QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Knuth & Ors v Department of Natural Resources, Mines and Energy* [2022] QCATA 26
PARTIES:	**BLAIR KNUTH, LENORE KNUTH & PHILLIP KNUTH** (applicants/appellants) **v** **DEPARTMENT OF NATURAL RESOURCES, MINES AND ENERGY** (respondent)
APPLICATION NO/S:	APL156-20
ORIGINATING APPLICATION NO/S:	GAR228-18
MATTER TYPE:	Appeals
DELIVERED ON:	28 January 2022
HEARING DATE:	16 June 2021
HEARD AT:	Brisbane
DECISION OF:	Senior Member Aughterson
ORDERS:	**1 The appeal is dismissed** **2 The parties must file and serve on the other party, within 28 days of these orders, any application and supporting submissions in relation to costs**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – where appeal of decision by Tribunal to set aside the Property Map of Assessable Vegetation (PMAV) made by the respondent under the *Vegetation Management Act 1999* (Qld) and to substitute a PMAV adopted by an expert witness of the respondent – whether Tribunal made error of law ENVIRONMENT AND PLANNING – REMNANT VEGETATION AND HIGH VALUE REGROWTH VEGETATION (HVRV) – whether particular methodology for assessing remnant vegetation prescribed by the *Vegetation Management Act 1999* (Qld) – whether methodology in policy followed – whether any error had consequent effect on other decisions – whether the definition of HVRV applicable from 8 March 2018 applied

Acts Interpretation Act 1954 (Qld), s 20(2)(c)
Land Act 1994 (Qld, s 53, s 468
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 146.
Vegetation Management Act 1999 (Qld), s 3, s 10, s 20AKA, s 20C, s 20CA, s 63, s 63B, s 129, Schedule to the Act
Vegetation Management and Other Legislation Amendment Act 2018 (Qld), s 38

Attorney-General for the State of Queensland & Ors. v Australian Industrial Relations Commission & Ors. (2002) 213 CLR 485
D'Arro v Queensland Building and Construction Commission (2017) QCA 90
De Simone v Legal Services Board [2017] VSC 471
Esber v The Commonwealth of Australia (1992) 174 CLR 430
Gold Coast City Council v Sunland Group Limited & Anor [2019] QCA 118
Harris v Caladine (1991) 172 CLR 84
Jensen v Queensland Building and Construction Commission [2017] QCAT 232
Jensen v Queensland Building and Construction Commission [2019] QCATA 11
Kentlee Pty Ltd v Prince Consort Pty Ltd [1998] 1 Qd R 162
Knuth & Ors v Department of Natural Resources, Mines and Energy [2020] QCAT 156
Re Drake and Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60
Save Beeliar Wetlands (Inc) v Jacob [2015] WASC 482
Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan (1931) 46 CLR 73

APPEARANCES & REPRESENTATION:

Applicant:	M.A. Jonsson QC and D. Purcell, instructed by Preston Law
Respondent:	I.N. Traves QC and B. Vass, instructed by in-house legal of the respondent

REASONS FOR DECISION

1 The property known as Burdekin Downs lies to the north of Charters Towers in Queensland. The present appeal concerns the proper categorisation of vegetation on that property under the *Vegetation Management Act* 1999 (Qld) ('the Act'). The scheme for vegetation management in Queensland involves the classification of

vegetation into various 'vegetation category areas', as set out in the Act.[1] Those category areas are A, B, C, R and X.[2] As noted in the reasons for decision at first instance,[3] Category X is a residual category, the broad effect of which is that vegetation clearing restrictions applicable to the other category areas do not apply. Property owners are entitled to clear category X land without the need for any approval.

2 In the present case, most of the land on Burdekin Downs has been categorised as a category B area, with small parts categorised as category C.[4] None of the property has been categorised as category X. It is the appellants' case that it should be so categorised.

3 In determining the appropriate category, the central question in the present case is whether the property contains 'remnant vegetation' or 'high value regrowth vegetation' (HVRV') within the meaning of Act. If it is not remnant vegetation or HVRV, then the property may be categorised as a category X area.[5]

4 Where the vegetation is no longer remnant vegetation through natural causes, it retains its categorisation as remnant vegetation.[6] On the other hand, where it has lost that categorisation because of human intervention it may be categorised as a category X area. The Tribunal at first instance found that there was no evidence of relevant clearing through human intervention.[7] That finding of fact was not separately challenged on the appeal.[8] On the other hand, the grounds of appeal based on errors of law include that the Tribunal at first instance failed to apply the methodology for determining the existence of 'remnant' vegetation prescribed by law, which methodology had been adopted by the appellants' expert witnesses. Rather, the Tribunal erred in accepting the different methodology adopted by the respondent's expert witnesses. It was submitted that the learned Member's erroneous criticism of the appellants' approach to characterisation of vegetation as either remnant or non-remnant, in particular the rejection of the averaging methodology, also afflicted the Tribunal's assessment of the weight to be given to the evidence of the appellants' experts relevant to the question of whether any loss of the remnant status arose because of human intervention.[9] The appellants referred to this as the 'proviso issue'.[10] In relation to that issue, other than the suggested flow on effect, no other specific errors of law were pointed to.[11]

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1 See ss 20AKA to 20AO of the Act.
2 The Act, s 20AKA.
3 *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [3].
4 See Map, Appeal Book p. 331.
5 See also Transcript 1-12 line 31 to 1-13 line 31.
6 The Act, s 20CA(3)(a). On that basis, for an area to be category X, it must be that the vegetation is non-remnant or, where it was remnant, it has lost the remnant status through human intervention.
7 *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [40]-[41], [70]-[71].
8 Appellants' submissions, [21]-[22]; respondent's outline of submissions, [9], [33]; respondent's supplementary submissions, [45]. See also Transcript 1-10 line 10-27; 1-12 line 14-26; 1-38 line 35-46; 1-39 line 14 to 1-40 line 13; 1-41 line 7-33.
9 Appellants' submissions, [41]; appellants' supplementary submissions, [16]-[21]. See also the appellants' 7th ground of appeal. See also Transcript 1-5, line 19-25; 1-17 line 20-24; 1-36 line 35-47.
10 Transcript 1-5 line 19; 1-17 line 20-24.
11 See also Transcript at 1-13 line 40-44; 1-14 line 28 to 1-16 line 2; 1-19 line 37 to 1-20 line 15; 1-38 line 35 to 1-40 line 13; 1-41 line 7-33.

5 If a landowner proposes that any part of their land be categorised as category X, an application is made to the chief executive under s 20C of the Act for the making of a Property Map of Assessable Vegetation ('PMAV') in relation to the land. In the present case, that application was made on 19 September 2017, proposing mapping a large part of the property (approximately 15,000 hectares) as category X.[12] Following an initial decision by the chief executive and an internal review of that decision, both rejecting that proposal, an application to review a decision was brought before the Tribunal by the appellants. The Tribunal found that the proper categorisation of the vegetation is as shown on the map appearing in the statement of evidence of the respondent's expert witness, Hans Dillewaard.[13] That categorises most of the land as remnant vegetation (a category B area), with small parts categorised as HVRV (a category C area). None of the property is categorised as category X.

6 The appellants now appeal that decision of the Tribunal, it being argued that much of the property should be categorised as a category X area consistent with their PMAV.

7 The appeal is based on errors of law,[14] which, in essence, are said to be that:[15]

(1) the Tribunal failed to apply the methodology prescribed by the Act for determining whether vegetation is 'remnant vegetation' in accordance with parts (b)(i) and (b)(ii) of the definition of that term under the Act. It is not in dispute that parts (a) and (b)(iii) of the definition have been satisfied;

(2) To the extent that the Neldner methodology[16] is applicable, the Tribunal fell into error in failing to apply that methodology in determining whether vegetation is remnant vegetation.

(3) in determining that the small part of the property that did not contain 'remnant vegetation' consisted of HVRV, so that on that basis also it could not be a category X area, the Tribunal applied the wrong legislative definition of 'high value regrowth vegetation'; that is, it applied the definition of that term applicable from 8 March 2018, rather than, as it should have done, the pre 8 March 2018 definition. Under the older provision, which extended only to leasehold land, the definition of HVRV would not have applied to Burdekin Downs. On the other hand, under the

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12 *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [1], [39].

13 See Map at Appeal Book p. 331.

14 See [8] and [9] of the grounds of appeal; Appellants' submissions, [88]-[89]. See also Transcript 1-10 line 11. On that basis, the appeal proceeds in accordance with s 146 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld).

15 Appellants' submissions, [21]-[22], [31]-[35]. There were 7 grounds of appeal, which overlap. In relation to ground 1 in these reasons, see grounds of appeal 1, 2, 3(a) and (c), 4(a), 5(a), 6 and 7. In relation to ground 2 in these reasons, see grounds of appeal 1, 2, 3(b), 4(a), 6 and 7. In relation to ground 3 in these reasons, see grounds of appeal 1, 3(d), 4(b), 5(b), 6 and 7. For the corresponding parts of the appellants' written submissions, for ground 1 in these reasons, see at [23]-[64]; for ground 2, see at [64]-[68]; for ground 3, see at [69]-[85] and appellants' supplementary submissions at [6]-[21].

16 See below, [13]-[16].

definition applicable from 8 March 2018, HVRV now includes vegetation located on freehold land, which would include Burdekin Downs.

Ground 1

8 Ground 1 of the appeal is that the Tribunal failed to apply the prescribed methodology for determining whether vegetation is 'remnant vegetation' in accordance with parts (b)(i) and (b)(ii) of the definition of that term under the Act. In essence, it is submitted that the legislation requires measurements and data sourced from localised field measurements, averaging and comparisons, which was the foundation for the conclusions of the appellants' experts as to the appropriate categorisation.[17] On the other hand, it is submitted that the respondent's experts impermissibly prioritised remote imagery in drawing their conclusions.[18] It is submitted that the Tribunal at first instance fell into error by adopting that approach.

9 The Tribunal at first instance found that the methodology advocated by the appellants' experts, in particular their averaging methodology (as distinct from any averaging methodology), was flawed.[19] That finding was not directly challenged on appeal.[20] Rather, the question in relation to the first ground of appeal is whether there is a statutorily prescribed methodology for determining whether vegetation is 'remnant vegetation' and, if so, whether the methodology adopted by the respondent's experts and accepted by the Tribunal was inconsistent with that prescribed methodology.[21] With reference to averaging, the appellants' submissions advocate the importance of averaging as a general proposition, rather than directly addressing and responding to the Tribunal's criticisms of the averaging methodology adopted by the appellant's experts.[22]

10 The term 'remnant vegetation' is defined in the schedule to the Act and means vegetation:

(a) that is—

(i) an endangered regional ecosystem; or

(ii) an of concern regional ecosystem; or

(iii) a least concern regional ecosystem; and

(b) forming the predominant canopy of the vegetation—

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17 Appellant's submissions, [14], [37].

18 Ibid, [15], [31]-[32].

19 *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [104], [112]. See also Transcript 1-16 line 15 to 1-17 line 8; 1-29 line 44 to 1-30 line7; Transcript 1-53 line 29 to 1-55 line 11; 1-63 line 3 to 1-65 line 3.

20 Appellants' submissions, [21]-[22]; respondent's outline of submissions, [33]; respondent's supplementary submissions, [45], [48].

21 Appellants' submissions, [28]-[32].

22 Ibid, [33]-[37]. As to those criticisms, see *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [94]-[99], [104], [112]. In *Knuth*, at [88], it is also stated: 'Mr Stanton agreed that the methodology for determining remnant status set out in Neldner was standard and appropriate. He also agreed that Neldner gave no support to his approach of averaging height and canopy cover and then applying a discount factor to assess the remnant status of vegetation'. See also respondent's outline of submissions, [68]-[69]. See also Transcript 1-30 line 36-45; 1-36 line 10-19.

(i) covering more than 50% of the undisturbed predominant canopy; and

(ii) averaging more than 70% of the vegetation's undisturbed height;[23] and

(iii) composed of species characteristic of the vegetation's undisturbed predominant canopy.[24]

11 In the present case, the issue is the appropriate methodology for assessing Parts (b)(i) and (b)(ii) of the definition of remnant vegetation. There is no issue in relation to the other aspects of the definition.[25] The respondent's expert witness, Mr Hans Dillewaard,[26] categorised much of the vegetation as remnant, with some small pockets of HVRV.[27] On the other hand, the appellants' expert witness, Mr David Stanton,[28] designated an area in the order of 15,000 hectares of Burdekin Downs as category X.[29]

12 It is the appellants' case that the statutorily prescribed process or methodology for the assessment of the presence of remnant vegetation was not followed by the respondent's expert witness, Mr Dillewaard, so that the conclusions drawn by him are flawed. It is submitted that in adopting that evidence the Tribunal at first instance fell into error.[30]

13 While the appellants acknowledge that the Act 'does not comprehensively prescribe the methodology' to determine the comparisons required by parts (b)(i) and (ii) of the definition of 'remnant vegetation', it is submitted that resort to statutory instruments or policy (in relation to which see references, below, to the adopted 'Neldner methodology') cannot be used to allow a departure from the positive requirements of the Act.[31]

14 Section 10(1) of the Act requires the Minister to prepare a 'policy for vegetation management for the State'. By s 10(2)(a), the policy 'must state outcomes for vegetation management and actions proposed to achieve the outcomes', while s 10(4) provides that the policy is not subordinate legislation. In accordance with s 10(1) of the Act, there has been prepared a 'State Policy for Vegetation Management' ('the Policy').[32]

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23 'Undisturbed height' for vegetation 'means the height to which the vegetation normally grows': see Schedule to the Act.

24 'Undisturbed predominant canopy' for vegetation 'means the predominant canopy the vegetation normally has': see Schedule to the Act.

25 In relation to Parts (a) and (b)(iii) of the definition, it was accepted by the parties that Burdekin Downs contains least concern regional ecosystems and that, for Part (b)(iii), the area is composed of a species characteristic of the vegetation's undisturbed predominant canopy (namely, ironbark): Appellants' submissions, [20]; Transcript 1-28 line 7-18.

26 A Principal Botanist with the Queensland Herbarium. His evidence was supported by a second expert witness for the respondent, Dr Rod Fensham: *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [51].

27 *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [10].

28 A Consultant Ecologist. His evidence was supported by a second expert witness for the appellants, Dr Paul Williams: *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [55].

29 *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [1].

30 Appellants' submissions, [31]-[37], [40], [43].

31 Ibid, [57]-[58].

32 See AB, p 621-631.

15 By clause 1, the Policy provides a framework for decisions, including: 'Making and amending maps, including regulated vegetation management maps and property maps of assessable vegetation'. The outcomes contemplated by s 10(2)(a) of the Act are set out at clause 3 of the Policy and reflect the Purposes of the Act, as set out at s 3 of the Act. Clause 4 sets out the actions proposed to achieve the outcomes. Subclause 4.6(3) provides:

> In assessing an application for a PMAV, an area will be assessed first for suitability as Category B, then for suitability for Category C, then for Category R. An area will not be made Category X if it is identified as remnant, or as high value regrowth using the Queensland Herbarium published methodology.

In a footnote to that sub-clause it is stated: 'At the time of making this Policy, the Queensland Herbarium's published methodology is the "Survey and Mapping of Regional Ecosystems"'.

16 The current version of that publication is version 5.0 ('Neldner').[33] The Tribunal took the Policy into account in making its decision.[34] That is an appropriate course, the more so where the policy is specifically required by the Act,[35] providing the policy is consistent with the applicable legislation.[36] It was not submitted to the contrary.[37] However, it is the appellants' case that the Policy is not consistent with the statutory prescription.[38]

17 It is submitted that parts (b)(i) and (ii) stipulate minimum numeric parameters and require a comparison to be undertaken quantitatively; that is, the vegetation must cover more than 50% of the undisturbed predominant canopy and must average more than 70% of the vegetation's undisturbed height.[39] Reference is made to the term 'undisturbed predominant canopy', which is defined in the Schedule to the Act to mean the predominant canopy the vegetation 'normally has', and to the term 'undisturbed height', which means the height to which the vegetation 'normally grows'.[40] It is submitted that by stipulating minimum criteria, 'Parliament has at least implicitly imposed minimum requirements with respect to the comparisons necessary to satisfy the statutory construct'.[41]

18 It is next submitted:[42]

> [53] In the case of height, multiple measurements are required to be taken from the vegetation under assessment to permit an averaging to take place. In

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33 See AB, p 639-781; *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [25]. Referred to as 'Neldner', after the lead author of the methodology: see AB p 640.
34 *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [20]ff.
35 The Act, s 10. However, s10(3) provides that the policy is not subordinate legislation and there is no express indication that the policy is to have binding effect. As to a possible implied obligation to take the policy into account, see *Save Beeliar Wetlands (Inc) v Jacob* [2015] WASC 482, [150]-[188].
36 *Save Beeliar Wetlands (Inc) v Jacob* [2015] WASC 482, [130]ff and cases cited therein.; *Re Drake and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60.
37 Appellants' submissions, [58].
38 Ibid, [43]-[56].
39 Ibid, [45]-[51].
40 Ibid, [46]-[47].
41 Ibid, [49].
42 Ibid, [53]-[54].

> the case of (two-dimensional) canopy coverage on the other hand, Parliament has imposed no similar requirement. In the case of canopy coverage, a simple comparison between singular figures is, strictly, permissible.
>
> [54] On the evidence, the precise numeric calculations required to implement a current statutory comparison can only, accurately, be undertaken by reference to locally taken measurements.

19 Rather than reliance on 'locally taken measurements', it is submitted that, in reliance on what was said in Neldner, the use of remotely sourced imagery, data and analysis by the respondent's experts, in the assessment of whether or not vegetation should be categorised as remnant, led to a departure from the requirements of the Act.[43] It is submitted that the respondent's experts prioritised remote imagery and that the Tribunal, in adopting that evidence, departed from the methodology (involving specific quantitative comparisons) required by the Act.[44]

20 In Neldner at clause 3.3 it is stated:[45]

> Vegetation is assessed as remnant unless there is evidence, from satellite imagery, SLATS woody cover and/or available aerial photographs and/or available site data/observations, that there has been anthropogenic (caused by humans) clearing. Where there has been tree death caused by natural causes, e.g. drought death, fire, cyclone, storm or hail damage or insect or fungal attack, the vegetation is still regarded as remnant. Where there is evidence of anthropogenic clearing, the vegetation may still be classified as remnant if it is assessed as meeting the 50% cover, 70% height and characteristic species criteria. By studying satellite imagery and aerial photographs and comparing the pattern on the imagery with the extant vegetation in the field, Queensland Herbarium botanists, technicians and computer support officers (GIS) gain expertise in the recognition of remnant vegetation for different types of vegetation and regional ecosystems from the imagery and aerial photographs. This includes knowledge of the time it takes for a vegetation type to grow back to remnant status after clearing. For example, no eucalypt woodland or open forest vegetation types cleared in the last 20 years have met the remnant definition following on ground assessment. These vegetation types usually take 30 years to regain remnant status (Queensland Herbarium, unpublished data, March 2004).

21 It is next submitted by the appellants:[46]

> [63] In fidelity to the Act, and to the criteria provided for under the Act, the learned Member ought to have preferred the locally sourced (or, in other words '*ground-truthed*') measurements, analysis and conclusions of Mr Stanton, corroborated as they were by the similarly locally sourced measurements, analysis and conclusions of Dr Williams.
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> [64] There is no support within the *Vegetation Management Act 1999* for recourse to subjective analysis premised upon remotely sourced imagery,

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43 Appellants' submissions, [60]-[62]. See also Transcript 1-24 line 15-19; 1-25 line 13-18; 1-25 line 33-37; 1-27 line 29-42.

44 Appellants' submissions, [15], [62].

45 AB, 668.

46 Appellants' submissions, [63]-[64].

> as undertaken by the Departmental witnesses, Mr Dillewaard and Dr Fensham. (footnote omitted)

22 It is the submission of the appellants that 'the precise numeric calculations required to implement a current statutory comparison can only, accurately, be undertaken by reference to locally taken measurements'.[47]

23 However, there are at least two difficulties with the appellants' submissions. First, it is not apparent that parts (b)(i) and (ii) of the definition of 'remnant vegetation' prescribe any particular methodology for arriving at the given percentages. If that were intended, it could readily have been included in the definition. Indeed, it seems unlikely that any prescription was intended, given the broad purposes of the Act,[48] including the conservation of remnant vegetation,[49] the potential wide variety in the composition of ecosystems,[50] and the fact that best practice in relation to methodologies might change from time to time. Also, as noted by the Tribunal at first instance, 'the assessment of remnant vegetation is far from a precise science', in part because of reference to potentially imprecise terms such as 'normal' height or growth.[51] Neldner notes: 'The normal canopy height (and cover and species) may vary within regional ecosystems according to environmental conditions'.[52] Further, as submitted by the respondent,[53] the appropriate methodology in any given case might vary, so that, for example, in an area where there had been no historical settlement and the vegetation undisturbed, the relevant conclusion as to undisturbed height could readily be established by aerial imagery. Presumably, such considerations underlie the requirement at s 10 of the Act for the preparation of a state policy for vegetation management, rather than placing reliance on statutory prescriptions.

24 Second, it is not evident that a proper interpretation of 'remnant vegetation', with particular reference to parts (b)(i) and (b)(ii) of the definition, read in the context of the s 3 purposes of the Act, necessarily excludes any particular methodology for determining what is 'remnant vegetation'. The appellants submits that as the Act

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47 Ibid, [54].

48 By s 3(2) of the Act, the purpose is to be achieved by, among other things, providing for 'assessment benchmarks' and a framework for decision making that 'applies the precautionary principle that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation to the environment if there are threats of serious or irreversible environmental damage'. In relation to the precautionary principle, see *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [144]-[153]. See also Transcript 1-29 line 1-42; 1-52 line 43 to 1-53 line 5.

49 The Act, s 3(1)(a). See also the 'precautionary principle' at s 3(2)(d) of the Act.

50 See, for example, *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [85], [91], [98], [103], [116]. See also appellants' submissions, [27].

51 *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [115]. Also, as noted in Neldner (Appeal Book, p 645):

> Vegetation and regional ecosystem survey and mapping is a labour-intensive activity. The process requires a high level of informed scientific judgment, ecological knowledge and skill in mapping and defining plant communities, which often lack sharply defined boundaries in terms of space or species composition. A large number of people are currently involved in vegetation and regional ecosystem survey and mapping in Queensland. The aim of this document is to provide a practical guide for vegetation ecologists to ensure that compatible methodologies are used by Queensland Herbarium officers and other people producing ecosystem (RE) and vegetation maps.

52 *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [116].

53 Transcript, 1-49 line 33 to -150 line 23.

seeks to strike a balance between conservation and sustainable land use,[54] a construction of the provision based on the purposes of the Act is not apposite.[55] It is then submitted that focusing on the definition itself, the definition provides:[56]

> a relatively straight forward quantitative, and that's our emphasis, comparison premised upon readily available and measurable – objectively measurable information so as to yield transparent reproducible and independently verifiable conclusions, and relevantly to this appeal, not requiring subjective and debatable interpretation of remotely sourced imagery requiring a trained eye and premised upon information that might not be readily available to the average citizen, and importantly, the average land owner.

25 It is not made clear why remote imagery requires 'subjective and debatable interpretation' or, otherwise, why it is not an appropriate methodology. It is noted that at the hearing at first instance, the appellants' expert Mr Stanton agreed that the methodology for determining remnant status set out in Neldner was standard and appropriate.[57] Also, in any endeavour, technical or expert evidence and the means of establishing the foundations for that evidence, might not be readily available to the average citizen or person dependent on that information. Presumably, it was the intention of the legislation that appropriate, technical or otherwise, methodologies be adopted to determine what is and is not 'remnant vegetation' and, again, that this was a consideration underlying s 10 of the Act. Also, it is noted that the respondent's experts relied on site visits and measurements taken, as well as satellite imagery.[58]

26 Also, as submitted by the respondent:[59]

> If a methodology is provided by the definition of 'remnant vegetation', the methodology would be apparent from its words. But a moment's attention to the definition shows that is not the case. Moreover, it cannot sensibly be suggested that the definition of 'remnant vegetation' somehow compels *the methodology chosen by Mr Stanton*. There is no reference in the definition to reference sites, to the selection of reference sites, what is to be averaged, and so on. The definition of 'remnant vegetation' does not even refer to an average in relation to coverage of the undisturbed predominant canopy at all, a fact glossed over by the appellants and dealt with unconvincingly at paragraph [34] of the appellants' submissions. The suggestion that the methodology used by Mr Stanton shows fidelity to the statute is plainly incorrect.

27 In my view, no methodology for determining what is and is not 'remnant vegetation' is prescribed by the Act. It follows that the methodology adopted by the appellants' expert witnesses is not prescribed and, accordingly, there was no error on the part of the Tribunal at first instance in relation to that issue.

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54 Reference is made to s 3(1)(a) to (g) (conservation) and 3(1)(h) (sustainable land use) of the Act. See Transcript 1-20 line 15-36.

55 Transcript, 1-21 line 1-19.

56 Ibid, 1-21 line 10-19.

57 *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [88].

58 Ibid, [78]-[79], [90]-[92], [105], [110]. See also Transcript 1-51 line 37 to 1-52 line 41. Neldner does acknowledge the importance of site data and field knowledge in mapping: *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [82].

59 Respondent's outline of submissions, [43]. See also Transcript 1-50 line 37 to 1-51 line 36.

28 In relation to what the appellants referred to as the 'proviso issue' (see [4] above), it is submitted that the learned Member's criticism of the appellants' approach to characterisation of vegetation as either remnant or non-remnant, in particular the rejection of the averaging methodology, also afflicted the Tribunal's assessment of the weight to be given to the evidence of the appellants' experts relevant to the question of whether any loss of the remnant status arose because of human intervention.

29 That submission evidently presupposes that the Tribunal at first instance was in error in not adopting the methodology proposed by the appellants' experts, so that that the wrongful criticisms of that approach also afflicted the Tribunal's assessment of the appellants' evidence in relation to the question of whether or not there had been human intervention. As noted at [4] above, the findings of the Tribunal on the latter issue were not otherwise challenged. The submission of the appellants that the Tribunal erroneously failed to follow the methodology of the appellants' expert witnesses is rejected.[60] If the findings of, and criticisms made by, the Tribunal in relation to that issue have not been demonstrated to be in error, the suggested flow on effect dissipates. There is no necessary inference that the assessment of the 'proviso issue' might have been 'afflicted'. There has been no indication of any other error of law.[61]

30 Nor is there any apparent error on the part of the Tribunal at first instance. The evidence as to whether or not there had been tree clearing and, to the extent that there had been logging, whether or not the vegetation had grown back to remnant status was discussed at length by the learned Member.[62] It was found, and accepted by the appellants' expert witness Mr Stanton, that pre-1945 records indicated that logging had been confined to a limited area.[63] It was also found that available aerial photographs, starting in 1945, show no evidence of the historical logging that had occurred on Burdekin Downs,[64] and it was noted that Mr Stanton conceded that none of the imagery after 1945 showed anthropological land clearance.[65] However, Mr Stanton maintained that the 1945 imagery was evidence of prior broad and fine scale disturbance of vegetation across Burdekin Downs.[66] After extensively setting out the evidence of all of the expert witnesses, the Tribunal concluded that the different vegetation structures are more likely to be the result of drought than anthropological clearing.[67]

31 Ground 1 of the appeal is rejected.

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60 It is the submission of the respondent that even if the appellants were successful on the characterisation argument, it does not follow that the evidence of the appellants' experts on this issue should be accepted: Transcript 1-11 line 41 to 1-12 line 12. However, given the conclusions drawn in these reasons, it is not necessary to further consider that question.

61 See above, at [4].

62 *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [30]-[81].

63 Ibid, [40]. See also Transcript 1-57 line 15-47.

64 *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [44], [48], [67], [70].

65 Ibid, [45]. See also Transcript 1-58 line 1-9 and line 37-44; 1-65 line 25 to 1-72 line 42.

66 *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, [45].

67 Ibid, [70], [138], [140]. See also [71]ff.

Ground 2

32 It is submitted by the appellants that, in any event, contrary to the evidence of Mr Dillewaard, Neldner did not justify the approach taken by the respondent's witnesses.[68] It is submitted that Neldner identifies an order of precedence with respect to the various methodologies:[69]

> [65] That order of precedence is reflected within Part 3.3 commencing at pg 30 of Neldner on the (relevant) premise that there has been extensive historical disturbance in an area under scrutiny, and there is associated doubt as to whether the vegetation meets the remnant criteria.
>
> [66] In such circumstances, Neldner recommends (in the first paragraph at the top of pg 32) that:
>
> > *'Remnant vegetation is assessed <u>in the field</u> by measuring the canopy criteria at a site and comparing it to a reference site to determine if it meets the cover, height and characteristic species thresholds. This remnant or non-remnant assessment can then be extrapolated to other areas using satellite image, aerial photographs and/or field observations'*
>
> [67] As that passage emphasises, localised field observation data is afforded precedence to permit the comparison required under the statute. It is only after such a locally sourced comparison and assessment has been undertaken that the results might then be extrapolated to other areas with the use of remotely sources visual imagery (such as satellite images).
>
> [68] Contrary to that stipulated hierarchy, the Departmental experts placed reliance on remote imagery <u>in the first instance</u>. And so to, derivatively, did the learned Member below. (footnotes omitted)

33 However, it is not apparent from Part 3.3 that Neldner advocates the hierarchy suggested. The passage from Neldner at [66] of the Appellants' submissions omits the immediately preceding sentence:[70]

> Field assessment of the remnant status of vegetation may be required where there is evidence of extensive mechanical or chemical disturbance on available imagery and where there is doubt that the vegetation meets the remnant criteria.

It is in that context, that the passage quoted at [66] sets out the methodology for any such field assessment. It is also noted that Neldner suggests that field assessment 'may' be required where disturbance is evidenced by prior 'available imagery' and where there is relevant doubt. That falls short of indicating an order of precedence in favour of locally sourced measurements.

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68 Appellants' submissions, [64]
69 Ibid, [65]-[68].
70 See AB, 670.

34 Ground 2 of the appeal is also rejected.

Ground 3

35 Ground 3 of the appeal relates to small pockets of the property in relation to which it was not in issue that it did not contain 'remnant vegetation'.[71] However, it was held by the Tribunal at first instance that those pockets of the property consisted of HVRV, so that on that basis it could not be a category X area. The appellant submits that the Tribunal applied the wrong legislative definition of 'high value regrowth vegetation'; that is, it applied the definition of that term applicable from 8 March 2018, rather than, as it should have done, the pre 8 March 2018 definition.[72] Under the latter definition, HVRV meant specified uncleared vegetation on leasehold land, while under the former definition it was extended to vegetation on freehold land, which would include Burdekin Downs.[73]

36 At the time of the appellants' application for a PMAV pursuant to s 20C of the Act (19 September 2017), 'high value regrowth vegetation' was relevantly defined to mean 'vegetation located – (a) on a lease issued under the *Land Act* 1994 for agricultural or grazing purposes …'. The definition was amended in 2018,[74] and now provides:

> *high value regrowth vegetation* means vegetation located—
>
> (a) on freehold land, indigenous land, or land subject of a lease issued under the *Land Act 1994* for agriculture or grazing purposes or an occupation licence under that Act; and
>
> (b) in an area that has not been cleared (other than for relevant clearing activities) for at least 15 years, if the area is—
>
> (i) an endangered regional ecosystem; or
>
> (ii) an of concern regional ecosystem; or
>
> (iii) a least concern regional ecosystem.

37 However, there is a relevant transitional provision. Section 129 of the Act is headed 'Applications under s 20C made but not decided before 8 March 2018', and provides:

> (1) This section applies if—
>
> (a) before 8 March 2018, an application was made under section 20C; and
>
> (b) immediately before 8 March 2018, the application had not been decided.

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71 See Map, Appeal Book p. 331, area shaded light blue.

72 See *Knuth & Ors v Department of Natural Resources, Mines and Energy* [2020] QCAT 156, fn. 6.

73 In the appellants' written submissions of 2 November 2020, it was stated that the documentary evidence received at the Tribunal hearing showed that the whole of the appellants' land had, by then, transitioned to freehold title: Appellants' submissions, [83], fn. 58. See, however, [49], below.

74 *Vegetation Management and Other Legislation Amendment Act* 2018 (Qld), s 38. The amendment took effect on 8 May 2018.

> (2) The chief executive must continue to deal with and decide the application under this Act as in force before 8 March 2018.

38 The application under s 20C was made on 19 September 2017 and had not been determined by 8 March 2018. The original decision made by the chief executive pursuant to s 20C was made on 3 April 2018. The application for internal review under s 63 of the Act was made on 27 April 2018 and the decision in relation to that review was made on 8 June 2018. The application for external review before the Tribunal under s 63B of the Act was made on 6 July 2018 and the hearing was conducted in November and December of 2019.

39 At the hearing of the present appeal, leave was given for the parties to file supplementary written submissions on the question of whether the operation of s 129 should be confined to the initial application under s 20C of the Act. Supplementary submissions were filed by the appellants on 24 June 2021 and by the respondent on 4 August 2021.

40 The appellants submit that once triggered, s 129(2) of the Act serves to mandate that 'the chief executive must continue to deal with and decide the application' under the Act as in force prior to 8 March 2018, it being noted that both the original application under s 20C and the internal review application under s 63 of the Act are determined by the chief executive.[75] In other words, the chief executive's statutory decisional role and responsibility does not expire on the making of the original decision and, in those circumstances, the chief executive was compelled to apply the version of the Act in force immediately prior to 8 March 2018.[76]

41 It is further submitted by the appellant that given that the Tribunal was limited to the functions and powers of the chief executive on internal review,[77] the Tribunal was similarly constrained, even though it was conducting a fresh hearing on the merits.[78]

42 However, subject to legislative requirements to the contrary, it is well accepted that a merits review or hearing de novo is conducted on the basis of the material then before the court or tribunal and the law as it exists at the time of the review or hearing. As stated by Dawson J in *Harris v Caladine*:[79]

> A hearing de novo may be contrasted with an appeal stricto sensu and an appeal by way of rehearing. In an appeal stricto sensu the question is whether, upon the material before the tribunal below, the conclusion which was reached was correct. An appeal by way of rehearing involves the rehearing of the matter as at the date of the appeal, but upon the evidence called before the tribunal below, subject to a power to receive further evidence. On an appeal by way of rehearing the rights of the parties must be determined by reference to the circumstances, including the law, as they exist at the time of the rehearing.

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75 Appellants' submissions, [79]. In relation to the internal review, see s 63A of the Act.

76 Appellants' supplementary submissions, [9]-[10]; Appellants' submissions, [80].

77 Reference is made to s19(c) of the QCAT Act, which provides that the Tribunal 'has all the functions of the decision-maker for the reviewable decision being reviewed': Appellants' submissions, [83], fn. 57. See also appellants' supplementary submissions, [10], [12].

78 Appellants' submissions, [83].

79 (1991) 172 CLR 84, 125.

Similarly, in *Esber v The Commonwealth of Australia*,[80] Brennan J observed:

> Exercising an administrative jurisdiction, the A.A.T. determines applications for review on a hearing de novo, acting on the materials before it when it makes its determination. Where, on a hearing de novo, the question for decision is whether an applicant should be granted a right, the law as it then exists is applied, not the law as it existed at an earlier time. (footnotes omitted).

The observation of Brennan J was cited with approval by Fraser JA, with whom Philippides JA and Mullins J agreed, in *D'Arro v Queensland Building and Construction Commission*.[81]

43 The question remains as to whether the legislation indicates a contrary intention. The transitional provision at s 129 of the Act provides that where an application was made 'under s 20C' before 8 March 2018 but had not been decided before that date, 'the chief executive must continue to deal with and decide the application under this Act as in force before 8 March 2018'. In both the heading and body of the section, reference is made to applications under s 20C; that is, the original application for the PMAV. If it had been the intention to extend the transitional arrangements to the application for internal review under s 63 and the application for external review under s 63B, that could readily have been spelt out in s 129.

44 While it might be argued that the requirement under s 129(2) of the Act for the chief executive to 'continue to deal with and decide' the application under the Act as in force before 8 March 2018, extends the operation of s 129 to the original application and the internal review by the chief executive,[82] those words cannot be stretched to also embrace the quite separate external review by the Tribunal. The express transitional provision should be regarded as confining the transitional arrangements and, in particular, does not extend to external review proceedings before the Tribunal. In my view, though it is not necessary to decide, nor does it extend to the internal review. The term 'continue to deal with' can readily be understood to refer to the original decision maker, given the express reference to s 20C of the Act. In any event, in the present case, the question is one of what law should have been applied by the Tribunal on external review.

45 In the alternative, the appellants submit that section 20 of the *Acts Interpretation Act 1954* (Qld) preserves the rights accrued under the earlier legislation. That section relevantly provides:

> (2) The repeal of amendment of an Act does not -
>
> (c) affect a right, privilege or liability acquired, accrued or incurred under the Act

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80 (1992) 174 CLR 430, 448.

81 (2017) QCA 90, [28]. See also *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, per Dixon J, 106-108*; Gold Coast City Council v Sunland Group Limited & Anor* [2019] QCA 118, [172]; *Jensen v Queensland Building and Construction Commission* [2017] QCAT 232, [26]; *Jensen v Queensland Building and Construction Commission* [2019] QCATA 11.

82 For consideration of the scope of the term 'dealing with' in the context of a transitional provision, see *Attorney-General for the State of Queensland & Ors. v Australian Industrial Relations Commission & Ors*. (2002) 213 CLR 485, [55], per Gaudron, McHugh, Gummow and Hayne JJ.

46 The difficulty with that submission is that the relevant amendments under the Act came into effect on 8 March 2018,[83] while the decision of the chief executive was made on 3 April 2018. Accordingly, no 'right' had been 'acquired' or had 'accrued' at the time of the amendments of the Act. By s 20C(3) of the Act, if the owner of the land and the chief executive agree to the making of the PMAV, the chief executive must make the PMAV. No such agreement was reached. By s 20C(5), where the chief executive refuses to make a PMAV the owner must be given an information notice about the decision, while s 20CA(2) sets out the circumstances in which the chief executive cannot make an area a category X area on the PMAV. Section 20CA(7) of the Act, then provides:

> If, after considering any properly made submissions by the owner, the chief executive still considers the relevant area is not a category X area, the chief executive may make the relevant area other than a category X area on the PMAV.

47 It is evident that there is a discretion vested in the chief executive and that no decision such that might create a 'right' in the appellants arose prior to 3 April 2018.[84]

48 Accordingly, the third ground of appeal is also rejected. The Tribunal at first instance was not in error in applying the law as it existed at the time of the Tribunal hearing.

49 There is a further matter. At the hearing of the appeal, the appellants sought to correct a submission made in the appellants' original submissions on appeal at [83] fn. 58;[85] that is, that the documentary evidence received at the Tribunal hearing showed that the whole of the appellants' land had, by then, transitioned to freehold title. The correction is that at the time of the hearing, Lot 3 on Crown Land Plan BKN36 was then still held by the appellants under 'a perpetual lease having no defined purpose'. The relevance of that is that the definition of HVRV, both pre and from 8 March 2018, refers to 'land subject to a lease issued under the *Land Act 1994* <u>for agriculture or grazing purposes</u> …'. (emphasis added)

50 It is submitted that as the lease was held for 'no defined purpose', Lot 3 did not qualify for designation as containing HVRV. In reply, the respondent refers to s 53

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83 See *Vegetation and Other Legislation Amendment Act 2018* (Qld).

84 See *D'Arro v Queensland Building and Construction Commission* [2017] QCA 90, [29]-[33], per Fraser JA, with whom Philippides JA and Mullins J agreed; *Kentlee Pty Ltd v Prince Consort Pty Ltd* [1998] 1 Qd R 162. In relation to when a 'right' arises relative to the making of a discretionary decision, see *De Simone v Legal Services Board* [2017] VSC 471, [116]. In *Attorney-General for the State of Queensland & Ors. v Australian Industrial Relations Commission & Ors*,[84] the High Court considered, then, s 8 of the *Acts Interpretation Act 1901* (Cth), which relevantly provided:

> Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not:
> (c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed.

Gaudron, McHugh, Gummow and Hayne JJ, noting that the presumption in s 8 might be displaced by a transitional provision in an Act, held that the transitional provision considered in that case was exhaustive and left no room for s 8 of the *Acts Interpretation Act 1901* (Cth) to operate. However, it is noted that s 20 of the *Acts Interpretation Act 1954* (Qld) is not made subject to any contrary intention and, further, by s 20(5) provides: 'This section is in addition to, and does not limit, sections 19 and 20A, or any provision of the law by which the repeal or amendment is made'.

85 See fn. 73, above. See also Transcript 1-5 line 41ff.; appellants' supplementary submissions, [2]-[5].

of the *Land Act* 1994 (Qld), which provides that a 'lease must state the purpose for which it is issued', and to s 468(1) of that Act, which provides that a 'grazing homestead perpetual lease is taken to be a perpetual lease for grazing or agricultural purposes issued under this Act'.[86]

51 In any event, this issue was not raised at the hearing at first instance and was not a ground of appeal. It was raised for the first time in the course of oral submissions on the appeal and in supplementary submissions filed subsequent to the appeal hearing.

52 The correction should not be allowed at such a late stage. There has been no opportunity for the respondent to lead evidence as to the nature of the leases, including in the context of the statutory provisions referred to above. In *Coulton v Holcombe*, Gibbs CJ, Wilson, Brenna and Dawson JJ stated:[87]

> In a case where, had the issue been raised in the court below, evidence could have been given which by any possibility could have prevented the point from succeeding, this Court has firmly maintained the principle that the point cannot be taken afterwards.

53 For the reasons outlined above, the appeal is dismissed.

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86 Respondent's supplementary submissions, [32], [34].

87 (1986) 162 CLR 1, p 7-8. Reference was made to *Suttor v Gundowda* (1950) 81 C.L.R. 418, p.438 and *Bloeman v The Commonwealth* (1975) 49 AL.J.R. 219.