



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B24/2026

BETWEEN:

REDLAND CITY COUNCIL
Applicant

and

DARREN BURNS
Respondent

**SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR
THE STATE OF QUEENSLAND (INTERVENING)**

Filed on behalf of the Attorney-General for the State of Queensland

14 May 2026

PART I: Internet publication

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

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland seeks leave to intervene in support of the appellant, or alternatively to be heard as amicus curiae in this proceeding. The Attorney seeks to make submissions as to the correct interpretation of the scope of the defence under s 22(2) of the *Criminal Code* (Qld) (**Code**).

PART III: Reasons why leave to intervene should be granted

3. The Attorney-General should be granted leave to intervene in accordance with the principles set out in *Roadshow Films Pty Ltd v iiNet Ltd [No 1]*.¹
4. First, the Attorney-General is the Minister responsible for the administration of law and justice in Queensland, and has powers to commence criminal prosecutions.² The Attorney-General and the State she represents³ will be directly affected by the decision in this proceeding. Several departments of the State prosecute persons for offences which may be affected by the defence in s 22(2) of the Code. Examples of prosecutions for regulatory offences by departments affected by s 22(2) include *Walden v Hensler*,⁴ *Scrivener v Sargent*,⁵ and *McDonald v Holeszko*,⁶ three of the cases cited by the Appellant.
5. Second, the Attorney-General can assist the Court by making submissions to assist it to make the correct determination. The Attorney-General's submissions reflect her broader interest in the proper application of s 22(2) of the Code compared to the immediate interests of the parties, including the broader consequences for other regulatory schemes with cultural defences, such as s 14 of the *Fisheries Act 1994* (Qld) and s 41A of the *Animal Care and Protection Act 2001* (Qld).

¹ (2011) 248 CLR 37, 38-9 [2]-[6] (the Court).

² *Attorney-General Act 1999* (Qld) ss 5(c), 7(1)(a).

³ See *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 409 [75] (Gaudron and Gummow JJ) (albeit in a different context).

⁴ (1987) 163 CLR 561.

⁵ [2018] 1 Qd R 282.

⁶ [2019] QCA 285.

6. Alternatively, the Attorney seeks leave to be heard as *amicus curiae* for the same reasons.

PART IV: Submissions

SUMMARY OF ARGUMENT

7. The honest claim of right defence in s 22(2) of the Code provides an exception to the principle that ignorance of the law provides no excuse set out in s 22(1). Section 22(1) and (2) together provide:

22 Ignorance of the law—bona fide claim of right

(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.

8. The Attorney-General submits that, properly construed, the defence in s 22(2) applies if four elements are present:
- (a) the offence is ‘an offence relating to property’—meaning an offence where the act or omission that constitutes an element of the offence is the misappropriation of property or the destruction of, or injury to, property;⁷
 - (b) the relevant act was done or omitted to be done ‘in the exercise of an honest claim of right’—meaning the defendant honestly believed they had a right grounded in civil law to do what they did,⁸ and if that right existed, it would constitute a defence to the charge;⁹
 - (c) the act was done or omitted to be done ‘with respect to any property’—meaning

⁷ *Walden v Hensler* (1987) 163 CLR 561, 574-5 (Brennan J).

⁸ *Walden v Hensler* (1987) 163 CLR 561, 580-1 (Deane J), 592-3 (Dawson J), 603 (Toohey J); *Macleod v The Queen* (2003) 214 CLR 230, 243-4 [41] (Gleeson CJ, Gummow and Hayne JJ); *R v Perrin* [2018] 2 Qd R 174, 193-4 [89] (Morrison JA, Atkinson J agreeing).

⁹ *Walden v Hensler* (1987) 163 CLR 561, 580-1 (Deane J), 591-2 (Dawson J); *R v Waine* [2006] 1 Qd R 458, 463 [30] (Keane JA, McMurdo P and Wilson J agreeing); *Scriven v Sargent [No 2]* [2018] 1 Qd R 282, 286-7 [26], 287-8 [31] (Boddice J, Morrison JA and Dalton J agreeing).

with respect to the property the subject of the charge;¹⁰ and

(d) the act was done or omitted to be done ‘without intention to defraud’.

9. These submissions are directed to the first two elements.

STATEMENT OF ARGUMENT

Issue One: What is ‘an offence relating to property’?

10. The correct approach to statutory interpretation is well settled and was recently summarised by Gageler CJ, Gordon, Jagot and Beech-Jones JJ in *Palmanova Pty Ltd v Commonwealth*.¹¹ Section 22(2), in short, must be read in the context of the provision and the Code as a whole.
11. Section 22(2) applies ‘as for an offence relating to property’. On a very broad reading—like that adopted by the majority of the Court of Appeal—that could mean ‘any act or omission affecting property’.¹² However, it is submitted that, properly construed, the words refer to an offence involving the misappropriation of property or the destruction or injury of property. That is so for several reasons.
12. First, it is a well-established principle of statutory interpretation that the same meaning ordinarily is given to the same words appearing in different parts of a statute.¹³ The phrase ‘offence relating to property’, which is used in s 22(2), appears in two other places in the Code:¹⁴ the heading to Part 6, and s 680.

¹⁰ *Olsen v Grain Sorghum Marketing Board; Ex parte Olsen* [1962] Qd R 580, 585 (Mansfield CJ); *R v Walsh* [1984] 2 Qd R 407, 408 (Kneipp J, Kelly and Carter JJ agreeing); *R v Waine* [2006] 1 Qd R 458, 462-3 [27]-[28] (Keane JA, McMurdo P and Wilson J agreeing).

¹¹ (2025) 99 ALJR 1362, 1364-5 [4]-[7].

¹² *Walden v Hensler* (1987) 163 CLR 561, 574 (Brennan J).

¹³ See *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, 618 (Mason J, Barwick CJ and Jacobs J agreeing); *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645, 659 [32] (French CJ, Crennan, Kiefel and Bell JJ); *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661, 673 [29] (French CJ, Kiefel, Bell and Keane JJ); *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456, 466-7 [21] (the Court); *R v Jacobs Group (Australia) Pty Ltd* (2023) 280 CLR 170, 181 [25] (Kiefel CJ, Gageler, Gordon, Steward, Gleeson and Jagot JJ).

¹⁴ In the 1897 Draft Code, the phrase ‘offence relating to property’ was also included in cl 683 which related to the discharge of an offender on a summary conviction for any ‘offence relating to property’. The margin note identified that the section was to replace those in previous legislation for offences that would be classified within Part 6 of the proposed Code and permitted summary conviction: Sir Samuel Griffith, *Draft of a Code of Criminal Law* (Government Printer, 1897) 299-300 (‘1897 Draft Code’). See Sir Samuel Griffith *A Digest of the Statutory Criminal Law in Force in Queensland on the First Day of January 1896* (Government Printer, 1896) 140-179.

13. Part 6 is headed ‘Offences Relating to Property and Contracts’. It contains offences such as stealing, robbery, burglary, fraud and stock offences. The Part is divided into four divisions: ‘Stealing and like offences’ (div 1); ‘Injuries to property’ (div 2); ‘Forgery and like offences’ (div 3); and ‘Offences connected with trade and breach of contract’ (div 4).
14. Section 680 of the Code permits a person arresting another on a charge of an ‘offence relating to property’ to seize property in the possession of the person arrested. That section is in similar terms to cl 705 of the 1897 Draft Code.¹⁵
15. The defence in s 22(2) applies to offences outside Part 6 by operation of s 36 of the Code.¹⁶ However, the use of the same phrase in the heading to Part 6 strongly suggests that an ‘offence relating to property’ in s 22(2) was intended to mean an offence of the same type as those set out in Part 6.¹⁷ What those offences have in common is that ‘an element of the offence is either the causing of another to part with property or the infringement of another’s right over or in respect of property’.¹⁸
16. Nothing in s 680 is inconsistent with that view.
17. Accordingly, the words ‘offence relating to property’ in s 22(2) are apt to refer to a ‘property offence’,¹⁹ whether found in Part 6 of the Code or elsewhere.
18. Secondly, s 22(2) must be read in the immediate context of s 22(1).²⁰ Section 22(1) sets out the fundamental principle underpinning the criminal law that ignorance of the law does not afford an excuse for the commission of an offence. That principle is ‘the working hypothesis on which the rule of law rests’.²¹ It ‘compel[s] people to learn the standard of conduct required of them’²² and therefore serves an educative and deterrent

¹⁵ 1897 Draft Code, 310.

¹⁶ Section 36(1) of the Code provides ‘The provisions of this chapter [Chapter 5, which includes s 22] apply to all persons charged with any criminal offence against the statute law of Queensland’. See *Walden v Hensler* (1987) 163 CLR 561, 573 (Brennan J), 580 (Deane J), 599 (Dawson J).

¹⁷ In other words, the ‘offence relating to property’ refers to that ‘concatenation of elements which constitute a particular offence’ relating to property: see *R v Barlow* (1997) 188 CLR 1, 8-9 (Brennan CJ, Dawson and Toohey JJ).

¹⁸ *Walden v Hensler* (1987) 163 CLR 561, 574 (Brennan J).

¹⁹ The paraphrase used by Nettle J in *Pickett v Western Australia* (2020) 270 CLR 323, 357 [84].

²⁰ *Walden v Hensler* (1987) 163 CLR 561, 580 (Deane J).

²¹ *Ostrowski v Palmer* (2004) 218 CLR 493, 500-1 [2] (Gleeson CJ and Kirby J), quoting *Blackpool Corporation v Locker* [1943] 1 KB 349, 361 (Scott LJ). See also *Walden v Hensler* (1987) 163 CLR 561, 603 (Toohey J).

²² Glanville Williams, *Criminal Law: The General Part* (Stevens & Sons, 2nd ed, 1961) 289 [102].

function.²³

19. The defence in s 22(2)—beginning with the word ‘But’—is an exception to that principle. That context suggests that s 22(2) must be read narrowly so that it remains an exception that does not undermine the general rule in s 22(1). As Brennan J said in *Walden v Hensler*, if the defence in s 22(2) were understood as applying to any act or omission affecting property, it would ‘put a premium on ignorance of the general criminal law’ and ‘unduly subvert[] the capacity of the criminal law to serve the public interest, for it would go far towards frustrating its broad educative and deterrent function’.²⁴ The broad reading adopted by the majority in the Court of Appeal suffers from that vice.
20. Thirdly, the broader reading would also render the words ‘as for an offence relating to property’ redundant. If ‘for an offence relating to property’ were read broadly as meaning ‘for an act or omission affecting property’, those words would be entirely subsumed by the words that come next in s 22(2): ‘for an act done or omitted to be done by the person with respect to any property’. In accordance with settled principle, this Court should strive to give every word in s 22(2) work to do and should avoid an interpretation that would render the phrase ‘for an offence relating to property’ superfluous.²⁵
21. Fourthly, the narrower interpretation of s 22(2) is reinforced by considering how claims of right operated at common law.²⁶ An honest claim of right arose as a plea at common law to negative an intent to steal in offences containing that element, the

²³ *Walden v Hensler* (1987) 163 CLR 561, 574 (Brennan J).

²⁴ *Walden v Hensler* (1987) 163 CLR 561, 574 (Brennan J).

²⁵ *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71] (McHugh, Gummow, Kirby and Hayne JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 266 [39] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376, 388 [74] (the Court); *Northern Land Council v Quall* (2020) 271 CLR 394, 424 [61] (Kiefel CJ, Gageler and Keane JJ).

²⁶ Ordinarily, a code is to be interpreted by reference to the natural and ordinary meaning of its terms, without reference to the common law it was intended to replace: *Brennan v The King* (1936) 55 CLR 253, 263 (Dixon and Evatt JJ). However, where a provision is ambiguous, it is legitimate to look to its common law antecedents: *Pickett v Western Australia* (2020) 270 CLR 323, 337 [23] (Kiefel CJ, Bell, Keane and Gordon JJ), 361 [92] (Nettle J); *Namoa v The Queen* (2021) 271 CLR 442, 447 [11] (Gleeson J, Kiefel CJ, Gageler, Keane, Gordon, Edelman and Steward JJ agreeing). Here, notes in the margin to Sir Samuel Griffith’s 1897 Draft Code indicate s 22 was intended to reflect the position at common law: 1897 Draft Criminal Code, 12-13 (cII 24-25).

archetype of which was larceny.²⁷ The plea was also used in respect of both trespass²⁸ and wilful damage,²⁹ a matter noted by Brennan J in *Walden v Hensler*.³⁰

22. However, s 22(2) of the Code departs from the common law by providing a defence of an honest claim of right rather than by negating *mens rea*.³¹ In other words, s 22(2) can apply to offences that have no mental element that an honest claim of right would negative. That being so, the role played by the words ‘an offence relating to property’ in s 22(2) becomes apparent: they ensure that the defence is limited to offences involving the misappropriation of property or the destruction or injury of property. Those were the central offences to which a claim of right applied at common law.³²
23. That understanding is inconsistent with the broad view of the majority of the Court of Appeal whereby any act or omission constituting an offence, having even a tangential involvement with property, is classified as an ‘offence relating to property’.
24. Fifthly, and relatedly, that approach is supported by Brennan J’s explanation of the purpose of s 22(1) and (2); namely, to balance the deterrent purpose of the criminal law with justice in relation to offences relating to property which ‘raise difficult questions of private law to which members of the community without special knowledge and special skills cannot be expected to know the answer’.³³ The purpose of the section is to absolve those who make a genuine mistake about their private law rights relating to property, not to absolve those who make a genuine mistake about the criminal law.
25. Sixthly, the broader reading of s 22(2) may give rise to practical difficulties that

²⁷ Sir James Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol 3, 131-142. For common law cases in which intent to steal was an element of the charge, see *R v Hall* [1828] 3 C & P 409; 172 ER 477; *R v Reed* (1842) C & M 306; 174 ER 519; *R v Boden* (1844) C & K 395; 174 ER 86; *R v Hemmings* (1864) 4 F & F 50; 176 ER 462; *R v Wade* [1869] 11 Cox CC 549.

²⁸ *Kuhn v Ringelstein; ex parte Ringelstein* (1898) QLJ 74.

²⁹ *R v Langford* (1842) C & M 602; *R v Day* (1844) 8 JP 186; *Taylor v Newman* (1863) 8 LT 424.

³⁰ (1987) 163 CLR 561, 572-3. There were outlier cases that arguably involved offences other than property offences; however, ‘[h]ow far claim of right avail[ed] [in those cases was] not clear’ even in 1961: Glanville Williams, *Criminal Law: The General Part* (Stevens & Sons, 2nd ed, 1961) 345 [117].

³¹ *Walden v Hensler* (1987) 163 CLR 561, 573 (Brennan J).

³² *Walden v Hensler* (1987) 163 CLR 561, 591 (Dawson J). The words ‘without intention to defraud’ in s 22(2) also reflect the emphasis at common law on the absence of a dishonest intention in cases of larceny and the like.

³³ *Walden v Hensler* (1987) 163 CLR 561, 570.

Parliament is unlikely to have intended.³⁴ As Doyle JA recognised in the Court of Appeal, the wider view of an ‘offence relating to property’ leads to an inordinate number of offences potentially answering that description, including offences of going armed so as to cause fear, using the internet to procure a child or dangerous operation of a motor vehicle.³⁵ Doyle JA accepted that ‘could lead to [the section] having a scope which it is unlikely Parliament intended’. That issue was resolved by Doyle JA by relying on the other limitations within s 22(2).³⁶ That approach does not, however, take account that the defence is to be applied by juries in some cases. If the defence arises on the evidence, a trial judge is bound to give the direction.³⁷ In the extreme scenarios raised by Doyle JA, it is possible that sufficient doubt would attend the other limitations of s 22(2) such that the defence would need to be left to the jury.

26. Sixthly, the narrower construction of ‘offence relating to property’ gives a coherent operation to s 22(2) read as a whole. All judges in the court below determined that the defence requires that the ‘honest claim of right’ be an answer to the charge and thereby remove criminal responsibility.³⁸ As discussed further below in relation to the second issue, a claim of right must be a claim arising from the civil law which, if it existed, would have authorised the act or omission of the defendant. The requirement that the offence have an element of misappropriating or damaging property would sit harmoniously³⁹ with the requirement that the claimed private right would, if well-founded, provide an answer to a charge for an offence with those elements.
27. Seventhly, in light of the foregoing matters, none of the textual reasons identified by the majority in the Court of Appeal for adopting the broad reading of s 22(2) should be accepted. The majority relied on the definitions of ‘property’⁴⁰ and ‘offence’ in the

³⁴ *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 321 (Mason and Wilson JJ); *Tjungarrayi v Western Australia* (2019) 269 CLR 150, 164-5 [36] (Gageler J); *Mondelez Australia Pty Ltd v AMWU* (2020) 271 CLR 495, 500 [3], 514-5 [41]-[42] (Kiefel CJ, Nettle and Gordon JJ).

³⁵ *Redland City Council v Burns* [2025] QCA 222, [151].

³⁶ *Redland City Council v Burns* [2025] QCA 222, [152].

³⁷ *Stevens v The Queen* (2005) 227 CLR 319, 329-331 [24]-[29] (McHugh J).

³⁸ *Redland City Council v Burns* [2025] QCA 222, [58] (Bowskill CJ), [166] (Doyle JA, Bond JA agreeing). See also *Walden v Hensler* (1987) 163 CLR 561, 580-1 (Deane J), 591-2 (Dawson J).

³⁹ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-2 [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ); *ENT19 v Minister for Home Affairs* (2023) 278 CLR 75, 106 [87] (Gordon, Edelman, Steward and Gleeson JJ).

⁴⁰ ‘Property’ is defined broadly: see Code, s 1.

Code,⁴¹ with the latter being cast in these terms:⁴²

An act or omission which renders the person doing the act or making the omission liable to punishment is called an *offence*.

28. Doyle JA reasoned that this definition ‘require[d] that attention [be] given to the act of the person which makes the person liable to punishment’.⁴³
29. For the reasons outlined earlier, however, to treat the definition of ‘offence’ as mandating a broad view of s 22(2) would involve giving the phrase ‘an offence relating to property’ a meaning different from the meaning it has elsewhere in the Code. The broad view would also ignore the common law background to the defence in s 22(2) and would render the words ‘offence relating to property’ entirely superfluous. The majority did not appreciate those points.
30. Moreover, the fact that ‘property’ is defined broadly and the words ‘relating to’ can be a term of broad import⁴⁴ are not decisive. The degree of connection required between two subject matters joined by the words ‘relating to’ must be determined by reference to the text, context and purpose of the provision, and the facts of the case.⁴⁵ Here, the text, context and purpose of s 22(2) suggest that an ‘offence relating to property’ does not bear the broad meaning adopted by the majority. Instead, those factors support giving s 22(2) the narrower meaning set out by Brennan J in *Walden v Hensler*.
31. Finally, there is no binding authority that stands in the way of adopting that interpretation. No *ratio decidendi* emerged from *Walden v Hensler* on the correct interpretation of s 22(2). Within the majority, Brennan J adopted the narrow reading, Deane J adopted the broad reading, and Dawson J did not address the issue.⁴⁶ In the minority, Toohey adopted the broad reading and Gaudron J proceeded on the same premise.⁴⁷ Lower courts have since cobbled together a majority of judges from the

⁴¹ [2025] QCA 222, [124]-[129].

⁴² Code, s 2.

⁴³ [2025] QCA 222, [127].

⁴⁴ *Redland City Council v Burns* [2025] QCA 222, [129] (Doyle JA, Bond JA agreeing); *O’Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356, 374 (Toohey and Gaudron JJ); *Wilkie v Commonwealth* (2017) 263 CLR 487, 546 [147] (the Court).

⁴⁵ *Redland City Council v Burns* [2025] QCA 222, [39] (Bowskill CJ); *Minister for Home Affairs v DMA18 as litigation guardian for DLZ18* (2020) 270 CLR 372, 397 [43] (the Court).

⁴⁶ *Walden v Hensler* (1987) 163 CLR 561, 574-5 (Brennan J), 580 (Deane J). Dawson J may have proceeded on the premise the first element was satisfied: see at 592-3.

⁴⁷ *Walden v Hensler* (1987) 163 CLR 561, 598-9 (Toohey J), 605-6 (Gaudron J).

majority and minority to conclude that the broad reading of ‘offence relating to property’ should be adopted.⁴⁸ That approach is incorrect as a matter of principle.⁴⁹ This Court is free to determine the matter from first principles, and it should do so.

32. For the reasons outlined above, reasoning from first principles, this Court should find that the defence of honest claim of right in s 22(2) only applies where a person has been charged with a property offence, meaning that one of the elements of the offence is the causing of another to part with property or the infringement of another’s right over or in respect of property.

Issue Two: What claims may constitute an ‘honest claim of right’?

33. A ‘claim of right’ is not defined in the Code.⁵⁰ However, at common law, it has always been understood to be a claim of private right grounded in the civil law.⁵¹
34. As Dawson J explained in *Walden v Hensler*⁵² (embraced by Gleeson CJ, Gummow and Hayne JJ in *Macleod v The Queen*):⁵³

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...

35. Likewise, Deane J pointed to the need to show a belief in ‘some special entitlement’ arising independently of ‘the applicable provisions of the criminal law’.⁵⁴ Justice

⁴⁸ *Molina v Zaknich* (2001) 24 WAR 562, 579 [101] (McKechnie J, Malcolm CJ and Templeman J agreeing).

⁴⁹ See *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303, 314 (Mason CJ, Wilson, Dawson and Toohey JJ); *Brodie v Singleton Shire Council* (2001) (2001) 206 CLR 512, 563 [112] (Gaudron, McHugh and Gummow JJ) (observing that dissenting opinions are to be ignored in identifying the *ratio decidendi*); *Stevenson v Yasso* [2006] 2 Qd R 150, 180 [103] (McPherson JA).

⁵⁰ The phrase ‘claim of right’ also appears in ss 275, 276 and 278. Section 275 provides a defence for using force that is reasonably necessary to defend the person’s possession of moveable property under a ‘claim of right’. Section 276 provides a defence for the use of force that is reasonably necessary to take property from a person who does not ‘claim rights to it’. Section 278 provides a defence for the use of force to defend peaceable possession of land, structure or vessel by a person with ‘a claim of right’, even against a person entitled by law to possession. The expression ‘claim of right’ in those three sections is directed toward a right to have possession of the property, either ownership or some lesser right, indicating that the phrase is primarily directed at a claim to a proprietary right.

⁵¹ Glanville Williams, *Criminal Law: The General Part* (Stevens & Sons, 2nd ed, 1961) 304 [107].

⁵² (1987) 163 CLR 561, 592-3.

⁵³ (2003) 214 CLR 230, 243 [39]-[41].

⁵⁴ (1987) 163 CLR 561, 580-1.

Toohy said that ‘a claim to a “liberty” or “immunity” from the restraint imposed by the legislation in question’ is no more than ignorance of that law.⁵⁵

36. Gibbs J said in *Mitchell v Norman; Ex parte Norman* that the right claimed need not be one that is in fact recognised by law.⁵⁶ However, it is submitted that proposition is subject to a qualification: the right claimed must be one that is capable of being recognised by our system of law; that is, a right of a kind that is recognised by our system of law. As Gaudron J said in *Walden v Hensler*:⁵⁷

In the present case, the foundation of Mr Walden’s claim of right is based on his membership of an Aboriginal community and the customs of that community. That seems to me to lay a sufficient foundation for a claim of right, provided that the claim is made by reference to some supposed operation of the law, for within a legal context, rights do not exist in the abstract. A right must mean a right in law, and not merely one which owes its existence to a moral order, religious code or other non-legal regimen. A claim of right predicated on the customs of the Aboriginal community does not, without more, constitute a claim of right within the contemplation of s.22 of the Code. However, should such a claim be asserted on the basis that the customs of the Aboriginal community in question are recognized by law, the claim will be brought within the purview of the section. It is not to the point to inquire whether or not the right claimed subsists at law: the nexus that is required to bring the right claimed within the scope of the section is its supposed recognition by the law.

(underlining added)

37. That conclusion is supported by two related considerations. First, the place of s 22(2) as an exception to s 22(1) suggests that the right must have a place inside rather than outside the Australian legal system. The exception permits mistakes about one area of the law (civil law rights) to act as a defence to criminal offence provisions. To allow a claim of right having no reference to a right recognised by our system of law would subvert s 22(1) and its purpose of securing the rule of law.
38. Second, to permit a claim of right to fall within s 22(2) that had no reference point in the law of Queensland would lead to absurd consequences. It would mean, for example, that a right honestly asserted by a ‘sovereign citizen’ to use or take property

⁵⁵ (1987) 163 CLR 561, 603.

⁵⁶ *Mitchell v Norman; Ex parte Norman* [1965] Qd R 587, 594-5 (Gibbs J), approved in *R v Waine* [2006] 1 Qd R 458, 462 [23] (Keane JA, McMurdo P and Wilson J agreeing). See also Glanville Williams, *Criminal Law: The General Part* (Stevens & Sons, 2nd ed, 1961) 314 [108].

⁵⁷ (1987) 163 CLR 561, 608-9.

would fall within a claim of right under s 22(2).⁵⁸ For these reasons, there are limits on the kinds of claims to which the defence in s 22(2) will apply.

39. Native title rights are, however, private rights recognised by our system of law.⁵⁹ If a defendant honestly believes their native title rights authorised them to do the particular act that is the subject of the charge, then they will have an honest claim of right arising independently of the criminal provision.
40. In addition, a claim of right must be one that, if well-founded, would provide an answer to the charge.⁶⁰ Accordingly, if the claimed native title right happens to satisfy a statutory exemption related to traditional cultural practices, the person will have an answer to the charge that satisfies s 22(2). The Queensland statute book has several defences or exemptions which refer to Aboriginal or Torres Strait Islander cultural practices, including sch 21, part 1 (para (5)) of the *Planning Regulation 2017* (Qld), s 14 of the *Fisheries Act 1994* (Qld) and s 41A of the *Animal Care and Protection Act 2001* (Qld).
41. However, if the asserted right is only recognised by Queensland law in the defence provision itself, the right claimed would not arise independently from the offence provision and would not be a ‘right’. Such a mistake would be in truth a mistake about whether the defence applies. That would amount to ignorance of the law, for which s 22(1) of the Code provides there is no excuse.⁶¹

Application to the present case

42. The charged act or omission which constituted the ‘offence’ was the clearing of native vegetation where that clearing constituted prohibited development.⁶²
43. The *Planning Regulation* was a ‘categorising instrument’⁶³ under the *Planning Act* which categorises development into three categories: accepted development

⁵⁸ See, as an example of the type of claim that might be asserted, a claim that the public ‘own the roads’ in relation to a parking fine: *Jones v Brisbane City Council* [2025] QCA 195.

⁵⁹ *Commonwealth v Yunupingu* (2025) 99 ALJR 519, 539-40 [60]-[61] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), 591 [288]-[290] (Edelman J).

⁶⁰ *Walden v Hensler* (1987) 163 CLR 561, 581, 583 (Deane J), 592-593 (Dawson J), 603 (Toohey J), 608-609 (Gaudron J).

⁶¹ See *Walden v Hensler* (1987) 163 CLR 561, 580-1 (Deane J).

⁶² *Redland City Council v Burns* [2025] QCA 222, [117]-[118].

⁶³ A ‘categorising instrument’ is a regulation or local categorising instrument that, relevantly, categorises development as prohibited, assessable or accepted development: s 43(1)(a) of the *Planning Act*.

(development that does not require a permit), assessable development (which requires a permit) and prohibited development (where a permit cannot be applied for).⁶⁴

44. That categorisation is relevant to whether a development permit is required to carry out the development proposed, as well as relevant to a criminal offence under s 162 (carrying out prohibited development) or s 163 (carrying out assessable development without a permit). For the same reasons, the carveout for ‘exempt clearing work’ is not simply a removal of criminal liability, but also removal from a categorisation as prohibited development. Section 44(6)(a) of the *Planning Act* states that if no categorising instrument categorises development, it is accepted development.
45. The gravamen of the offence under s 162 of the *Planning Act* is carrying out development (clearing) which was prohibited development. The misappropriation or damage or destruction of property is not an element of that offence. The offence can be committed by a person with extensive property or civil rights to the land or the vegetation, including the owner. Equally, it can be committed by a person with no rights to the land or vegetation. For that reason, it is submitted the offence is not an offence relating to property.
46. The District Court judge found that Mr Burns did not give evidence of a belief that he was authorised to carry out the clearing because of his native title rights under the Determination, which exhaustively described the native title rights of the Quandamooka People. Rather, the stated belief arose from a right to clear by reason of Aboriginal cultural practice separate from the Determination. It is, at best, doubtful that such a cultural practice amounts to a private legal right of the kind to which s 22(2) of the Code applies.⁶⁵
47. The cultural activity exemption in the *Planning Regulation* is also not a claim of right identified in s 22(2). The inclusion of ‘a traditional Aboriginal or Torres Strait Islander cultural activity, other than a commercial activity’ in the definition of ‘exempt clearing work’⁶⁶ means that clearing that falls within that description is not prohibited or assessable development. Absent some other categorisation by the regulation or a local government planning scheme, the clearing was accepted development. But accepted

⁶⁴ *Planning Act 2016* (Qld) ss 43, 44.

⁶⁵ See *Redland City Council v Burns* [2025] QCA 222, [81]-[86] (Bowskill CJ).

⁶⁶ *Planning Regulation*, sch 21, part 1(para (5), sch 24 (definition of ‘exempt clearing work’). See *Redland City Council v Burns* [2025] QCA 222, [16] (Bowskill CJ).

development is not a ‘right’ to carry out the development. It simply means that no planning permit is required.⁶⁷ It does not mean that a person is entitled to carry out that act on another person’s land, or contrary to other laws. It does not provide a ‘right’ which is an answer to the charge. Rather, an honest belief about that exception applying is a mistake about the law and so falls within s 22(1).

48. That conclusion is consistent with the approach to planning laws taken by the Court of Appeal in *Scriven v Sargent*⁶⁸ and *McDonald v Holeszko*,⁶⁹ both of which are discussed by the Appellant in its submissions.
49. For those reasons, the right claimed by Mr Burns was not a right that invoked s 22(2) of the Code.

PART V: Time estimate

50. It is estimated that the presentation of the intervenor’s oral argument will take approximately 35 minutes.

Dated 14 May 2026.



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⁶⁷ *Planning Act 2016* (Qld) s 44(4).

⁶⁸ [2018] 1 Qd R 282, 286-7 [26].

⁶⁹ [2019] QCA 285, [20]-[21].

**ANNEXURE TO SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR
THE STATE OF QUEENSLAND**

Pursuant to *Practice Direction No. 1 of 2024*, the Attorney-General for the State of Queensland sets out below a list of the statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions	Reason for providing version	Applicable date or dates
<i>Statutes</i>					
1.	<i>Animal Care and Protection Act 2001 (Qld)</i>	Current	s 41A	Illustrative purposes	Current
2.	<i>Attorney-General Act 1999 (Qld)</i>	Current	ss 5, 7	Role of proposed intervenor	Date application made to intervene
3.	<i>Criminal Code Act 1899 (Qld)</i>	Current as at 26 February 2020	sch, ss 1-2, 22, 36, ss 275, 276, 278, Part 6, s 680	Act in force as at the date of the offence	The date the offence was alleged to have been committed
4.	<i>Fisheries Act 1994 (Qld)</i>	Current	s 14	Illustrative purposes	Current
5.	<i>Planning Act 2016 (Qld)</i>	Current	ss 43, 44, 162, 163	Act in force as at the date of the offence	The date the offence was alleged to have been committed
6.	<i>Planning Regulation 2017 (Qld)</i>	Current	sch 21, part 1 (para (5)), sch 24	Act in force as at the date of the offence	The date the offence was alleged to have been committed