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Your Ref:
Our Ref: DTM:160054

22 March 2018

Committee Secretary
State Development, Natural Resources and
Agricultural Industry Development Committee
Parliament House
George Street Brisbane Qld 4000

By email: sdnraidc@parliament.qld.gov.au

Dear Committee Secretary,

Vegetation Management and Other Legislation Amendment Bill 2018 (VMOLA)

Thank-you for the opportunity to provide a submission to the Vegetation Management and Other Legislation Amendment Bill 2018 (**VMOLA**). Despite the very short timeframe, I wish to provide comments to the Bill which I believe that the committee should consider prior to providing their recommendations back to the Parliament.

I am a legal practitioner who acts for rural landholders across Queensland. Unfortunately, I also represent a large and growing number of landholders dealing with the adverse nature of the current vegetation regime in Queensland and who will be further disadvantaged by the enactment of various elements of the proposed Bill.

Onus of proof and mistake of fact

The removal of the reversal of onus of proof and mistake of fact from the Bill is very much welcomed. For a rural advocate who feels they are sometimes yelling into the wind in opposition to Government policy, it gives me some heart that the current Government can listen and see common sense. I thank the current committee and the previous committee for their hard work in retaining these basic legal protections.

Property Maps of Assessable Vegetation

I further support the Minister and Government for their strong commitment to the retention of the Property Map of Assessable Vegetation process. The PMAV provides landholders with business and management certainty for their properties. There are some that would like to see the removal of the PMAV process which would throw rural and regional Queensland into chaos. I thank the committee for their work in advocating the benefits of the PMAV and the business certainty it provides to 1000s of hard working rural landholders across the State.

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Removal of high-value agriculture and irrigated high-value agriculture

In Queensland, it is possible to apply to clear vegetation for, among other things, a coal mine, a port, a railway line, a pipeline, a compressor station or a sub-divisional development but the current Bill proposes that it will be **impossible** to apply for a high-value agriculture or irrigated high-value agriculture permit.

At a time where Australia is experiencing a food and fibre commodity boom and the increasing risks to world food security, the Bill proposes to prevent any further land in Queensland being developed for agriculture. With the decline in the resources boom, agriculture took up the slack by providing employment and exports and was a rare shining light in the post GFC gloom. Now, the very substance of sustaining human life on this planet, i.e. food, is now a mission impossible for future development in Queensland.

To put it in perspective, Queensland is 185 million hectares in size. There is currently 87 million hectares of remnant vegetation (over 50% of the states land mass) which will be unable to be developed for agriculture under the current Bill.

The most insidious element of this Bill, is the majority of the remnant vegetation is contained in the States north which is predominantly owned and managed by indigenous landowners. The Bill prevents them from developing their land and sharing the wealth and freedom that those who in the south east of the State take for granted. The Bill in this regard is paternalistic at best and racist at worst and clearly breaches the fundamental legislative principles of Queensland.

South East Queensland has cleared the majority of its vegetation and has had the benefit of the huge economic growth as a result of that development. Now, the undeveloped North must bear the blunt of "guilty" environmentalists who reside in urban environments where the "remnant vegetation" has been completely removed.

The HVA and IHVA process required extensive approvals processes to be adhered to. It was not simply, as portrayed by some, a tick and flick. The investment made by landholders who engaged in the process ranged in the millions of dollars and has brought wide spread economic development and employment to areas previously unharnessed. This development was undertaken with the view to long term economic, social and environmental sustainability and was a common-sense approach to developing our untapped water and land resources in north Queensland

High Value Regrowth

For a politician or a government bureaucrat, 15 years might sound like a long time. But for a landholder, managing vast expanses of rangeland which has been in their family for multiple generations, 15 years is a very short snap shot in the overall management of regrowth vegetation. The amendment to the definition of "regrowth" proposed in the Bill, now looks to take another 862,506 hectares of land (that's 1,725,012 Lang Parks to use the vernacular) out of food production and convert those areas to pseudo National Parks. This is on top of the already 87 million hectares of "National Park" retained on private land.

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Regrowth vegetation in watercourses

The Bill proposes to extend the restrictions to clearing vegetation within 50 meters of a water course to the Burnett-Mary, eastern Cape York and Fitzroy Catchments. This places a further restriction on productive farming land.

I provide in **Appendix 1** to my submission some maps which demonstrate the extent and complete unworkability of these restrictions.

Land that has been cultivated, contoured and farmed for generations now has watercourse regrowth buffers placed over the land. A cotton farm at Theodore, prime farm land at Wallaville and Bundaberg, a prime broadacre farming land at Wandoan and Taroom, are now placed under the restrictions of the regrowth codes. I also provide an overlay of the mapping on a coal mine to further demonstrate the illogical application of this proposal.

It would appear obvious, the proposed Bill is not meant to cover prime farming or developed land. However, a change to the codes regulating these areas could result in unacceptable restrictions to prime farming land.

If the restrictions are adopted, it is my recommendation that a further provision be included in the Bill, where landholders are able to change Category R (regrowth in watercourses) to Cat X where evidence can be provided that no regrowth exists, and land has been previously developed or farmed.

Self-assessable codes

As a solicitor, I actually support the removal of the self-assessable codes for thinning under the current codes. The current code is basically impossible to comply with and only exposes landholders to enforcement and compliance activities of the Department. The code either needed to be streamlined or an assessment mechanism to be put into place to avoid landholders inadvertently breaking the law.

I do not however support the changes to the fodder harvesting codes. Mulga is a highly regenerative tree species which provides an invaluable fodder source to livestock during extreme drought periods. The current codes allow the appropriate level of flexibility and timing to allow a landowner, in extreme drought conditions, to manage their land and retain their livestock. The current codes should be retained.

Enforceable undertakings

The Bill proposes a new compliance tool - a "voluntary" Enforceable Undertaking. These undertakings are proposed to be used as an alternative to prosecution or a restoration notices. While I support any mechanism which avoids landowners being taken to court, I do not support this new proposal. While it might appear to be less arduous than a formal restoration notice or enforcement proceeding, as a solicitor who has seen first hand the tactics of Departmental officers placing landholders under duress to achieve an outcome, I strongly consider that this process will be open to an abuse of process. It is not hard to conceive that a landholder provided with the option of prosecution would opt for an enforceable undertaking as being seen as a path

of least resistance. However, the conditions and requirements of the undertaking may be more arduous than the formal processes and exposes them to future compliance activities for potential breaches. This is made even more serious when considering the increase to the penalty units and compliance powers of the Department under the Bill.

New section 30A

The Bill proposed to allow an authorised officer who believes on "reasonable grounds" that a vegetation clearing offence is happening to enter private property without the occupier's consent or a warrant to investigate. The requirement for police or authorised officers to obtain a warrant before entering private property is a basic legal tenant of our legal system. There is no legal or policy justification for a vegetation clearing offence to be treated different than a drug raid or a murder investigation.

Amendment to section 37 – failure to help an authorised officer

The Bill proposed to increase the penalty units increased from 50 ($6,307.50) to 200 ($25,230).

Section 37 essentially requires a landholder to assist an authorised officer even though it is against their best interests. The basic legal tenant of the right to silence and the defence of self-incrimination are abrogated by this clause. The increase in the penalty unit only places a landholder at a further disadvantage.

The same applied to the amendment to s38 - failure to give information, s51 – power to require information and s54 – failure to produce a document.

Amendment to s54B – Restoration Notice

The Bill proposes to increase the maximum penalty increased from 1665 ($210,039) to 4500 ($567,675) penalty units. Justification, as set out in the explanatory note is it provides an *"appropriate level of deterrence for aggravated non-compliance with a Notice"*.

Restoration Notices are notoriously difficult if not impossible to comply with. I attach as **Appendix 2** a decision *Whyenbirra Pty Ltd v Department of Natural Resources* – Dalby Magistrates Court – Civil M201/06 as per Cornack SM for the committees reference. Her Honour in that decision, ultimately to reject the provision of a restoration notice on the landowner, succinctly summarised the issues with the restoration notice process. Her Honour stated that the restoration notice was *"unreasonable and unjust as it is unclear, confusing, oppressive, uncertain, vague and impossible to comply with"*. Since that decision, restoration notices have not improved.

The Bill now proposes to punish a landowner trying to comply with a restoration notice with fines far in excess of community standards.

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Landcover and Trees Study

The basis for this Bill is founded on the State Government's own investigations and report on state wide vegetation changes. The Government's latest Statewide Landcover and Tree Study (SLATS) report showed 296,324 hectares was cleared between 2013-14. Of the 296,000 hectares of the total vegetation cleared between 2013 to 2014 only 103,000 hectares of it was classified as remnant vegetation. 193,324 hectares was regrowth vegetation on category X white country. This is country that had been historically cleared for agricultural purposes and demonstrates how quickly regrowth vegetation can grow – particularly in the Brigalow and wet / coastal sclerophyll dominant regional ecosystems.

Of the 103,000 hectares of remnant vegetation, the clearing was classified as:

- 58,710 hectares (57%) for fodder under fodder codes;
- 23,690 hectares (23%) Multiple Permit Purposes (Fodder, Thinning & Encroachment);
- 7,200 hectares (7%) Native forest practice;
- 4,120 hectares (4%) fence, firebreak, road and infrastructure;
- 4,120 hectares (4%) encroachment;
- 2,060 hectares (2%) - Grazing Lease regrowth;
- 2,060 hectares (2%) thinning;
- 1,030 hectares (1%) other.

It is quite clear that the figures provided by SLATS have been manipulated to create a scare campaign regarding the amount of vegetation and the types of vegetation being cleared in Queensland. The reaction, including the Bill, is unjustified by the numbers. Ultimately, the people of Queensland will be worse off as a result.

Thank-you once again for the opportunity to provide a submission regarding the Bill.

Yours faithfully
Marland Law

Tom Marland
Principal

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Queensland Government

Legend

Proposed RVM category R - reef-regrowth watercourse vegetation [proposed]

Cities and Towns

Road

- Highway
- Main
- Local
- Private

Railway

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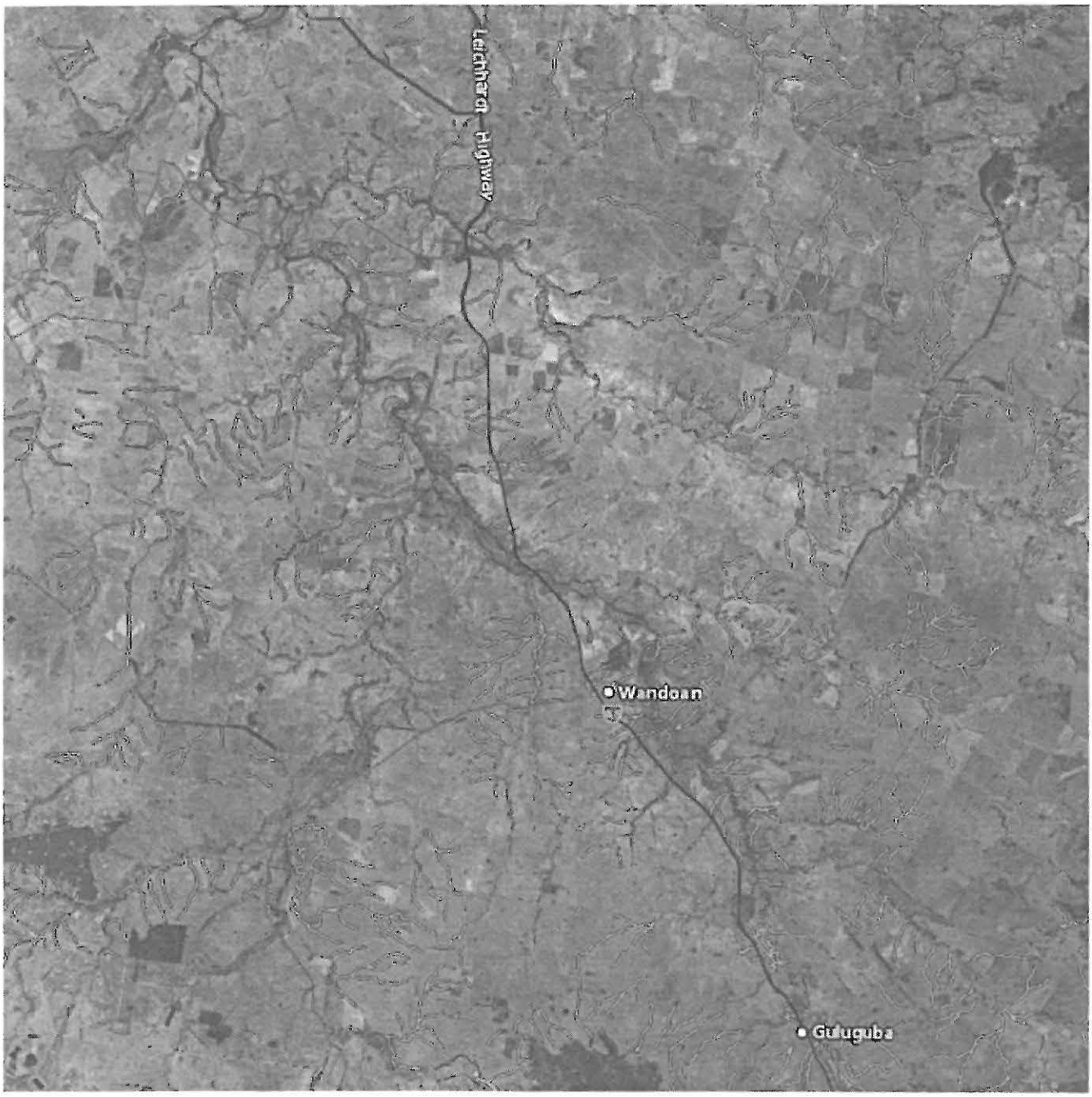

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TRANSCRIPT OF PROCEEDINGS

MAGISTRATES COURT

CORNACK, Magistrate

CIVIL M201/06

WHYENBIRRA PTY LTD Complainant

and

DEPARTMENT OF NATURAL RESOURCES Defendant

BRISBANE

..DATE 03/10/2008

..DAY 01

DECISION

03102008 D.01 T1/MES(IPS) M/T BRIS26 (Cornack, Magistrate)

DEANNA WHITE APPOINTED AS RECORDER

BENCH: Before we start, I would like to apologise for the inconvenience and cost to the parties incurred by the fact that I was ill for six weeks and because I was ill, I didn't even think about my reserve decisions or the fact that you were all turning up at Holland Park Magistrates Court expecting a decision. So I'm sorry for the inconvenience caused. Of course, if I had my way, I wouldn't have been sick and I hope you can understand that.

Secondly I would like to thank Mr Lang because I understand he is on leave at the moment and he's come home early from leave so I can give the decision today. I appreciate that because as I'm still in Dalby to arrange another day would have been very difficult, so I thank Mr Lang for that.

I am going to deal with the substantive appeal first. It might take me just a few moments to re-organise my papers, because as you will appreciate, there is quite a few exhibits and related papers that I might refer to.

MR LANG: Does your Honour want appearances?

BENCH: That is probably a lovely idea, Mr Lang. Thank you.

MR SHERIDAN: Good afternoon, your Honour. My name is Sheridan, spelt S-H-E-R-I-D-A-N, initals P D. I am Counsel instructed by Hillhouse Burrough McKeown. I appeal for the appellant Whyenbirra Pty Ltd.

BENCH: Thank you.

MR LANG: Good afternoon, your Honour. My name is Lang, L-A-N-G, initials D J, Barrister with the Crown Solicitor's Office. I appear for the respondant in this matter.

BENCH: Now, I am going to read from a prepared brief description so no need to take too many notes because if it sounds okay as I read it and don't have to cross out too many bits, I will give you a copy at the end. But if I do have to cross out a lot of bits, you can get the bare bones of what I have done anyway.

This is a hearing of an appeal brought by Whyenbirra Pty Ltd against the Department of Natural Resources. It arises - the appeal is against a decision by the respondant to give a compliance notice to the appellant. The appellant seeks orders that the compliance notice be overturned and that costs be awarded. The compliance notice seeks to restore certain

areas of land believed by the respondant to have been unlawfully cleared by the appellant. The appellant pleaded guilty to clearing four areas of remnant native vegetation classified variously as endangered, of concern, or not of concern. The notice seeks restoration of 19 separate areas of land. It is argued by the respondant that such a notice may be given even if there is no prosecution, provided the Department believes, on reasonable grounds, that an offence has been committed. The Department now has statutory power to lodge notification of the notice against the land with the Registrar of Titles. Obligations which arise under the notice flow to subsequent owners of the land. There are now severe penalties for a failure to comply with a compliance notice.

I find the notice given in this case is confusing, unclear, uncertain, vague and impossible to comply with. The reason for this conclusion - the reasons for this conclusion are as follows:-

1. The notice does not particularise where or what clearing is alleged to have occurred which gave rise to the notice. There are no dates given as to when the clearing occurred or how it occurred. It is impossible to tell from the notice itself whether it was the same clearing as alleged in the prosecution against the appellant, or whether it occurred before that clearing or after that clearing. Given that parties other than the appellant may be required to comply with the notice, detailed information is needed in the notice to identify what

native vegetation has been cleared and the precise area where this took place. Otherwise, those who own the land subsequently, who are bound also by the notice, will have inadequate information to allow them to comply with the notice.

2. The notice is silent as to the classification under any regional ecosystem map as to whether the native vegetation is endangered, of concern, or not of concern. There is no information as to the regional ecosystem sought to be restored.

3. The notice is silent as to the type of native vegetation that is required to be regrown. There is no reference to any regional ecosystem description, type or species of vegetation. The notice is silent as to whether the - as to where the unlawfully cleared lands are situated.

4. The notice refers to the whole of the land owned by the appellant. Attached to the notice are five sheets which map irregular polygons within those parcels of land. Some, but not all of the requirements in the notice, refer to the 19 specified areas. In the absence of information about the nature of the clearing, the meaning of the notice is confusing and incapable of compliance.

5. At the hearing of the appeal, no evidence was called as to the condition of the native vegetation prior to the alleged clearing. No evidence was called to substantiate the argument that simply keeping the land undisturbed will allow adequate regeneration. The notice does not set out the condition of the native vegetation prior to the alleged clearing. It does not set out the number,

type, nature or height of any tree, shrub, grass or any other plant. Therefore there is no objective means of measuring the success or otherwise of the proposed restoration.

6. The requirements of the notice extend, in some part, for 40 years. There is no scientific evidence to prove that this period is required to restore the vegetation to the same state that it was preclearing, or even that regeneration is likely at all. Such a period appears oppressive and unduly long in the absence of specific scientific evidence to the contrary. There is no evidence called that such a period is reasonable.

7. Attached to the notice are derived reference points and co-ordinates for GPS. These appear to mirror irregular polygons mapped onto five sheets attached to the notice. There are 19 such obscure polygons involving a total of 674 GPS co-ordinates that much be mapped by the appellant. These areas are required to be kept totally undisturbed. Such a regime is totally and unduly oppressive upon the appellant.

8. The polygons are scattered over paddocks used for grazing. It is impossible to keep those areas totally undisturbed without fencing them, given the nature of the use of the land. To require fences to be erected precisely on the boundaries of irregular polygons is unduly oppressive. Further it would - even to fence generally around those areas, I find would be unduly oppressive. It would appear impossible to comply with such a requirement.

9. The requirement to place painted star pickets in the ground at five places, is dangerous. Death or grievous injury may result when stock are being mustered or checked by persons on quad bikes or horses.

10. It would be impossible to comply with the requirements for taking photographs as set out in the notice. The notice requires photographs to be taken from the exact same position, two metres from each star picket, in a southerly direction at six monthly intervals for ten years. It is impossible for the exact same position to be identified on each of those 20 separate occasions. It is impossible to take the photos precisely at a height of 1.7 metres, unless the person taking the photographs is at least 1.8 metres in height themselves - an impossibility for myself, I would add. The photographs are required to be taken on a camera that uses colour film. Digital photographs should be permissible. It is unclear how many photographs are actually required to comply with the notice, given the conflict between condition 7 and part A of annex M.

11. Given that the photographs are to be taken in a southerly direction, and given the location of the monitoring points shown in the attachments to the notice, the photographs taken will reveal very little, if anything, of the restoration of the land in the polygons.

12. The notice gives no objective baseline of the heights or types of trees, shrubs and grasses to be restored. For compliance, the notice needs to specify this information at the time prior to the clearing, as at

the time the notice is given, and then, as at the time when compliance will be deemed to have been affected.

13. The prohibition on grazing within the areas is incapable of being complied with, as grazing may refer to that done by native wildlife. In addition, prohibition of the grazing of farmed animals could only be achieved by fencing around the polygons within the paddocks.

14. A prohibition on any disturbance, apart from compliance with the notice in paragraph 1, is incapable of compliance as mere transit of the area by humans or native animals may disturb the area.

15. Condition 2 appears incapable of compliance as it does not specify the area from which fire is to be excluded until 2009. It does not set out how this is to be achieved.

16. Condition 4 prohibits grazing for more than four years. Annexure E prohibits grazing for three years. Therefore the notice in this regard is confusing and unclear.

17. Condition 5 prohibits the maintenance of any exotic plant species. As the area in question has been extensively colonised with buffalo grass, it would appear that it is impossible to comply with this condition.

18. The notice gives no objective or scientific method to assess or measure compliance with it.

19. There is no scientific evidence produced to substantiate that any degeneration of any of the land by any specific act of unclearing - of unlawful land clearing is reasonably capable of being rectified.

20. It is argued by the respondant that all the landowner has to do, is allowed what was there to regrow. This submission is based on several false assumptions, including that the current or even some subsequent landowner knows, or knew, what was there in the first place and that leaving the land - leaving the area undisturbed will allow some plants to grow. The appellant may have pleaded guilty to offences without having precise or personal knowledge of the areas alleged in the prosecution to be - to have been unlawfully cleared. It may have accepted that it was caught up in the party provisions of the criminal law without having personal knowledge of those areas. It is also wrong to presume that the notice relates precisely to the clearing that was the subject of the prosecution because the notice is not clear on this point. It does not refer to the prosecution.

I therefore find that the notice is unreasonable and unjust as it is unclear, confusing, oppressive, uncertain, vague and impossible to comply with. I find that the appellant has demonstrated that the decision to give the notice was wrong at law and should be overturned and that an order as to costs should be made in favour of the appellant.

MR LANG: With respect, your Honour, can I be heard on costs?

BENCH: Well I thought we would do that at the end of everything.

MR LANG: Okay.

BENCH: But do you want to be heard on costs now? I thought I would allow you to have a discussion.

MR LANG: Well the costs with respect to this appeal are different perhaps to the costs with respect to the other issue, the other application.

BENCH: We heard it all together, didn't we?

MR LANG: Yes, your Honour. I'll wait.

BENCH: I thought I would just give my decisions and let you gentlemen have a discussion. Because you may sort it out without me interfering in it. I think that is what you are submitting in your submissions, Mr. Lang, that you wanted the Court to give its decision, and then for any question about costs to be argued then or at a later date.

MR LANG: Yes.

BENCH: So-----

MR LANG: It is my submission, your Honour, that costs can't be ordered.

BENCH: Okay, well, I'll just give you each a copy of those. I don't think I've got too many mistakes in them. Okay, now I will just give my decision in the application for punishment of contempt.

In this instance Whyenbirra Pty Ltd applies to the Court for an order that Scott Spencer be imprisoned or, in the alternative, fined for his contempt of court in failing to comply with an order of the Magistrates Court, made on the 15th of January 2007, whereby it was ordered that a compliance notice given to the appellant/applicant in these proceedings be stayed and that state operate until the determination of the appeal relating to the matter. Further an order that Scott Spencer take such administrative action as necessary to purge the contempt by removal of the stayed compliance notice from the title of the subject land. Further such other orders as the costs provide. Fourthly, that the respondant pay the applicant's costs on an indemnity basis.

Actually, I've just left my Court file up in my room, so do you think you can go up and get it? But while I'm waiting for that, I will continue. The thing I wanted to check was

whether the Court made an order that the compliance notice be stayed, or the decision to give the compliance notice was stayed.

MR SHERIDAN: From memory, the statute - the statute says that the decision to give the notice be stayed - and then it follows.

BENCH: But I don't know what actually the order was. Because originally there was an application for two orders and then there was an order made only in relation to one. So just-----. Is there agreement about that?

MR LANG: There were two orders. There were two orders sought and only one was done.

BENCH:Sought and only one - but did it say the decision to give the notice, or, the notice?

MR LANG: Well the power is to grant a stay of the operation of the decision.

BENCH: The decision to give the notice?

MR LANG: Yes.

BENCH: So, even if that's not specifically spelt out, for it to be an order of any force, it would have to be the decision to give the notice.

The background to these proceedings for contempt is as follows:-

The applicant, Whyenbirra Pty Ltd is the owner of freehold land or, was at all relevant times, the owner of freehold land. In April of 2005 a complaint was sworn alleging that Whyenbirra Pty Ltd commenced assessible development, that being land clearing, without a development permit. There were two charges set out in the complaint. One under the Integrated Planning Act, and another under the Vegetation Management Act - sorry no - it was the Land Act, I think. Anyway, sorry - it was under the Land Act of 1994. The first being - the first offence being start assessible development without a permit and the second being clearing trees with no permit. The defendant pleaded guilty to charge 1. No

conviction was recorded and the defendant was fined $5 000, ordered to pay professional costs and investigation costs, ordered to pay costs of Court, allowed six months to pay those sums in default levy and distress. Okay. That was in March 2006.

Some eight months later on the 30th of November 2006, a compliance notice was issued to Whyenbirren Pty Ltd. Within a fortnight an appeal had been filed and there was an application for the grant of a stay of the decision to give that notice. On the 15th of January 2007, the Magistrates Court at Dalby stayed the decision to give the notice to Whyenbirra Pty Ltd, subject to conditions. The Department has power under section 55A of the Vegetation Management Act to register the fact that a compliance notice has been given with the Registrar of Titles for inclusion as a notation on the title deed for the relevant land. The question, in this case, is whether the stay granted in relation to the decision to give the notice, exercised and extended to apply to any notice given to the Registrar of Titles under section 55A of the Vegetation Management Act. The Department thought about it and decided it did not, and on the 7th of February 2007 the Department requested that the title deed be amended to show notice that that compliance notice had been given.

There has been several changes in the law and the Vegetation Management Act over time. If a compliance notice requires a person to rectify a matter, the legislation is mandatory, not otherwise, and it provides that notice must be given to the

Registrar of Titles as soon as practicable after the compliance notice has been given. That is set out in section 55A of the Vegetation Management Act. Of course, it should be clearly stated from the outset that as soon as practicable has not been complied with in any event, because the compliance notice was given on the 30th of November 2006, eight months after a plea of guilty to a charge. The Department had adequate time in eight months to decide whether it was going to lodge anything with the Registrar of Titles and one would have thought, if the Department was sincere and serious about its obligations to comply with its own legislation, a mandatory requirement that it must register that the same day it issued the compliance notice, or served the compliance notice, it would have made the appropriate arrangements to register that with the Titles Office. That would seem to be not onerous - its own legislation, and it has a legal team.

It was quite clear that the compliance notice did require the company Whyenbirra Pty Ltd to rectify a matter, and it was going to have effect for 40 years. So it wasn't something minor, something significant and it had a significant impact, it seems, or potential significant impact, upon the value of the land. Someone finding out there's a compliance notice that was going to require them to take action for 40 years, may be less inclined to have anything to do with the property.

It's a little bit confusing, because at the date of the offences - the offences span from January 2001 to May 2003. The provision about registering the notice on the title deed,

was not in force until March 2003. Then therefore there is a question as to whether there is any power to register it as the offence occurred mostly prior to the date the law was changed. Unless there is some clear legislative intent that the statute has a retrospective application, then there is clearly - it could clearly be argued, and it has been argued in this case, that such a notification with the Titles Office should only be given on offences that occurred after the law had been changed, as it flows from an offence.

It is not necessary for me to decide that, and I do not think really that is accurate because a compliance notice can be issued even if no-one is prosecuted. The Court has power to stay the operation of the decision to give a compliance notice. This is to maintain the status quo between the parties pending the determination of an appeal. A stay stops anything from being done which would alter the position of the parties. It doesn't require anything to be undone, but it certainly does not allow an alteration in the legal position between the parties. It is argued by the respondant that all the notice did was notify people other than Whyenbirra about the compliance notice and didn't have any real impact on Whyenbirra Pty Ltd. I don't accept this argument as, as I've said, any person seeing that there was a compliance notice with the sorts of conditions as this compliance notice, may have had a significant impact on the value of the property.

The contempt power is the power of this Court to punish for wilful disobedience of a Court order. Of course, in this

case, it cannot be argued that any failure to comply with the Court order was casual, accidental, or unintentional because it was clear on the material the Department considered whether the order of the Court extended to prevent it from lodging the notification with the Titles Office. Had the notification been lodged with the Titles Office prior to the commencement of the appeal, there would be nothing that the appellant could complain about - or the applicant could complain about. It should have been done. It should have been done at about the same time as the compliance notice was issued. In any event, it should have been lodged very quickly after that, as the legislation requires it to be lodged as soon as practicable. There is nothing before me that would indicate there is any difficulty in having it done the same day. That the compliance notice was served - the compliance notice - a considerable amount of effort had been involved in formulating what was going to be in the compliance notice, and the Department should have been taking steps to notify the - or lodge this with the Titles Office at about the same time. Even after the appeal was filed, if the notice to the Titles Office had been lodged prior to the 15th of January, there would be no problem here, because there was no stay, the stay didn't commence until the 15th of January.

I am satisfied that the lodging of the material - or the lodging of a notice with the Registrar of Titles did interfere with the status quo of the parties to the litigation and the stay that was granted on the 15th of January should have stopped that happening and the lodging should not have occurred after the stay was granted. However I really find it's a technical breach because, from my reading of the legislation, the Department was in dereliction of its statutory duty to lodge it as soon as practicable, and the notification should have been given in November 2006. So I find there has been a contempt of the Court, but I am going to hear some submissions about penalty, because the consequence of the contempt is something relevant for the Court to take into account. And, of course, having found that there has been a contempt of a Court order, that says significant relevant - a big question is the question of costs. In this case, the applicant seeks that those costs be granted on an indemnity basis. So, will I let you gentlemen have a chat about costs, first?

MR LANG: Yes, your Honour. If you'd stand it down for ten minutes, we might.

BENCH: Ten minutes? Okay. Thank you. Although I don't know if there is going to be appeals, subsequent appeals to this. You may want to leave the whole question of costs to the Appeal Court, but I'll leave that for your discussions.

MR LANG: Thank you, your Honour.

THE COURT ADJOURNED

THE COURT RESUMED

BENCH: Thank you, you may be seated. How did you get on?

MR SHERIDAN: I make application for costs, your Honour.

BENCH: How much? Are you in agreement?

MR SHERIDAN: No.

MR LANG: No.

BENCH: Okay, thank you.

MR SHERIDAN: I have got some material - there's - I'll hand up some materials. I don't have the specific document with me. Your Honour might have it on your file from Mr Grearly. When we had directions in respect of the conduct of this matter, it was Mr Grearly's submission and, if I remember correctly, it was by consent that uniform civil procedure rules apply.

BENCH: Yes, that order was made.

MR SHERIDAN: Yes. On that basis, your Honour, I make an application for costs and indemnity costs pursuant to Rule 704 of the Uniform Civil Procedure Rules. I have provided, your Honour, a copy of the decision of Asset Loan and (indistinct) Pty Ltd, a decision of His Honour Justice McGill 2005. You will see on the front page there, under the catchwords "Costs - indemnity costs can be ordered in the Magistrates Court".

BENCH: So, is this for both?

MR SHERIDAN: Yes, your Honour.

BENCH: So you haven't separated it.

MR SHERIDAN: No, your Honour.

BENCH: Can you give me any idea roughly how much time you spent on the contempt proceedings?

MR SHERIDAN: It wouldn't have been a day, your Honour.

BENCH: So the total amount you are seeking for yours is $27 362, so what would be the total amount - the total proportion of that for the contempt proceedings?

MR SHERIDAN: Less than a day, perhaps-----

BENCH: How much are you for a day?

MR SHERIDAN: Three and a half thousand, your Honour.

BENCH: So you have done nine days?

MR SHERIDAN: Yes. That includes the without prejudice conferences and other attendances.

BENCH: You didn't include anything for September, when you came - went to get the decision.

MR SHERIDAN: When I went to get the decision?

BENCH: Yes, wasn't there a date - or was that August?

MR SHERIDAN: Down at Holland Park?

BENCH: Yeah.

MR SHERIDAN: I didn't go to Holland Park Court.

BENCH: Didn't you?

MR SHERIDAN: No. I don't know whether anyone did. I think we got the - I certainly didn't.
BENCH: I was told there was parties there.

MR SHERIDAN: We were there because we hadn't been advised that you were ill.

BENCH: Well, I didn't go there at all.

BENCH: Did you know I was ill?

MR SHERIDAN: Yes, someone - I think instructing solicitors-----

BENCH: You didn't tell Mr Lang.

MR SHERIDAN: -----told me in the morning. I'm not sure, I didn't go to it anyway. There's no - there's no cost for that put in there.

BENCH: A bit disappointing you didn't tell Mr Lang. Or your instructing solicitor didn't tell Mr Lang.

MR SHERIDAN: Yes, your Honour. In any event, the half a day is sixteen fifty, your Honour. That's the only expense for the contempt. But you can see, your Honour, if I take your Honour to page 12 - no back further - page 11 and paragraph 40 of His Honour McGill's judgement. Indemnity costs the Magistrates Court. It goes on there further and over to paragraph 46 on page 13, and His Honour helpfully sets out Rule 704 and down in 47 - paragraph 47 - halfway down - it - I may have highlighted it there for your Honour, I'm not sure - the Magistrate is also entitled to have regard to the amount in fact paid whose authority. This is an important consideration although not without limits. There is no reason in principle why the same approach cannot apply in the Magistrates Court. The argument was there was no power to award indemnity costs in the Magistrates Court, but His Honour found that, in his opinion, they were. I then take your Honour to the other case that I-----

BENCH: You filed your appeal in December '06. So why have you included the costs for that?

MR SHERIDAN: That was probably - December '06 that was probably the '07 - that's the date the fee notes were sent, your Honour.

BENCH: So that's not the date you did the work.

MR SHERIDAN: No. That's the date the fee notes is sent.

BENCH: Okay. So why do you say the Court should grant costs on an indemnity basis and why do you think the Court should grant costs simply by you putting some figures down and not supporting that with any material?

MR SHERIDAN: That's the record provided by instructing solicitor of the time spent and the bills sent.

BENCH: And are they going to produce their bills?

MR SHERIDAN: They can, your Honour. If that is not sufficient. There's another case that I've sent up.

BENCH: Yes I've got that here. Cussons?

MR SHERIDAN: You've got that one?

BENCH: I would have thought there is some obligation on your client or your instructing solicitors or yourself to say what you actually did for that. How many hours you were engaged or what you actually - what work you did. For some items may be in dispute. I suppose all of it is in dispute.

MR SHERIDAN: Well, all of it is, your Honour. They say no costs.

BENCH: Okay, well what I might do is, I might hear Mr Lang's submission about why no costs should be awarded, then I'll make a ruling on that and then if I do make a decision that costs are to be awarded, I could make an order that your instructing solicitors provide Mr Lang a copy of all your bills.

MR SHERIDAN: Taxable form.

BENCH: Not in taxable form, but just a copy of all the bills that have been rendered to the client. And a copy of all your invoices that are listed here. I suppose - because the Department will want to know that they are not paying for other work done, or other advice given, or other investigations conducted and then they have some questions about some of it. But I wouldn't be asking them to do it in taxable form, that seems to be -----

MR SHERIDAN: Yes, well.

MR LANG: With respect, your Honour, my learned friend has asked me for indemnity costs and perhaps he should say why indemnity costs as opposed to ordinary costs should be awarded.

BENCH: Okay, well I'll ask him to do that now. But would you mind, I've got someone here - I've got a lady in custody who is trying to get bail. And we should be able to just do that in about two minute, I'm hoping.

MR SHERIDAN: Certainly, your Honour.

MATTERS INTERPOSED

MR SHERIDAN: …which set out the principles where the parties should be awarded indemnity costs. If I can take your Honour to page 230.

BENCH: Can't you just tell me in a sentence?

MR SHERIDAN: Oh yeah, I can tell you in a sentence, your Honour. The-----

BENCH: Well, you know, maybe it will take you three sentences.

MR SHERIDAN: Maybe it will take me three? The basis is that for whatever reason as set out in that decision of Justice McGill, for whatever reason the party persists in what should on proper consideration be seen as a hopeless case. As your Honour pointed out during the appeal and was made in submissions, a notice must stand on its own. We pointed that out to the respondant in the notice of appeal. We then participated in a without prejudice conference the details of which ended up in the witness box and at the bar table and attempted to be tendered-----

BENCH: That's the witness box over there.

MR SHERIDAN: -----and that was knocked on the head. Now, from that arose a, what purported to be an amended compliance notice which is - and your Honour asked the question in the appeal, does not that - is that not a concession that the subject notice cannot stand on its own? Had this matter stopped then, we would not have had to go to appeal, but for reasons unknown to me - unknown to the appellant, sorry, they persisted with it and it's - I mean we have a look at the orders that your Honour gave as far as directions about how the matter was to proceed, the appeal was to be decided on the material that was before the decision maker. And large amounts of the evidence before the Court were never-----

BENCH: Are you going to just have a chat in there? Is that okay with the officers? Okay, yes, thank you.

MR SHERIDAN: On the 8th of April, your Honour, ordered by way of directions and they were by consent that the appeal be heard on the original material before the decision maker. A large proportion of the appeal time the evidence in respect of the respondant was material that had never been before the decision maker to the point that the entire department file was sifted through in the witness box in an effort to find some assistance in the interpretation of the permit. With the - there was also a list of witnesses to be called. The appellant prepared cross-examination for those witnesses on the list. Approximately half the witness was acquilled. The appellant was then confronted with surprise witnesses, maps that had been produced the day of, or the day before the appeal. There was the continual creeping barrage of disclosure, if you like, of material and evidence of witnesses that were unknown to the appellant, instead of those that were - that were on the list. So my submission that - your Honour

can have a look at that further, but that fits the guidelines of an award of indemnity costs. There must be something more other than contentious litigation that then hard fought won or lost and in that event costs - in that event costs follow the event. But in my submission, the way from the very start that this matter has been conducted by the respondant, from the time your Honour pointed out in her decision in the contempt, has been such that indemnity costs should be awarded. My submissions, your Honour, should - has the discretion, the unfettered discretion to do so, and my submission, your Honour, should. Unless I can assist your Honour further, that is my submission.

BENCH: Thank you. Yes?

MR LANG: Your Honour, with respect to the submissions about the witnesses, the appeallant required three of the witnesses that they say should have been called, when those witnesses had nothing at all to do with the decision making. So three of the people that the - where the respondant is alleged to have not called, had absolutely nothing to do with the decision. All the evidence, as you heard from the decision maker that he relied on, he gave. With respect to the power to award costs, your Honour, I will hand up two cases. One is a full Court of the Supreme Court, Wyatt and Albert Shire Council. That was an appeal on costs, again where the local government under the City of Brisbane Town Planning Act, and in that particular case, the Supreme Court said, on page 488:

> "The power to award costs of proceedings is entirely the creature of statute. Under the general law, there is no power of awarding costs."

So it is my submission that this appeal is under section 62 of the Vegetation Management Act and the - that as the Vegetation Management Act is entirely silent with respect to the power to award costs. With the other decision I have handed up is Purtell verses Ogill, a decision of the District Court where her Honour Justice Dick makes the - again sights Wyatt and Albert Shire Council and says:

> "The power to award costs of proceedings is entirely a creature of statute and must be traced to a statutory provision."

Then she goes on to talk about the UCPRs to say that it is her opinion that the rule costs follow the event do not - does not confer jurisdiction to award costs but rather regulates the exercise of the jurisdiction to award where the jurisdiction is otherwise conferred. It is my submission that unfortunately in this particular case, the Court, because the legislation does not allow - does not provide for how the appeal is to be conducted and whether costs can be awarded, this Court has no jurisdiction to award the costs. And even if - if your Honour is against me on that, it's my submission that there have been absolutely no actions of the department that have warrant indemnity costs. Your Honour's decision to dismiss the notice is on the basis that the notice itself is

wrong. The decision to - sorry, is vague and uncertain and those are the words you use. The decision to award the notice was not attacked. It cannot be said from, as I read your Honour's decision-----

BENCH: Do you want me to clarify that? The department produced not one shred of evidence to prove any lawful reason for giving a notice in any form because it wasn't proven anything about the land in question or what the clearing was. There is some vague reference to the prosecution but there were no particulars given of the prosecution. I just find that absolutely phenomenal that you make that submission Mr Lang.

MR LANG: It is my submission that there is nothing-----

BENCH: I just think it's a pretty terrible situation that a landowner can get a complicated document, like the compliance notice, expecting him to go out with a GPS and map 674 points himself to be able to comply with the notice and to keep those points of reference in mind for the next 40 years, that's the notice he's given, and he can't get costs if he wants to say that that notice isn't appropriate? And the department is supposed to be a model litigant. The department has huge resources. It's got more people working for the department than the defendant has, and the defendant is trying to conduct the business of - some sort of business with his land.

MR LANG: It's my submission, your Honour, that unfortunately as sad as that may be, the law is that any power to award costs has to be traced back to the statute. That's what the Court of Appeal says. It's a creation of statute, there is no general power of awarding costs. So, unfortunately, as Her Honour Justice Dick has found-----

BENCH: Her Honour Judge Dick, I thought.

MR LANG: Sorry, Judge - okay.

BENCH: And - so Her Honour Judge Dick comes to that conclusion, there might be 75 other decisions of 75 other District Court judges who have different views because it is not unusual for four judges in the District Court to come up with four different views on one thing. So whilst I've got to take that into account, I don't find that binding on me. Because if I sent Mr Sheridan off with half a day and permission to go and find some other District Court, learned District Court judges with ideas about costs other than that, I'm sure he would come up with them. Because I've had the experience of having two appeals on the same provisions about a similar criminal offence being heard against my decision on the same day between two different District Court judges, and they both come up with different competing ideas about whether or not to record a conviction. So I can't be - I can't comply with both of their ideas because they're totally inconsistent with one another. And that's what happens, because the District Court, it's not a proper hierarchy.

MR LANG: But there is still the full Court of the Supreme Court that says that it has to be - it has to be a creature of - is entirely the creation of statute and there is no general power for awarding costs.

MR SHERIDAN: Your Honour ordered in directions that these proceedings be conducted under the UCPR.

BENCH: Can you just let Mr Lang finish.

MR SHERIDAN: Yes, sorry.

BENCH: Because that's his point. The UCPR is facilitative, it's not substantive, it's procedural, not substantive. It doesn't give your client the right to costs. There has to be a right to costs in the legislation, and if there is a right to costs and the UCPR shows the procedure because it is the procedure rules - the civil procedure rules not the civil substantive law rules. Is that your point?

MR. LANG: It is exactly, your Honour. Unfortunately, as I say, the full Court of the Supreme Court has made that ruling that the costs are a creature of statute and unless there is the power to award costs in the statute, it can't be awarded. That's as - I appreciate that that may be, may be considered harsh.

BENCH: May be considered harsh?

MR LANG: May be. It depends-----

BENCH: It will be. It will be considered like "The Star Chamber".

MR LANG: Well, by the same token, your Honour, the Crown is bound by that as well. Had your Honour ruled that the notice was valid, the prosecution would not have been able to claim any costs back either. So it applies to both parties.

BENCH: Yes, well, you're the government. You're not the poor citizen. You stand there - you know, you've got the government - the government drafts the legislation. The government sets up this scheme. The government controls the scheme. Your department is the one doing all of this. You're the one - you're the one the power is in your court.

MR LANG: Then in - if - if there is to be an inference, then the inference has to be that the government doesn't want costs awarded - by not putting it in the legislation.

BENCH: So - what? You can have the thing lodged on your title deed and you can get dragged through days of litigation with the Department, with a list of witnesses who aren't produced, other witnesses who aren't notified, improper discovery and then you can just smile and put that down to experience?

MR LANG: With respect, your Honour, the - with respect to the witnesses, it was always the respondant's case that the witnesses necessary to prove the respondant's case would be - would be allowed. And would be called. With respect to that included on the list of witnesses that I provided to the appellant, three witnesses that they demanded be called, and they had the power to call those witnesses if they wanted. Your Honour, I hand up an affidavit that contains a letter from the - a letter dated May 2008 from the solicitors for the respondant.

BENCH: It's a copy.

MR LANG: Oh.

BENCH: It's your affidavit.

MR LANG: It's an affidavit to Yes, your Honour.

BENCH: Why didn't you just hand me up the letter?

MR LANG: I currently don't have it with me, your Honour.

BENCH: Thank you.

MR LANG: But with respect to indemnity costs, your Honour, there is no reason why indemnity costs should be awarded in this particular case. The notice was validly issued at the time. The notice has now been accepted to be - now been ruled

to be wrong. We are the respondants. We have kept a line of communication open with the appellants at all times. We have been prepared to listen to any suggestions. There is no reason at all to impose indemnity costs on the appellant - on the respondant. The - excuse me, your Honour. With respect, it's the appellant's appeal and it has taken two years to get to where we are now. Well, eighteen months, your Honour. There's been no evidence of any harm done to the appellant, even if -

BENCH: Other than having to pay $55 000 worth of costs. What do you call that - a tickle under the arm?

MR LANG: Well, no other harm. It's my submission, as I say, the first offer - unfortunately as sad as it is, the Court - the full Court has ruled that unless the power to award is a creation of statute, there is nothing in this statute that says anything. The - any agreement made between - prior to this has to be read subject to the law in any event and therefore the UCPRs, as your Honour rightly points out, are procedural only. They are not substantive and they themselves require a statutory basis to enliven them. So unless there is any more

BENCH: There is a heap more, I'm afraid. Because I find that the judgment of Wyatt and the Albert Shire Council can be clearly and easily distinguishable from the current case, because in Wyatt there was a provision for the awarding of costs - section 31 of the Town Planning Act.

MR LANG: That's correct.

BENCH And that is not the case here and so any helpful comments the Court of Appeal said is not part of its ratio descedende, it's part of some over addictum of some helpful judges who thought they'd like to trace the history of costs. So I am going to adjourn the question of costs until I get some helpful submissions about costs.

BENCH: So I can do some research myself about all the various pieces of legislation about what it says about costs. And I am going to have a look at what Judge Dick said, as I would have thought the rules of court under that Act would have had a provision about costs. So I am absolutely flabbergasted they don't. To help me to do that I am going to - I don't want to tie the appellant up in some further unnecessary costs incurred in trying to recover his costs, so I don't want him to spend 55 000 more dollars' worth of costs in trying to recover $55 000 worth of costs, because that might be throwing good money after bad. So I don't require any party to make any submissions, but if any party wishes to make submissions, they can make submissions. And I'm going to be back in Brisbane in November, giving a decision in a Work Cover matter. I think it's the 24th, or is it October? So I don't really want you to come along either because that would just waste costs. So what I would like to do is for - there will be no submissions, but if your solicitor would like to photocopy the bills from your invoices and the invoices they sent to Whyenbirra that are set out in the schedule - if they can photocopy them and send a copy to Mr Lang and to the Dalby Magistrates Court. If any party wishes to make submissions, they now have 14 days to make the submissions to be received at the Magistrates Court at Dalby and I will give a decision in writing about costs on the argument about contempt and costs on the other appeal. And now I will hear submissions about punishment for contempt.

MR SHERIDAN: There is one further matter, your Honour, in respect of the appeal.

BENCH: Yes.

MR SHERIDAN: Your Honour ordered, as I remember-----

BENCH: I thought I was going to get rid of this big, ugly file today, but it's keeping on following me around for more time.

MR SHERIDAN: Your Honour ordered that the notice was wrong at law and ordered should be overturned, and ordered costs. I just want to clarify that the order that the notice is overturned. Is your Honour ordering that it - the notation that was placed on the title be removed.

BENCH: Well, if I've overturned the decision to give the notice-----

MR SHERIDAN: Yes.

BENCH: Maybe haven't I made that clear?

MR SHERIDAN: It might be helpful if your Honour made it a bit clearer, and I would submit that it would be appropriate for your Honour to order that the notation of the compliance notice on the title, be removed, and I note here - I forget which exhibit this was, but it was in evidence in the Attorney-General's briefing note for the Director-General,

which advised him to place the notation on the title. It was signed by Scott Spencer, Chief Executive on the 7th of February - then the title records that it was placed upon there on the 8th of February. So if it took 24 hours to following that request by the Chief Executive placed a notation on the title, it might be appropriate for your Honour to put a time when that following the order of the Court should be removed from the title.

BENCH: Do I have to wait for an appeal?

MR SHERIDAN: There is no power to stay your Honour's order before there is an appeal.

MR LANG: Your Honour, it's my submission that because the - this may be the subject of an appeal, the appropriate time - the section 55A subsection (5) says:

> "As soon as practical after the compliance notice has been complied with, withdrawn or in any other way, terminated, the Chief Executive must give written notice of the fact to the Registrar."

So it's not-----

BENCH: It doesn't cover it, does it? Not terminated. It's not withdrawn. What was the other one?

MR LANG: Not complied with.

BENCH: No. None of those apply.

MR LANG: Well, with respect, I would suggest that your Honour's decision terminates the notice.

BENCH: No, I'm saying it does - no, I don't agree with you, because I believe it was incapable of being complied with from the very beginning. I don't terminate the notice, I don't say it stops having effect as from today, do I?

MR LANG: So in effect, what your Honour is saying that it was void at issue?

BENCH: I don't know if that is what I am saying. Because I can't - I'll have to have a look at that provision again.

MR LANG: It is my submission, your Honour, that-----

BENCH: Who's got the Vegetation Management - is it under the Vegetation Management Act?

MR LANG: The Vegetation Management Act. I'll hand it up, your Honour.

BENCH: Thanks.

MR LANG: An appropriate period would be one day past the - one day past the expiry for an appeal against your Honour's decision.

BENCH: That's not what Mr Sheridan says. He says there is no power of this Court to stay anything pending the appeal. And if you decide to appeal, and the appeal is upheld, and the notice is reinstituted, you can relodge. That's what you say, isn't it?

MR SHERIDAN: Yes, your Honour, in a nutshell.

MR LANG: Except your Honour, that the property has changed hands and if the property changes hands again - if once the notice is off, the property can change hands and then without being put back on.

BENCH: Yes, well, that notice can't be complied with, so I don't see how it's going to have any effect. I don't see how lodging that at the Titles Office protects anything because as far as I can see, it's not worth the paper it's written on. All it does, is create the impression that there has been something there that isn't there. Anyway that's your submission.

MR LANG: Yes.

BENCH: Interesting that the Vegetation Management Act allows the government to recover the costs that it incurs, as a debt owing to the State by the person if the compliance notice is not complied with, but doesn't allow there to be costs in the appeal.

MR LANG: That's for rectification work, I'm instructed, your Honour.

BENCH: What's the section about appeals?

MR LANG: Section 62.

BENCH: That doesn't say - where does it say the powers of the Court are?

MR LANG: It doesn't, your Honour. It doesn't say the power - the Court.

BENCH: It's not a very helpful piece of legislation, is it?

MR LANG: I couldn't agree with you more, your Honour, but again the legislation is silent.

BENCH: It doesn't say you can-----

MR LANG: That's been a problem all the way through this appeal, as I understand it.

BENCH: So what were you suggesting I make my decision be, that the decision to give the notice be overturned and that the what?

MR SHERIDAN: The notation on the title of the subject land be removed.

BENCH: But do you say I should make some specific references to whether the notice is void from the beginning, never existed. Make a finding that no proper compliance notice has ever issued.

MR SHERIDAN: I don't know whether your Honour has to go that far.

BENCH: That's what I want to do.

MR SHERIDAN: I've got some thing from Mr Lang's submission that the powers of the Court are that - the powers of the notice must stay there until it's removed, complied with or otherwise terminated, and I would have thought that your Honour's decision would go under the definition, if we need one, of otherwise terminated.

BENCH: Well, it's not terminated, because I'm saying it should never have been there, that the notice wasn't a proper notice.

MR SHERIDAN: Well, if the decision to give the notice is overturned, there is probably a very technical point of what description you should give as to the fate of the notice, the decision to give it is overturned, then it might be brought out in, but I am reluctant to put tags like that on this, because it has never been done before, but it is quite clear from your Honour's decision that the decision to give the notice was wrong at law, so if the decision to give the notice is wrong at law, then the notice is wrong at law, it has been given unlawfully. I'm just not exactly sure what proper notification to put on that your Honour, but I don't think it matters a great deal.

BENCH: I order the decision to give the notice is hereby overturned. I dismiss the compliance notice and find that no proper or lawful compliance notice has, in law, been given to the appellant to date. I direct the respondent to remove any notation on the title deed in relation to the land within seven days.

MR SHERIDAN: Thank you, your Honour.

BENCH: Someone ought to tell Parliament to cancel this piece of legislation.

MR LANG: I understand your Honour, amendments are being made.

BENCH: And they will probably be just as bad as what there's now, if this is anything to go by. The people who draft these, have no idea about the practice of it, do they?

MR LANG: That has been a criticism in the past, your Honour.

BENCH: Anyway, if anyone wants to make submissions about costs, you each have 14 days to do it, there is going to be no exchange, just make your submissions because you know what the other party is going to say. Mr Lang knows what Mr Sheridan want, Mr Sheridan knows what Mr Lang argues, you can put it in writing if you want to within 14 days. You can send it by email to the Registrar at Dalby if you want, and they will forward it on to me. You can - and I'll give a decision at a date to be fixed. If you've got any objection with me just ringing you and reading my decision?

MR LANG: No, your Honour.

MR SHERIDAN: No, your Honour.

BENCH: Save you all going to Dalby, or coming in here. Save any further costs to the parties. Thank you.

MR SHERIDAN: Your Honour. The punishment for the contempt.

BENCH: Punishment for contempt. Yes. What are you suggesting?

MR SHERIDAN: I think the upper limit is three years imprisonment and $1 000. Your Honour, I am not going to submit that the Chief Executive be imprisoned, although we do note that-----

BENCH: But that is what you did seek, rather provocatively.

MR SHERIDAN: Yes, well it is within your Honour's power to do it, but as your Honour in her decision indicated that you considered it a technical breach.

BENCH: Right, technical in the terms that if they had done their job properly, you wouldn't have a point as they would have lodged it with the title deed within days of them giving you the compliance notice, if they'd done their job properly.

MR SHERIDAN: Yes, sure. I'm not going to submit that your Honour impose a term of imprisonment because the contemptor is not before the Court. Whether your Honour considers that another contempt? Perhaps not.

BENCH: Well, I didn't think I should really impose a fine either. I thought that if you could satisfy me, your client has suffered a detriment, I might make an order that they rectify the detriment, but as I'd found that seeing as it was such a - they should have lodged it when they did the compliance notice, I thought there wasn't really any detriment because actually your client had a couple of months where he didn't have anything on his title deed.

MR SHERIDAN: And your Honour's decision to remove the compliance notice from the title of the land in some way, even though it is belated, removes the-----

BENCH: Well for the time being removes any detriment because you'll be off to the Supreme Court again.

MR SHERIDAN: Well we won't be, your Honour.

BENCH: Well you might - you may be dragged there.

MR SHERIDAN: Yes.

BENCH: Well, no, you won't be dragged there because Mr Sheridan you will enjoy the legal argument of it and you will enjoy the challenge of it, so it will just be round whatever it is. Two. So I would have thought that merely the Court making a finding that the department is in contempt, would be sufficient, unless they are in regular contempt of the Court orders. Do you know of any other case where they have been in contempt of the Court orders?

MR SHERIDAN: There would be two more on the same basis as this in the pipeline, your Honour.

BENCH: This is the first one?

MR SHERIDAN: This is the first one to be heard.

BENCH: Well, you see, I just don't really know what to do, except I suppose I could - the person who gave it is not a lawyer though are they?

MR SHERIDAN: No, your Honour, but their resources as far as obtaining legal advice is, for all intents, unlimited - by their own Department of Natural Resources legal division and Crown Law.

BENCH: Okay, well I thought I might allow them seven days to deliver a written apology to the Court for acting in contempt of the Court's order if they want to, and apologise to your client and I'll make an order as to costs if there is power to award costs.

MR. SHERIDAN: Thank you, your Honour, if your Honour pleases.

BENCH: I would have thought that your argument about indemnity costs is strongest on the contempt part.

MR LANG: With respect to that, your Honour, the simple point was the second condition that they - the condition - the contempt, if you like, that they sought to prosecute, they were looking to prosecute on the day - at the stay, and didn't. They didn't proceed with it, so - so it only became a-----

BENCH: That could be because they thought the first ground covered the second ground, and was unnecessary - being mere superfluous.

MR LANG: The other ground is - the other thing it could be is they didn't think it was important enough. You can't just be - but-----

MR SHERIDAN: Your Honour, this was argued and I think your Honour's found contempt.

MR LANG: I'm not saying-----

BENCH: Okay, well I would have thought that in an ordinary contempt provision involving a party, the Court would say you're in contempt, but you can apologise if you want, and I'll take that into account. So I thought I would allow my decision to get translated back to the person who did it to see if they offer a written apology for the contempt to both the Court and to the aggrieved party. And that that would be taken into account.

MR LANG: Yes, I will-----

BENCH: I would have thought it was a bit pointless no-one benefits from me imposing a fine and in the absence of any evidence of a preceding contempt of such a sort and in view of the nature of it, I didn't think it was appropriate to fine or imprison, simply to make a finding that a contempt has happened. And to allow costs if I am allowed - if I have power to award costs, to award costs on the totality of the claim for contempt.

MR LANG: If I can just make a couple of very quick points, your Honour?

BENCH: Well, only-----

MR LANG: One is the decision-----

BENCH: Well if they don't want to apologise, if that's what you are saying to me, I won't go any further.

MR LANG: No, no, no, your Honour. I'm taking - I'm going to take that back - take and seek instructions on that, but other points to consider that Mr Scott didn't - Mr Scott made the decision in compliance with the statutory provision.

BENCH: No he didn't. He was supposed to do it as soon as practicable. You can't tell me it takes three months to do that.

MR LANG: With respect, the fault lay not necessarily with Mr Scott but those who advise Mr Scott.

BENCH: They could have said, let's do it all at once and delay the compliance notice till they were ready to go.

MR LANG: I - again-----

BENCH: Couldn't they?

MR LANG: That is - that is without doubt and your Honour has also found that they did act under legal advice - that he did act under legal advice because he said - your Honour made the point that they considered whether - their position. So-----

BENCH: Well, acting on legal advice can get you into a lot of hot water, as a previous Chief Magistrate would probably attest. So - and ended up in jail after you've got legal advice about a certain email. So, yes I do accept all those things. That's why I was saying I don't intend to impose any penalty by way of fine, any penalty by way of imprisonment, but I did think that there should be an order for costs if one could be made, and I would have thought the department if - you don't know, there might be an appeal going to be lodged on that as well. There probably will be if there's a few others in the pipeline, there probably will be an appeal. So really, if there is going to be appeals, the question of costs is pretty academic, isn't it.

MR SHERIDAN: No, your Honour.

BENCH: It's not?

MR SHERIDAN: If you make an order as to costs, we follow the pattern thus far, Crown Law will appeal the order of costs.

MR LANG: I won't respond to that, your Honour.

BENCH: All I'm saying is that I don't intend to impose a fine. I don't intend to impose a period of imprisonment. I would allow seven days to invite an apology to be made. I would note that an appeal is likely. I do know it was made after legal advice. I do note that if the law had been strictly complied with as I set out, the notice would have already been lodged at the Titles Office before the appeal was lodged before the stay was applied for, so - and I really believe that there hasn't been - I don't believe in those circumstances there can be a detriment shown to the applicant, as if the law had been complied with in a prompt way, that notice would have been lodged as soon as the compliance notice was issued or within seven days. So - but unless the applicant has satisfied me there is a contempt of the Court order, and I think the making of that declaration itself has an impact upon the party that I've found against, so the question really is about a question of costs as to how to sort things out.

MR LANG: And the apology to you out at the Court-----

BENCH: Just something in writing.

MR LANG:-----at Roma - sorry at Dalby.

BENCH: Dalby. Don't send me any further west than I am, please Mr Lang.

MR LANG: I'm sorry. I'm not, your Honour.

BENCH: Yes, an apology to the Court and to the applicant because if that hadn't been done, the applicant wouldn't have been put to the expense of bringing these proceedings. But, anyway, that is a matter for whoever is going to make that apology if they are going to, they may not want to, they may instead prefer to appeal, and may have a Court hopefully find I'm wrong, so we will leave that for another day, but I will - I've invited you both to make submissions about costs within 14 days and to file any apology within seven days - no - yes, within seven days and I will be in touch shortly about a decision. Thank you.

MR LANG: Thank you, your Honour.

MR SHERIDAN: Thank you, your Honour.

BENCH: That probably makes it a little bit hard for your appeal, because that would be two appeals. An appeal about today's and then an appeal about costs - wouldn't there?

MR LANG: That's something we can work out in the future.

BENCH: You can add the costs on as you go along, couldn't you? Amend your grounds of appeal.

MR LANG: Probably only with debate.

BENCH: With leave?

MR LANG: With leave.

BENCH: So if you want me to try and do it quick where I can, but that's the order today.

MR SHERIDAN: Thank you, your Honour.

MR LANG: Thank you, your Honour.
