



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

REDLAND CITY COUNCIL
Appellant

and

DARREN BURNS
Respondent

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APPELLANT'S SUBMISSIONS

Part I: PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

Part II: THE ISSUES

2. The two issues in this appeal each relate to whether s.22(2) of the *Criminal Code* (Qld) (**the Code**) was available to the respondent. Those issues are:

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- a) whether an offence of carrying out prohibited development, contrary to s.162 of the *Planning Act 2016* (Qld) (**the Planning Act**), was an 'offence relating to property' within the meaning of s.22(2) of the *Code*; and
- b) whether the respondent's conduct was done 'in the exercise of an honest claim of right'.

3. If either of these questions is answered in the negative, it follows that the appeal should be allowed, and the relief sought in Part VII below granted.

Part III: SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

4. The Appellant contends that this appeal does not involve a constitutional matter.

Part IV: CITATIONS

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5. The citations for the decisions below are:¹

- a) in the Court of Appeal of the Supreme Court of Queensland – *Redland City Council v Burns* [2025] QCA 222; and
- b) on appeal in the District Court of Queensland – *Burns v Redland City Council* [2025] QDC 15.

¹ The Appellant also notes the unreported judgment of the Primary Magistrate dated 5 February 2024.

Part V: FACTS***Background***

6. This appeal relates to native vegetation cleared on land near Point Lookout on North Stradbroke Island described as Lot 153 on Survey Plan 304073 (**the Land**).² The Land falls within the appellant's local government area, and was owned by the State Government, with Queensland Bulk Water Supply Authority (trading as SEQ Water) as reserve trustee of the land pursuant to the *Land Act 1994*.³
7. The respondent is a Quandamooka man, a member of the group of Aboriginal Australians recognised as holding native title rights and interests on North Stradbroke Island. Those native title rights and interests were recorded by means of a consent determination order: *Delaney on behalf of the Quandamooka People v State of Queensland* [2011] FCA 741 (**the Determination**).⁴
8. Sometime after May 2020, the respondent engaged a contractor who used an excavator to clear approximately 2,400 m² of native vegetation, including all canopy trees (save for one large bloodwood tree) on the Land.⁵

9. The respondent's evidence at trial about this clearing was as follows:⁶

“Can you tell his Honour what you know about how that block was cleared? --- There was a fellow on the island who I'd noticed getting around with a big grab on the front of his excavator. So when I say “grab,” it's a big thing like that. And I approached him and I said, “Hey, could you do some trees for me?” And he said, “I'm not going to get in trouble.” I said, “No, you won't get in trouble.” I said, “It's me, it's native title land.” And he did - he agreed to do it for me.

And how - so what happened then? --- Well, he told me, “Well, I can do it at bloody 12 o'clock today,” or something like that. It was - it - I don't know if he done it on the same day or he said, “I can't do it until tomorrow.” It was something like that. And I took him to the place where it was and he parked his machine up, parked his truck up and he - - -

Keep going. Sorry?---He come up with his machine and I've pointed it out to him pretty much what I needed to have cleared and he cleared it for me. I stayed

² The nature of the clearing, and the proximity of the Land to Point Lookout, can be appreciated by the satellite images depicting the clearing and its locality tendered in the Magistrates Court trial as exhibits 15 and 17; Appellant's Book of Further Materials (**AFM**) pp. 19-20.

³ District Court Reasons for Judgment (**DC RJ**)[8] CAB 29.

⁴ Court of Appeal Reasons for Judgment (**COA RJ**)[103] CAB 113, [119] CAB 116; the Determination was tendered in the Magistrates Court trial as Exhibit 1; AFM p.5ff.

⁵ DC RJ[9] CAB 29.

⁶ T3-90/6-21; AFM p.87.

there for most of the while but I wasn't there the whole while. But he pretty much done exactly what I wanted him to do.”⁷

10. But the vegetation cleared was special. It was classified by the State Government as being remnant vegetation and having essential habitat.⁸ The ecological values of the Land were also recognised by the appellant's planning scheme, in that the land fell within the Conservation zone area, and the Environmental significance overlay code area.⁹
11. In addition to clearing all underground and understory trees, Mr Burns cleared between 25 to 30 canopy trees.¹⁰ The evidence at trial confirmed that the vegetation was in healthy condition,¹¹ that at least one of the trees destroyed was over 150 years old with the balance being between 50 and 100 years old,¹² and that the cleared vegetation provided habitat for fauna including koalas, possums, sugar gliders, birds and lizards.¹³
12. The respondent cleared the Land to allow him to build a permanent house for his daughter.¹⁴ The respondent's evidence in chief at trial was as follows:¹⁵

“And so in terms of the block at – near – off Tramican Street, what was the intention for that?---That is my baby daughter's, my youngest daughter, for her. She just had her first baby back then, so I said, “Well, I better get a move on and start getting the place ready for this girl,” because she's got a very good partner, and she's since had another baby and lives rolls. You know, when you live in a close-knit community like us, I describe it as a – as a conveyor belt. You know, you see all the kids that were once kids, having kids, then you look the other way, the other end of the conveyor belt, and you see elders dropping off the other end of the conveyor belt, so it's just a conveyor belt. So we was at that stage of my daughter's life, I said, “Well, we better get a move on.”

And it was your intention to build a house there?---It was my intention to assist them to build a house there, yeah, because I'm a sawmiller by trade, und under our native title rights and interests, we are allowed to take vegetation, bush – from the bush for our own personal use ...”¹⁶

⁷ See, also, the admissions about the clearing made by the respondent to Senior Constable Parsons – T3-10/23 to T3-11/12; AFM pp.46-47.

⁸ DC RJ[8] CAB 29.

⁹ Redland City Council Chief Executive Officer's Certificate tendered as Exhibit 7 in Magistrates Court trial, para 5; AFM p.16.

¹⁰ Evidence of Mr Stovell, Arborist, called for the appellant in the Magistrates Court proceeding, T2-45/47-49; AFM p.24.

¹¹ Ibid, T2-57/26-39; AFM p.36.

¹² Ibid, T2-46/5 to T2-47/6; AFM p.25-26.

¹³ Ibid, T2-47/8-19; AFM p. 26.

¹⁴ DC RJ[9] CAB 29; COA RJ[1] CAB 90, [118] CAB 116.

¹⁵ T3-93/45 – T3-94/10; AFM pp.90-91.

¹⁶ See, also, the respondent's evidence given in cross-examination about the nature of the house he proposed to construct: T4-6/5-43; AFM p.107.

13. After the native vegetation was cleared, it was placed into piles and later burned.¹⁷
14. While the land fell within an area with recognised non-exclusive native title rights under the Determination, those rights did not include an express right to clear native vegetation.¹⁸ While there was a recognised right to “*Live and be present on the area*”, ‘Live’ was defined as “*to reside and for that purpose erect shelters and temporary structures but does not include a right to construct permanent structures*”.¹⁹
15. In Queensland, the *Planning Act* regulates the carrying out of ‘*development*’, which comprises the carrying out of building work, plumbing or drainage work, operational work, reconfiguring a lot and making a material change of use of premises.²⁰ The clearing of native vegetation is recognised as ‘*operational work*’, it being “*work, other than building work or plumbing or drainage work, in, on, over or under premises that materially affects premises or the use of premises*”.²¹
16. The *Planning Act* also recognises three categories of development: ‘*prohibited development*’, being development for which a development application may not be made; ‘*assessable development*’, being development for which a development approval is required; and ‘*accepted development*’, being development for which a development approval is not required.²²
17. Because of the nature of the vegetation on the Land, any clearing of that native vegetation was categorised as ‘*prohibited development*’ unless it fell within one of the recognised types of ‘*exempt clearing work*’ prescribed in Schedule 21 of the *Planning Regulation 2017 (Qld)*.²³
18. If the clearing was not ‘*exempt clearing work*’, the carrying out of that development comprised an offence against s.162 of the *Planning Act*, which provided:

120 **“162 Carrying out prohibited development**

A person must not carry out prohibited development, unless—

¹⁷ DC RJ[9] CAB 29; COA RJ[8] CAB 91.

¹⁸ The Determination recognised a right to ‘take’ natural resources, which included plants (COA RJ[7(b)] CAB 91), but the Primary Magistrate and the District Court judge held the clearing fell outside this right (COA RJ[21] CAB 94; DC RJ[54] CAB 42).

¹⁹ COA RJ[7] CAB 91; Determination paras 3(b)(i) and 13; AFM pp. 11 and 13.

²⁰ *Planning Act 2016*, Schedule 2.

²¹ *Ibid.*

²² *Planning Act 2016*, s.44.

²³ *Planning Act 2016* s.43(1)(a) and *Planning Regulation 2017* s.19 and Sch 10, Part 3, s.4(1)(b), summarised at COA RJ[11]-[17]; CAB 92.

- (a) the development is carried out under a development permit given for a superseded planning scheme application; or
- (b) the local government for the area in which the development is carried out has agreed, or is taken to have agreed, to a request under section 29(4)(b) for the development.

Maximum penalty—4,500 penalty units.”

19. It was common ground below that none of the exemptions or provisos in subparagraphs (a) or (b) were applicable.²⁴

130 20. One of the key issues advanced by the respondent at trial was that the clearing was in fact ‘*exempt clearing work*’, because it fell within Schedule 21 item 1(5) of the *Planning Regulation 2017*, which comprised:

“*An Aboriginal or Torres Strait Islander cultural activity, other than a commercial activity*”

(the Cultural Activity exemption).

The decision of the Magistrates Court

21. The Appellant commenced criminal proceedings against the respondent by way of complaint and summons in the Magistrates Court and, after a trial, the respondent was found guilty of the offence against s.162 of the *Planning Act*, was convicted and fined.²⁵

22. The trial magistrate found that the clearing was not carried out pursuant to the Determination or the Cultural Activity exemption. His Honour also determined that s.24 of the *Code* (mistake of fact) did not apply, and s.22(2) of the *Code* (bona fide claim of right) did not apply because the offence created by s.162 of the *Planning Act* was not one relating to property.²⁶

The decision of the District Court

23. The respondent appealed to the District Court.²⁷ The District Court judge also found the clearing was not consistent with the rights and interests granted by the Determination, and fell outside the Cultural Activity exemption.²⁸ But his Honour

²⁴ Redland City Council Chief Executive Officer’s Certificate tendered as Exhibit 7 in Magistrates Court trial, para 4; AFM p.16.

²⁵ COA RJ[101] CAB 113.

²⁶ DC RJ[20] CAB 32; COA RJ[21]-[23] CAB 94-95.

²⁷ An appeal to the District Court is conducted as a rehearing on the original evidence: s 223, *Justices Act 1886* (Qld).

²⁸ COA RJ[26] CAB 96.

150 allowed the appeal, set aside the conviction and entered a verdict of not guilty. That was on the basis that the offence against s.162 of the *Planning Act* was an offence relating to property and that, because of the Cultural Activity exemption, the respondent's claim of right fell within the scope of s.22(2).²⁹

The decision of the Court of Appeal

24. The Appellant appealed to the Queensland Court of Appeal. Bowskill CJ found that the respondent's claim of right to act as he did was based on his mistaken belief as to his native title rights and interests, which rose no higher than ignorance of the law, and would have allowed the appeal.³⁰ Doyle JA, with whom Bond JA agreed,³¹ followed the reasoning of the District Court Judge³² and dismissed the appeal. All judges found that the offence created by s.162 of the *Planning Act* was an offence relating to property,³³ although Bowskill CJ would have decided otherwise had the point been free of authority.³⁴

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Part VI: ARGUMENT

25. In the proceedings below, the respondent contended that the clearing was carried out pursuant to an '*honest claim of right*' and that he was therefore excused of responsibility for that clearing because of s.22(2).

26. Section 22 of the *Code* provides as follows:

"22 Ignorance of the law—bona fide claim of right

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- (1) Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence.
 - (2) But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud. ..."

27. A relevantly identical provision is in the Western Australian *Criminal Code*, and both provisions are based upon the common law defence of *bona fide claim of right*.³⁵

²⁹ DC RJ[233] CAB 83.

³⁰ COA RJ[87] CAB 111.

³¹ COA RJ[98] CAB 113.

³² COA RJ[190] CAB 131.

³³ COA RJ[75] CAB 108, [98] CAB 113, [153]-[154] CAB 124.

³⁴ COA RJ[72] CAB 108.

³⁵ COA RJ[36] CAB 99.

180 28. Section 22(2) is potentially very broad in its operation. Unlike the mistake of fact defence, an ‘*honest claim of right*’ need not be reasonable,³⁶ and (according to some of the authorities³⁷) it is not necessary that the right claimed be one known to the law.³⁸ But its application can be difficult, it being juxtaposed with the rule that an erroneous belief that what one is doing is lawful is a mere mistake of law and provides no defence.³⁹

A. The First Issue: *Planning Act* s.162 is not an ‘*offence relating to property*’

29. The Appellant submits the court below erred in its finding that the offence of carrying out prohibited development, contrary to s.162 of the *Planning Act*, was an ‘*offence relating to property*’.

190 30. The findings that a s.162 offence was an offence relating to property was informed by the fact that the offending conduct resulted in the destruction of plants, and ‘plant’ is included in the definition of ‘property’ in the *Code*.⁴⁰

31. Notwithstanding this, Bowskill CJ’s finding was qualified as follows (underlining added):

200 “[72] Unconstrained by the authorities discussed above, I would have been inclined to the view that notwithstanding a “plant” may be “property”, properly understood the offence under s 162 of the *Planning Act* is not an offence relating to property; but is rather an offence relating to an activity (carrying out work, namely clearing vegetation). But, as the offence does have, as its focus, the removal or destruction of plants, which are property, I accept that the offence is an “offence relating to property” within the meaning of s 22(2).”

32. That approach is consistent with the terms of section 161 of the *Planning Act*, which provides that Chapter 5 Part 2 of the Act (which includes section 162) creates offences, each known as a “development offence.”

³⁶ *Walden v Hensler* (1987) 163 CLR 561, 600.

³⁷ Eg *Walden v Hensler*, 568-569 (Brennan J), 600 (Toohey J); *R v Waine* [2006] 1 Qd R 458, [23], where Keane JA (as his Honour then was) said that it was “clear” that this was so.

³⁸ *R v Waine*, [23].

³⁹ *Code* s.22(1); *Ostrowski v Palmer* (2004) 218 CLR 493.

⁴⁰ COA RJ[75] CAB 108, [98] CAB 113, [153]-[154] CAB 124.

What is an ‘offence relating to property’?

- 210 33. *Walden v Hensler* (1987) 163 CLR 561 (**Walden**) is the only decision of this court to consider s.22(2) in detail. *Walden* was an appeal against the conviction of a First Nations man for an offence of keeping two bush turkeys, contrary to s.54 of the *Fauna Conservation Act 1974* (Qld), which provided: “a person shall not take, keep or attempt to take or keep fauna of any kind unless he is the holder of a licence ...”.
34. The majority (Brennan, Deane and Dawson JJ) held that s.22(2) did not afford a defence, but for differing reasons. The minority (Toohey and Gaudron JJ) held the defence was available.
35. A key issue in *Walden* was whether the offence was one ‘relating to property’, it formerly being considered (at the intermediate appellate court level) that the provision only applied to offences set out in Part 6 of the *Code*, being ‘Offences relating to property and contracts’.⁴¹
- 220 36. In the majority, Brennan J (as his Honour then was) adopted what he described as a ‘narrower interpretation’,⁴² holding that s.22(2) was not engaged because it only applied to “conduct which causes another to part with property or which infringes another’s rights over or in respect of property”.⁴³ In explaining his finding, Brennan J reasoned:⁴⁴
- 230 “*[i]f s. 22 were understood as applying to any act or omission affecting property, it would have an application far wider than has been attributed to it in Queensland thus far (...) and far wider than the common law defence from which it was derived. The wider interpretation of s. 22 would put a premium on ignorance of the general criminal law. Contrary to the law’s intent, it would furnish a disincentive to the dispelling of ignorance as to the provisions of the criminal law governing the destroying, damaging, using, disposing or otherwise dealing with anything which answers the description of property.*”
37. Deane J explained that he did not consider the narrow construction in *Pearce v Paskov* [1968] WAR 66 to be correct, and that the provision was engaged because the offence was one “of keeping certain property without any relevant statutory licence of other authority”.⁴⁵

⁴¹ *Pearce v Paskov* [1968] WAR 66, 72.

⁴² At 574.

⁴³ At 574-5.

⁴⁴ *Ibid.*

⁴⁵ At 580.

38. Dawson J did not think it necessary to decide the point, finding s.22(2) inapplicable “*simply because s. 54(1)(a) imposes a prohibition against the keeping of fauna which is of general application irrespective of any proprietary or lesser right in the fauna and so affords no scope for the exercise of any claim of right*”.⁴⁶
- 240 39. In the minority, Toohey and Gaudron JJ held that the offence was one relating to property, but for different reasons. Toohey J reasoned that the section applied because the offence ‘*relates to the taking or keeping of something which answers the definition of property*’.⁴⁷ Gaudron J reasoned slightly differently to arrive at the same conclusion. Her Honour explained that “*Section 22 is not without difficulty: it is not clear what function is served by the adverbial phrase ‘as for an offence relating to property’*”, and focused instead on what comprised ‘*an act with respect to property*’,⁴⁸ ultimately finding the provision was engaged because the turkeys were capable of being the subject of ownership.⁴⁹
- 250 40. The consequences of this diversity of reasoning manifested in *Stevenson v Yasso* [2006] 2 Qd R 150 (*Stevenson*), an appeal that considered whether s.22(2) was available to a defendant charged under s.84 of the *Fisheries Act 1994* (Qld): unlawfully using or possessing fishing apparatus (being a monofilament net exceeding a prescribed size). As in *Walden* (and the present proceeding), the defendant contended the offending conduct was consistent with his indigenous customary practices.
- 260 41. In determining whether s.84 was an ‘offence relating to property’, McMurdo P applied *Walden* considering cumulatively the reasoning of Deane J (majority) and Toohey and Gaudron JJ (minority), and finding s.22(2) was engaged because the impugned fishing apparatus was ‘property’.⁵⁰ McPherson JA was critical of McMurdo P’s use of a combination of majority and minority reasoning to extract a binding principle,⁵¹ and found s.22(2) was not engaged.⁵² Fryberg J did not need to decide the issue.
42. The intermediate appellate authorities advanced by the parties below also do not directly consider the fact that the word ‘property’ is used twice in s.22(2): “*a person is not criminally responsible, as for an offence relating to property, for an act done or*

⁴⁶ At 593-4.

⁴⁷ At 599.

⁴⁸ At 605.

⁴⁹ At 606.

⁵⁰ At [64].

⁵¹ At [103].

⁵² At [104].

omitted to be done by the person with respect to any property ...”, such that it follows that to engage the provision a defendant must establish (on an evidential basis) that: (1) the offence is an ‘*offence relating to property*’, and (2) the impugned act was done (or omitted to be done) ‘*with respect to property*’.

- 270 43. Any reasoning (such as that adopted by McMurdo P in *Stevenson* and the court below⁵³) that the first limb of s.22(2) is satisfied if the offending conduct involves things capable of being described as property will inexorably lead to a conclusion that the second requirement is also made out. Such an approach fails to give effect to the differing language employed in each limb, an outcome contrary to established principle.⁵⁴
- 280 44. Accordingly, the Appellant submits that the ‘*narrower*’ approach advanced by Brennan J in *Walden* ought be accepted as correct—an offence relating to property must be of a type that ‘*causes another to part with property or which infringes another’s rights over or in respect of property*’. Put another way, that a consequence of the offending impacts or involves something responding to the definition of property should not, it is respectfully submitted, be sufficient alone to make that offence one ‘*relating to property*’.
45. This construction would have the effect that whether an offence is one related to property may be discerned from the text of the offence provision in question, and not by consideration of the nature or consequences of conduct said to comprise the offending against that provision which, naturally, can materially vary.

Planning Act s.162 is not an ‘offence relating to property’

46. The Appellant submits the offence of carrying out prohibited development, contrary to s.162 of the *Planning Act*, is not an ‘*offence relating to property*’.
- 290 47. Although property is broadly defined in s.1 of the *Code*, the law is presently unsettled as to whether, for an offence to be one ‘related to property’, it is sufficient that the subject matter of the offence is capable of being the subject of a proprietary right, or whether the offending conduct must infringe the proprietary rights of another.

⁵³ Bowskill CJ at COA RJ[72] CAB 108; Doyle JA at COA RJ[153] CAB 124.

⁵⁴ *Plaintiff M70/2011 v Minister of Immigration and Citizenship* (2011) 244 CLR 144; [97], and the authorities referred to therein.

48. As was acknowledged by Doyle JA, there is risk associated with a broad application of s.22(2).⁵⁵

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“[151] It might be thought that acceptance of the broader approach to the expression “an offence relating to property” in s 22(2) of the Code could lead to it having a scope which it is unlikely Parliament intended. Many offences which might generally not be thought of as offences relating to property could be charged in ways which include aspects involving acts concerning property. For example: going armed so as to cause fear (s 69); using the internet to procure children under 16 (s 218A); distributing intimate images (s 223); dangerous operation of a vehicle (s 328A) and many more. However, it is not necessary for the purposes of this appeal to determine the limits of the expression “an offence relating to property”. While the expression “relating to” is a broad connecting factor, there are some limits to be gleaned from the context and purpose of the provision: *O’Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356; *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313 , 331.”

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49. In this context, the Appellant contends the reasoning of McPherson JA in *R v Cunliffe* [2004] QCA 293 (*Cunliffe*)⁵⁶ should be preferred, notwithstanding his Honour’s reliance on Brennan J’s reasoning in *Walden* (which was not adopted by the other majority judges).

50. In *Cunliffe*, the court considered a contention that s.22(2) was engaged for offences about the possession and growing of marijuana, adopting similar reasoning to Bowskill CJ and Doyle JA that, because the subject drug was a plant and therefore property, the offence was one ‘*relating to property*’. McPherson JA explained (with McMurdo P and MacKenzie J agreeing in the result, but for different reasons which did not consider the ‘*relating to property*’ point):

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“[16] Expressly or by implication, s 22(2) applies only to offences “relating to property”. The expression “relating to” is no doubt capable in many contexts of a very wide meaning; but, in the context of s 22(2), none of the offences with which the Cunliffes were charged depended in any way on there being “property” in any things that were in issue. Section 8 of the Drugs Misuse Act, which creates a crime of production of a dangerous drug like cannabis, does not incorporate as one of its elements that the person doing so must own or have any “property” in the cannabis produced. The section prohibits an activity, namely production, which is independent of ownership of the plant or product produced, or of the land on which it is cultivated. The activity is and remains prohibited even if the land or the plant in question

⁵⁵ COA RJ[151] CAB 124.

⁵⁶ See also *Fanna v Leavy* [2005] QCA 378 at [4], where McPherson JA held that shooting and taking protected birds in contravention of the *Nature Conservation Act 1992* (Qld) was not an offence relating to property, following the reasoning of Brennan J in *Walden*.

330 belongs to another, as in fact is quite often the case in prosecutions under the section. It makes no difference who owns the plant that is being cultivated or produced. ...

[17] It is evident from what I have said that I regard the words “as for an offence relating to property” as limiting the availability of s 22(2) to offences which in some way “relate to” property in the sense of being or affecting proprietary rights in something. To the contrary, the Cunliffes point to the definition of “property” in s 1 of the Code, which comprehends a wide range of objects or things, including “(d) a plant”; but this is not the sense in which the expression “relating to property” is used in that portion of s 22(2) of the Code. ...

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[20] For my part, I would with respect, if free to do so, prefer the analysis of Brennan J. For reasons I have given, none of the offences here of producing or of possessing cannabis or things used in connection with it involves interference with the property rights of others so as to constitute “an offence relating to property” within the meaning of s 22(2) of the Code, or attract the exemption from criminal responsibility which it confers.”

51. With respect, this reasoning is apt to the subject proceeding, given the s.162 offence does not depend in any way on there being ‘property’ in the destroyed vegetation.

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52. This is also consistent with the reasoning in *Olsen v The Grain Sorghum Marketing Board; ex parte Olsen* [1962] Qd R 580. In that case, the appellant was convicted of buying sorghum other than from the Board contrary to a provision regarding commodities. Hangar J observed that “*the purchase of any of the commodity is the offence*”,⁵⁷ and the appellant attempted to rely on s.22(2) based on legal advice concerning s.92 of the *Constitution* which was found to be unsoundly based. The court unanimously held that s.22(2) was not engaged, with Mansfield CJ and Stable J holding that the offence charged was not one relating to property within the meaning of the section, and instead concerned the impermissible buying of a commodity⁵⁸ (despite the offence provision referring to a thing which answers the description of property).

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53. Ultimately, the Appellant respectfully submits that the following principles ought to be accepted for the construction of s.22(2) of the *Code*:

- a) whether an offence is one ‘relating to property’ must be discernible on the face of the offence provision—to do otherwise would give the provision too broad an application, and would manifest in an offence provision being an offence relating

⁵⁷ *Primary Producers’ Organisation and Marketing Act*, s 15; *Olsen* at 589.

⁵⁸ At 585, 593.

to property, or not, depending upon the particular circumstance of the offending;
and

- b) an offence is one ‘relating to property’ only if the offence provision proscribes the infringement of proprietary rights of others, or causes another to part with property. Put another way, offending conduct that merely involves things that answer the description of ‘property’, or which satisfies the second s.22(2) limb in that what is alleged involves an ‘*act done by the person with respect to any property*’, is insufficient to make the offence one ‘relating to property’.

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54. Applying that reasoning, the result must be that the offence created by s.162 of the *Planning Act* is not one relating to property.

B. The Second Issue: The clearing was not done ‘*in the exercise of an honest claim of right*’

55. The Appellant submits the majority of the Court of Appeal erred in finding that the respondent’s conduct was done ‘*in the exercise of an honest claim of right*’.⁵⁹

What is the nature of the ‘honest claim of right’?

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56. The juxtaposition between ss.22(1) ‘*ignorance of the law*’ and 22(2) ‘*bona fide claim of right*’ was considered by Deane J in *Walden*, who held that while the offence was one ‘*relating to property*’, the claim of right was misconceived (underlining added):⁶⁰

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“The phrase “honest claim of right” has no defined meaning for the purposes of the Code. Its connotation in s. 22 must be determined in the context of the opening provision of that section that ignorance of the law does not of itself afford any excuse for an action or omission which would otherwise constitute an offence and against the background of general common law principle to that effect. Plainly, the fact that a person can honestly say that he thought he was entitled to do the relevant act because he was unaware that it was proscribed by the criminal law does not suffice to provide him with a defence of honest claim of right under s. 22. Nor does an honest belief of some special entitlement to do the particular act with respect to property necessarily constitute such a defence. An honest belief of a special entitlement to do the act with respect to the property, such as belief of ownership, will only constitute a defence under s. 22 of the Code if that entitlement would, if well founded, preclude what was done from constituting breach of the relevant criminal law which an accused is assumed to know: In other words, it is not to the point to establish an honest belief of a special relationship with property which, even if it existed, would not constitute an answer to the offence charged.

⁵⁹ COA RJ[98] CAB 113, [190] CAB 131.

⁶⁰ At 580-1.

57. Dawson J expressed similar reasoning, explaining (underlining added):⁶¹

400 “It is not ignorance of the criminal law which founds a claim of right, but ignorance of the civil law, because a claim of right is not a claim to freedom to act in a particular manner – to the absence of prohibition. It is a claim to an entitlement in or with respect to property which goes to establish the absence of mens rea. A claim of that sort is necessarily a claim to a private right arising under civil law: see *Cooper v Phibbs*, per Lord Westbury.”

58. This reasoning by Dawson J was cited with approval by the plurality in *MacLeod v The Queen* (2003) 214 CLR 230 at [41].

59. What adds complexity is the stated principle that claims of this type need not be known to the law, it being at first blush difficult to rationalise principles which do not comfortably co-exist. How can the requirement that the rights claimed “*would, if well founded, preclude what was done from constituting a breach of the relevant criminal law*”⁶² apply where the claim need not be one recognised by (or known to) the law, or unfounded in fact?⁶³ This difficulty is avoided if it is accepted that the claim must be based on a “private right arising under civil law.”

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60. Returning to the reasoning of Dawson J in *Walden*, what comprises a ‘*claim to a private right arising under civil law*’ has not been explored in detail by appellate courts (or this court), nor its practical differentiation from mere mistake of law. An exception is *Molina v Zaknich* (2001) 24 WAR 562, where it was held that a right to enter a workplace arising under the *Industrial Relations Act 1979* (WA) was part of the civil law.⁶⁴ But an erroneous belief that clearing native vegetation is not unlawful because of the existence of an exemption in the statute creating that offence is scarcely a claim to a private right arising under the civil law.

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61. In finding s.22(2) engaged, the District Court appellate judge explained (underlining added):⁶⁵

430 “In my view, absent the cultural activity exemption, Mr Burns’ claim of right would not fall within the scope of s. 22(2). A belief that he was entitled by native title rights to clear land would rise no higher than an ignorance of the law because even if he had such native title rights, they would not have provided any answer to the specific prohibition on clearing native vegetation. However, the existence of the cultural activity exemption changes the position. Mr Burns’ belief as to his claim

⁶¹ At 592-3.

⁶² *R v Waine* [2006] 1 Qd R 458, [30], citing *Walden v Hensler* (1987) 163 CLR 561, 580-1.

⁶³ *Walden v Hensler* (1987) 163 CLR 561, 568-9; *R v Waine* [2006] 1 Qd R 458, [23].

⁶⁴ At [103].

⁶⁵ DC RJ[233] CAB 83.

of right was one which if correct, would have given rise to the cultural activity exemption. That is, if he was correct in his belief that he had a traditional right to blaze, clear and build, then that would have excluded the clearing for that activity from the scope of the offence because the clearing would have fallen within the scope of exempt clearing work.”

62. This reasoning, essentially adopted by Doyle JA,⁶⁶ has as its bedrock the Cultural Activity exemption. But that exemption does not found ‘*a claim to a private right arising under civil law*’— indeed, unlike rights recognised by the Determination, such as a right to take, share and exchange traditional natural resources, the Cultural Activity exemption:

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- a) is not a private right, but instead falls within the broader category of ‘*exempt clearing work*’ applicable to all; and
- b) is not a right arising under the civil law, being the regulation of private rights of the type considered in *Cooper v Phibbs*,⁶⁷ because the Cultural Activity exemption does not posit any positive civil right to deal with property. On the contrary, it instead establishes a proviso or exemption against what would otherwise be criminal conduct.

63. Further, the evidence at trial fell short to discharging the evidential onus on the defendant to show that a contractor to clearing native vegetation with an excavator so as to enable the laying of a concrete slab for the construction of what might have been a two-storey house with a verandah and carport⁶⁸ was in any way akin to a traditional cultural activity.

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64. Ultimately, the Appellant submits the reasoning of Bowskill CJ, with respect, more accurately sets out what should be the law in circumstances of this type and ought be adopted by the court (footnotes omitted, emphasis in original):⁶⁹

“[83] The primary judge’s consequent conclusion (Judgment at [233]) that this claim of right fell within s 22(2), was in error in two respects:

- (a) First, because it is logically inconsistent with the conclusion, also expressed in the Judgment at [233], that “a belief that he [Mr Burns] was entitled by native title rights to clear land would rise no higher than an ignorance of the law because even if he had such native title rights, they would not have provided any answer to the specific

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⁶⁶ COA RJ[190] CAB 131.

⁶⁷ (1867) LR 2 HL 149 at 170 per Lord Westbury, referred to by Dawson J in *Walden* at 593, see also *Olsen* (supra), 590 per Hanger J.

⁶⁸ Being the respondent’s evidence about the house he proposed to construct: T4-6/32-34; AFM p.107.

⁶⁹ COA RJ[83] CAB 110, [85]-[86] CAB 111.

prohibition on clearing native vegetation”. It is logically inconsistent because the express basis, in Mr Burns’ evidence, and as found by the primary judge, at [223], for why he held the belief he claimed was as a native title holder (not on some other basis).

- (b) Second, because the conclusion that Mr Burns’ belief as to this *other* claim of right was one which, if correct, would have given rise to the “cultural activity” exemption was not supported by the evidence. ...

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...

[85] ... Accepting for present purposes that Mr Burns’ actions were honest, his claim of a right to act as he did was on the basis of his mistaken belief as to the content of his rights as a native title holder. That was properly characterised by the primary judge as rising no higher than ignorance of the law, and not a claim of right capable of engaging s 22(2). That belief provided no defence to the charge.

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[86] This conclusion sits comfortably with a rational and just application of the law, based on the proper construction of s 22(2). The opposite conclusion, in my respectful view, causes significant uncertainty in the application and enforcement of laws such as s 162 of the *Planning Act*, to the conduct of persons purporting to act in accordance with what their belief is as to their native title rights, even where there has been a determination of those native title rights, which is inconsistent with the principle in s 22(1) of the *Code*.”

65. This reasoning is also consistent with the Queensland Court of Appeal decision *Scriven v Sargent (No 2)* [2018] 1 Qd R 282 (*Scriven*), where the court rejected a submission that because vegetation was a fixture to real property, s.22(2) was capable of engagement for an analogous native vegetation clearing development offence.⁷⁰

66. In *Scriven*, Boddice J (as his Honour then was), with whom Morrison JA and Dalton J agreed,⁷¹ rejected a submission that because vegetation was a fixture to real property, s.22(2) was capable of engagement with respect to a development offence analogous to s 162 of the *Planning Act*:

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“[24] The applicant submits that s 4.3.1 does not constitute a general offence as unconditionally fixed natural vegetation is registered as a fixture to real property and accordingly a matter to which the applicant properly has a claim of ownership as the registered owner of the property in question. A defence of claim of right pursuant to s 22 was available because the claim was an entitlement to act in respect of the native vegetation.

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[25] That submission cannot be accepted for two reasons. First, the natural vegetation on the applicant’s land was not a fixture for the applicant to use as he saw fit. The *IPA* and the *VMA* lawfully protected clearance of that natural vegetation without an effective permit.

⁷⁰ At [24]-[26], followed by the Court of Appeal in *McDonald v Holeszko* [2019] QCA 285.

⁷¹ At [1] and [33].

[26] Second, that submission fails to accord any significance to the requirement in s 22 for the honest belief, if it had been well founded, to be a defence to the charge. The belief claimed by the applicant amounted to no more than an assertion that he honestly believed he had an entitlement to act in relation to the native vegetation. That assertion amounts to no more than an allegation he was unaware of the effects of the relevant legislation. Such a claim, even if held honestly, is not protected by s 22 as it merely amounts to ignorance of the law.”

510 67. *Scriven* was followed by *McDonald v Holeszko* [2019] QCA 285. In that case the appellants were the registered owners of a rural property and charged with unlawfully clearing native vegetation. Their assertion that the clearing of vegetation for the purpose of feeding livestock was in the exercise of an honest claim of right was rejected, with Flanagan J, with whom Sofronoff P and Philippides JA agreed,⁷² explaining at [20]:

520 “Mr McDonald submits that as one of the registered owners of the property he has a statutory right to the effective use and economic benefits of all vegetation upon, and forming part of, the property. He asserts that the clearing of vegetation on his property for the purposes of feeding livestock in a period of prolonged severe drought was in the exercise of an honest claim of right in accordance with s 22(2) of the *Queensland Criminal Code*. This Court has, however, previously decided that a defence under s 22 is not available as a defence to the deliberate clearing of vegetation contrary to statute even if it were assumed that there was sufficient evidence to show that Mr McDonald honestly believed the state of the law permitted him to clear vegetation in the way that he did.”

68. The Appellant submits the reasoning regarding the application of s 22(2) in *Scriven* and *McDonald* is indistinguishable from the present case and the court ought be satisfied that such an approach, as held by Bowskill CJ, should be adopted.

Part VII: ORDERS SOUGHT

530 69. The Appellant seeks the following orders:

- a) appeal allowed;
- b) the orders of the Court of Appeal be set aside, and in lieu thereof:
 - i) the appeal to the Court of Appeal be allowed with costs; and
 - ii) the orders of the District Court be set aside, and in lieu thereof an order that the appeal to the District Court be dismissed; and

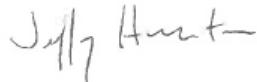
⁷² At [1]-[2].

c) the matter be remitted to the District Court for the limited question of costs.

Part VIII: ESTIMATE OF TIME

70. It is estimated that 2 hours will be required for the Appellant’s oral argument.

540 Dated: 30 April 2026



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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

REDLAND CITY COUNCIL
Appellant

550

and

DARREN BURNS
Respondent

ANNEXURE TO APPELLANT'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2024, the Appellant sets out below a list of the provisions and statutes referred to in these submissions.

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	<i>Criminal Code Act 1899</i> (Qld)	Current as at 26 February 2020	ss 1, 2, 22 and 24 of Schedule 'Criminal Code'	Act in force on the date of the offence.	The date the offence was committed.
2.	<i>Justices Act 1886</i> (Qld)	Current as at 20 September 2023	s 223	Act in force when appeal made to the District Court of Queensland	The date the appeal commenced (7 March 2024).
3.	<i>Planning Act 2016</i> (Qld)	Current as at 19 March 2020	ss 43, 44, 161, 162 and Schedule 2	Act in force on the date of the offence.	The date the offence was committed.
4.	<i>Planning Regulation 2017</i> (Qld)	Current as at 27 March 2020	s 19, sch 10, Part 3, sch 21 and sch	Act in force on the date of the offence.	The date the offence was committed.
5.	<i>Criminal Code Act Compilation Act 1913</i> (WA)	31 March 2026	s 22 of Schedule 'Criminal Code'	For illustrative purposes only	