended for, they will not be so construed: *McAlister v The Queen* (1990) 169 CLR 324 at 330; *R v Di Maria* (1996) 67 SASR 466 at 472- 474. If a court can construe the words actually used by the parliament to carry into effect the parliamentary intention, it will do so notwithstanding that the specific construction is not the literal construction and even if it is a strained construction. The process of construction will, for example, sometimes cause the

---

29 [1980] AC 74.
30 (1990) 171 CLR 1 at 20.
31 (1999) 46 NSWLR 681 at 686-687 and 733-744 respectively.
32 [1980] AC 74 at 105.
33 *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113.
34 (1999) 46 NSWLR 681 at 687.
35 *R v Young* (1999) 46 NSWLR 681 at 687 – 688.

> court to read down general words, or to give the words used an ambulatory operation. So long as the court confines itself to the range of possible meanings or of operation of the text — using consequences to determine which meaning should be selected — then the process remains one of construction."

[49] Spigelman CJ's approach, thus expressed, is consistent with that of: McHugh J in *Newcastle City Council v GIO General Ltd*; Brennan CJ, Dawson, Toohey and Gummow JJ in *CIC Insurance Ltd v Bankstown Football Club Ltd*[36] and Mason CJ, Wilson and Dawson JJ in *Re Bolton; Ex parte Beane*.[37] In *Re Bolton*, after referring to the Minister's second reading speech, Mason CJ, Wilson and Dawson JJ said:

> "That speech quite unambiguously asserts that Pt III relates to deserters and absentees whether or not they are from a visiting force. But this of itself, while deserving serious consideration, cannot be determinative; it is available as an aid to interpretation. The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law."

[50] The primacy of the language of a statute in the determination of its meaning was affirmed, yet again, in the joint reasons of Hayne, Heydon, Crennan and Kiefel JJ in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[38] in which it was said:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy." (footnotes deleted)

[51] The joint reasons further warned against concentrating on the legislative purpose at the expense of due consideration of the text:[39]

> "Fixing upon the general legislative purpose of raising revenue carried with it the danger that the text did not receive the attention it deserves. This danger was adverted to by Gleeson CJ in *Carr v Western Australia* when he said:
>
> > '[I]t may be said that the underlying purpose of an Income Tax Assessment Act is to raise revenue for government. No one would seriously suggest that s 15AA of the *Acts Interpretation Act* has the result that all federal income tax

---

36 (1997) 187 CLR 384 at 408.
37 (1987) 162 CLR 514 at 518.
38 (2009) 239 CLR 27 at 46-47.
39 (2009) 239 CLR 27 at 47-48.

> legislation is to be construed so as to advance that purpose. Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue. In some cases, there may be found in the text, or in relevant extrinsic materials, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.'"

[52] At no time did counsel for the respondent advance an explanation of how the provisions of the IPA under consideration, either alone or considered together with the relevant provisions of the VMA, might be construed so that the requirement to apply for a development approval before clearing "native vegetation on freehold land" ceases to exist. No such explanation could have been advanced. The above authorities make it plain that, despite the clear ministerial statements, a court is not free to construe the IPA as if the language of the IPA had been altered to reflect the policy contained in the ministerial statements. The respondent's argument, like the Judge's findings, was based on the erroneous premise that it was permissible to construe a statute, not by reference to its words, but by ignoring its words and applying a Legislative policy perceived to arise from extrinsic materials.

[53] The applicant has therefore established that the Judge erred in law in his construction of the IPA.

The Magistrate's reasons

[54] The Magistrate found as follows in relation to the nature and extent of clearing:

> "It has certainly been proved beyond reasonable doubt that there has been clearing on parts of the land owned by the Defendant. The evidence and photographs prove that he has cultivated his land to grow wheat. This activity would require clearing of the land. The question in this case is whether the Prosecution has proved beyond reasonable doubt that this clearing has taken place in areas where it is unlawful to clear at a time when it was unlawful to do so.
>
> …
>
> A Certificate under Section 66B of the Vegetation Management Act 1999 was admitted into evidence as Exhibits 25. Section 66B provides that statements made in a certificate are evidence of the matters stated in the absence of evidence to the contrary. The statements in this case relate to whether vegetation in a stated area has been cleared, the person's conclusions drawn from a stated remotely sensed image, and whether a stated area is an area of remnant vegetation. Two further certificates under the Land Act were admitted into evidence and form part of the same exhibit.
>
> Evidence may be derived from the comparison of remotely sensed images which can prove a change in vegetation cover. The remotely sensed images cannot provide proof of the nature of the vegetation on the land. These images cannot show whether vegetation is remnant or non remnant. Nor can they prove whether the change

occurred from natural factors such as fire, drought, flood, storm or wind or by mechanical clearing or some other form of human intervention.

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

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

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

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

…

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

…

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

The question of the division of categories into dominant and sub-dominant parts by the department has led to doubt about the

> interpretation of the maps. Linda Lawrence responded to this difficulty by combining the two distinct parcels into one. A legal officer in the Department, according to the evidence of the witnesses in this case, had previously indicated that the sub-dominant areas should be excluded from areas the subject of any prosecution, in view of the absence of statutory recognition of sub-dominant areas. The Witness Peter Witheyman agreed with this interpretation. Counsel for the Defendant submits that the maps relied upon as a whole are illegal and cannot therefore be used by the Prosecution to prove the case.
>
> I find I am satisfied that the Prosecution must prove for Charge 1 that the area cleared was within an area of land properly mapped as remnant endangered regional ecosystem in a regional ecosystem map under the Vegetation Management Act 1999. I find in this case the only area the prosecution has so proved for Charge 1 falls within an area that is mapped as sub-dominant on a map that fails to record for that area the numbers that reference the particular regional ecosystem. These two factors lead to doubt as to whether that area is part of a remnant endangered regional ecosystem. I therefore find that the prosecution has failed to prove to the required standard all the elements of the first charge and I find the defendant not guilty."

The role of clause 3A(c) of Part 1 Schedule 8 in the respondent's argument

[55] The focus of the respondent's counsel's outline of argument was on statutory construction. The submissions on other aspects of the prosecution case were contained in paragraphs 30 to 37 inclusive. The first such argument advanced was that no application for a development permit was necessary if the clearing in question came within an exemption to clause 3A of Part 1 Schedule 8 of the IPA.

[56] The outline of argument did not identify any exemption capable of application. In his address, senior counsel for the respondent grudgingly identified clause 3A(c) of Part 1 Schedule 8 as the relevant exemption. The Magistrate found, and it was not disputed, that a substantial area of the subject land had been cleared for wheat growing purposes. That was the only clearing identified by counsel for both sides as relevant to the appeal.

[57] "Routine Management" is defined in Schedule 8 Part 4 of the IPA to mean, relevantly, "clearing native vegetation … that is not remnant vegetation".

[58] In order for clearing to be exempt under clause 3A(c), it had to be "necessary for routine management." Relevantly, because of the definition of "routine management", that meant necessary for "clearing native vegetation … that is not remnant vegetation." It was unnecessary to go further and consider whether the area cleared was in an area outside "(iii) a remnant endangered regional ecosystem shown on a regional ecosystem map" if the subject vegetation was proved to be "remnant vegetation": the exemption couldn't apply unless the subject clearing of "native vegetation on freehold land" was "necessary for routine management".

[59] Counsel for the applicant did not take issue with the proposition put forward by counsel for the respondent, in reliance on *Macarone v McKone, ex parte Macarone*[40] that the prosecution had the onus of negativing the application of the

---

[40] [1986] 1 Qd R 284.

clause 3A(c) exemption. Consequently, the prosecution assumed the burden of establishing (in addition to clearing by the respondent within the period charged) that there was clearing of native vegetation which was remnant vegetation.

[60] I will consider these matters further when discussing the Magistrate's findings.

The evidentiary value of the certificate under s 66B of the VMA

[61] The next matter addressed in the respondent's counsel's outline of argument was the certificate made by Ms Lawrence under s 66B of the VMA. It was submitted that it was not open to the applicant to contend that the certificate was proof "of anything at all". This conclusion was said to flow from a combination of: the credibility and probative weight of the certificate being matters for the Court; the conclusion of the Magistrate that the certificate could not be acted upon safely; the express rejection by the Magistrate of the statement in the certificate that 19.9 hectares of remnant "endangered" vegetation had been cleared and the Magistrate's failure to accept that Ms Lawrence's evidence showed that any cleared vegetation was remnant.

[62] To these matters counsel added expressions of concern by the Magistrate "about material aspects of the evidence of other prosecution witnesses".

[63] Counsel for the applicant submitted, in effect, that the Magistrate's approach to the certificate was wrong; that s 66B(2)(f) and (g) permitted the certificate to state, as it did, that an area of remnant vegetation had been cleared; that it did state that areas had been cleared and was uncontradicted evidence which should have been accepted.

[64] Section 66B relevantly provides that a statement in a complying certificate "is evidence of the matters stated in the absence of evidence to the contrary" of the matters listed in sub-paragraphs (a) to (g) inclusive of s 66B(2). Those matters include:

> "(e) the location of a stated area;
> (f) whether vegetation in a stated area has been cleared;
> (g) whether a stated area is or is likely to be an area of remnant vegetation or regulated regrowth vegetation."

[65] The section is silent as to the weight to be given to statements made in the certificate. What weight should be given by a tribunal to the contents of such a certificate will depend therefore on matters such as: the relevant expertise of the certifier; the personal knowledge of the certifier as to the matters certified; the credibility of the certifier; and the reliability of the sources of information relied on to establish the certified matters.

[66] In her reasons, the Magistrate noted the inconsistency in the course of evidence in descriptions of areas of the same land varying between "remnant of concern regional ecosystem", "remnant endangered regional ecosystem" and "non-remnant regional ecosystem". Her Honour observed that the maps tendered "further break down each stated category into dominant and sub-dominant groups". She noted that the VMA did not recognise these subcategories and that "a regional ecosystem map should show all the numbers that reference the various regional ecosystems". She drew attention to the fact that there was a division of departmental opinion on the separation of land into dominant and sub-dominant categories. Her Honour noted that a legal officer in the Department "had previously indicated that the sub-

dominant area should be excluded from areas the subject of any prosecution" and that the applicant "agreed with this interpretation".

[67] The Magistrate, after summarising the evidence, concluded that "the only area the prosecution has so proved for Charge 1 falls within an area that is mapped as sub-dominant on a map that fails to record for that area the numbers that reference the particular regional ecosystem". She added that, "These two factors lead [me] to doubt as to whether that area is part of a remnant endangered regional ecosystem". Because of her Honour's finding as to what the prosecution was required to prove, her Honour's conclusion must be understood as meaning that the area referred to was within an area mapped as "remnant endangered regional ecosystem".

[68] If her Honour's conclusions were based solely on the division of "remnant endangered regional ecosystems" and "remnant not of concern regional ecosystems" on maps relied on by the prosecution into dominant and sub-dominant categories and upon the absence of numbering, her Honour would have erred. The maps referred to in Ms Lawrence's certificate did not purport to be certified regional ecosystem maps for the purposes of the VMA. Their role was to show changes in the vegetation resulting from clearing between 25 January 2001 and 15 April 2004 and to identify relevant boundaries and areas of clearing. Plainly, the evidence of change in a particular area would need to be linked with evidence that the area was within a regional ecosystem map or, if not within the area of such a map, with evidence satisfying paragraph 3 of the definition of "remnant vegetation".[41]

[69] I would also regard it as a dubious proposition that a map which met all of the requirements of the definition of "regional ecosystem map" could not be accepted as such a map if it clearly showed "remnant endangered", "remnant of concern" and "remnant not of concern" regional ecosystems but subdivided each such ecosystem into dominant and sub-dominant areas. Such a subdivision is not contemplated by the definition but that does not mean that a duly certified map could not be regarded as "maintained by the department for the purpose of showing for the area" the matters in paragraphs (b)(i) to (vi) inclusive of the definition, provided that the unauthorised information was not added in such a way as to prevent the fulfilment of the stated purpose. The omission of "numbers that reference regional ecosystems" is a different matter, as it may well be right that a map could not be regarded as "maintained by the department for the purpose of showing for the area" the matters in paragraphs (b)(i) to (vi) inclusive if it did not contain the matters specified in (b)(iv). However, as the matter was merely mentioned in passing and not argued, it is undesirable that a conclusive view on the point be expressed.

[70] Another question which may be relevant but which was not the subject of argument is whether an amendment to the regional ecosystem map which meets the requirements of paragraph 2 of the definition of "remnant map" need show all of the information specified in the definition for the certified map.

[71] It is desirable, I think, to set out the substance of Ms Lawrence's certificate (Exhibit 25):

" **Certificate**

Section 66B, *Vegetation Management Act 1999*

I, Linda Josephine LAWRENCE, hereby certify the following :

---

41 *Vegetation Management Act* 1999 (Qld) (Reprint 1A), Schedule.

> I am an appropriately qualified person to prepare a certificate or report about remotely sensed images. My qualifications are attached and marked 'Annexure LJL_0l'.
>
> I have also attached the maps listed below, which I produced on 20 October 2006.
> 'LJL_02 - Pre Clearing (25/01/2001)'
> This map represents a remotely sensed image captured on 25 January 2001.
> 'LJL_03 - Post Clearing (15/04/2004)'
> This map represents a remotely sensed image captured on 15 April 2004.
> 'LJL_04 - RE Clearing (confirmed from version 2.1)'
> 'LJL_05 - RE Clearing (version 2.1)'
> 'LJL_06 - RE Clearing (version 3.0)'
> 'LJL_07 - RE Clearing (version 4.0)'
>
> These images show a reduction in vegetation response due to vegetation clearing, on Lot 2 on BEL5381, locality of Hebel. The change occurred between 25 January 2001 (see map LJL_02) and 15 April 2004 (see map LJL_03).
>
> After studying these images, I overlayed the clearing areas on certified and confirmed Regional Ecosystem mapping data and the survey boundary location information provided to me. The results of my analysis for the vegetation clearing areas are as follows: -
>
> The non-exempt areas cleared of vegetation for Lot 2 on BEL5381 are:
> Remnant 'endangered' = 19.9 hectares
> Remnant 'of concern' = 525.9 hectares
> Remnant 'not of concern' = 76.4 hectares
> Total Remnant Clearing = 622.2 hectares"

[72] Ms Lawrence swore in her oral evidence that she produced maps from remotely sensed images and compared these with "certified and confirmed Regional Ecosystem mapping data and the survey boundary location information provided to [her]." Having done that, she expressed the opinion set out at the foot of the certificate. Ms Lawrence had a Bachelor of Applied Science in Environmental Studies. Her duties with the Department were "to analyse remotely sensed imagery in terms of vegetation and cover change". She relied on a colleague, Ms Cartan, to confirm "the regional ecosystem mapping". That is, "the type and status of vegetation cover on the property and surrounding land". She obtained "ground control surveyed coordinants from the surveyor Mr Mallett so as to properly identify the boundaries of the subject property".

[73] In the course of her evidence, Ms Lawrence used a PowerPoint presentation in order to explain the processes she had gone through in order to arrive at the results certified in the certificate. She conceded in cross-examination that she was unable to deduce from the imaging used by her the type or nature of the vegetation on the subject land. Such identification was made by reference to information provided to her by Ms Cartan. That information was divided into dominant and sub-dominant categories which Ms Lawrence combined into one category. She was directed to make this change by Mr Peter Witheyman, who had no relevant expertise.

[74] Ms Cartan was a botanist with the vegetation management section of the Queensland Herbarium at the Botanical Services Unit within the Queensland Environmental Protection Agency. Since 2001 she had worked in the vegetation management section assessing regional ecosystem maps on a property by property basis. In her oral evidence she described "regional ecosystem" as "a combination of a particular vegetation type that grows on a particular geology within a particular bio-region … and a combination of those three factors make up a regional ecosystem". She said that at the request of Ms Lawrence, she produced "an assessment of the original ecosystem …" for the subject land. She complied with the request by "looking at satellite imagery, aerial photography, the actual looking at the remnant, non-remnant status". Through that process, Ms Cartan produced an updated version of a 2001 regional ecosystem map.

[75] In determining whether vegetation was remnant, Ms Cartan took the approach that the vegetation in any area which "had any disturbance is considered remnant". The disturbance had to be by mechanical means only and not by fire, storm or, presumably, flood. She later appeared to modify this opinion by confining burning to "natural burning" but conceded that she could not determine from a satellite image whether burning had been natural or not. Ms Cartan accepted that she had not carried out any field inspections for the purposes of her assessment and had not relied on data collected in the field. She said, however, that she had been "on several properties adjacent to [the subject property] and [had] seen these eco system types that we are talking about that are existing on this property – on adjacent properties and in the broader landscape …".

[76] Senior counsel for the respondent in his oral submissions criticised the prosecution case at first instance for being "modern" and not "relying on old-fashioned techniques of a botanist going out to the land" and swearing to the nature of the vegetation on the basis of personal observations. But whether what was done was sufficient to identify the vegetation types which existed on the cleared land prior to clearing depended on whether the Magistrate accepted Ms Cartan's evidence and, in particular, the reliability of the methodology and techniques which she employed. If, which I doubt, the Magistrate's observations meant that as a matter of law or practicality the techniques utilised by Ms Cartan to identify vegetation type were incapable of proving vegetation type without supplementation by visual observations she erred.

[77] The Magistrate was of the view that in order to succeed, the prosecution was required to prove that the cleared area on the land was within land "properly mapped as remnant endangered regional ecosystem in a regional ecosystem map under the VMA". For the reasons given earlier, that conclusion was wrong. Count 1 alleged the starting of "assessable development without an effective permit for the development" and the relevant particulars stated, "1. The assessable development was operational work that was the clearing of native vegetation on freehold land." Clause 3A(c) of Part 1 of Schedule 8 to the IPA, on the approach taken by the prosecution, made it necessary to show that the respondent cleared remnant vegetation.

[78] Why the Magistrate concluded as she did was unexplained. Perhaps it was a combination of the defence counsel's submissions, that as a matter of statutory construction, a development permit was required only where the clearing of native trees was within a remnant endangered regional ecosystem and the prosecution case

which sought to establish that some areas of endangered regional ecosystem had been cleared. Ms Lawrence certified that 19.9 hectares of such clearing had taken place. The notice of application for leave to appeal did not challenge the Magistrate's conclusion in this regard but a draft notice of appeal belatedly proffered during the hearing of the appeal did.

[79] Although it is, perhaps, arguable that, subject to the mapping point discussed above, the Magistrate would have found the prosecution case made out. I do not think this is the correct view of the reasons. The observations on the mapping point come after extensive criticisms of the prosecution evidence and there is no clear finding that the subject clearing took place within the period charged or that it was carried out by the respondent.

[80] Two procedural points must be mentioned. First, the learned Magistrate found the respondent not guilty on all counts in the complaint, but as far as appears from the record, did not formally order the dismissal of the complaint. Such an order is clearly to be implied and must now be varied. Second, senior counsel for the applicant submitted that the appropriate course is to remit the matter to the Magistrate for determination according to law. The matter will have to be reheard but there is no reason in this case why it must be reheard by the same Magistrate.

[81] I would not order that the respondent pay the applicant's costs of the appeals, as one of the reasons put forward by counsel for the applicant for granting leave, which I accept, is the public interest in having an interpretation by this Court of the subject provisions of the IPA and VMA. It is also of relevance that considerable confusion as to the proper construction of the subject legislation relevant to development permits for clearing has resulted from explanatory notes and the Minister's second reading speech. For the same reasons, I would not interfere with the orders for costs made in the courts below, except for varying the orders for costs in respect of the appeal to the District Court. I would make no order as to costs in that respect.

Orders

I would make the following orders:

1. Leave to appeal granted;
2. Appeal allowed; and
3. Set aside so much of the order of the District Court made on 20 March 2009 as ordered the appellant pay the respondent's costs of the appeal and dismissed the appeal to that court and in lieu thereof order:
    a. appeal allowed;
    b. set aside so much of the orders made in the Magistrates Court on 19 January 2007 as ordered that the charge embodied in count one of the complaint be dismissed;
    c. remit the proceeding to the Magistrates Court to rehear and determine count one according to law.

[82] **CULLINANE J:** I have read the reasons of Muir JA in this matter. I agree with those reasons and the orders he proposes.

[83] **FRYBERG J:** I agree with the orders proposed by Muir JA and I agree generally with his Honour's reasons for those orders.

[84] The respondent committed an offence under the *Integrated Planning Act* 1997 ("*IPA*") if he started assessable development without a development permit for the

development. Despite a suggestion by the respondent to the contrary, by the end of the evidence the only real issue remaining in the case was whether the clearing done by the respondent fell within the exception built into the definition of "assessable development" in *IPA*.

[85] The exception was stated in *IPA* in these terms (so far as is relevant):

> "… unless the clearing is—
> …
> (c) necessary for routine management in an area that is outside—
> …
> (iii) a remnant endangered regional ecosystem shown on a regional ecosystem map."[42]

The trial was conducted on the basis that the prosecution bore the onus of negativing the exception.

[86] "Remnant endangered regional ecosystem" and "regional ecosystem map" are defined so as to draw upon definitions contained in the *Vegetation Management Act* 1999 ("*VMA*"). They are defined using terms which are themselves defined terms in that Act. Muir JA has set out the two definitions.[43] Their complexity is evident.

[87] "Routine management" is an even more complex term. The chains of nested definitions are so elaborate that it is impossible sensibly to state its meaning with those definitions expanded.

[88] Muir JA has stated the respondent's contentions.[44] I was at first minded to be critical of them for not including a detailed comparison of these provisions as they stood before and after the amendments effected by the *Vegetation Management Amendment Act* 2000. One would normally expect such an approach in support of submissions such as those advanced. In the present case, such a criticism would be unfair. Nonetheless it remains a difficulty for the respondent that the operative provisions of the legislation are not demonstrated to be capable of supporting the interpretation for which he contends. There is no ambiguity in the words of the statute.

[89] The approach to statutory interpretation adopted in the court below was in error. Muir JA has referred to authorities which demonstrate this. I agree with his Honour's analysis and add a citation of *Ross v Council of the City of Logan*.[45]

[90] I also agree with his Honour's analysis of the course of proceedings in the Magistrates Court.

[91] It is regrettable that this case must be reheard, but it is not possible for this Court to make the findings necessary to resolve it.

---

42 *IPA*, sch 8, pt 2, cl 3A.
43 Para [13] of Muir JA's reasons.
44 Paras [24] – [35] of Muir JA's reasons.
45 [2008] QCA 280.