HIGH COURT OF AUSTRALIA

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Details of Filing

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Form 27D – Respondent's Submissions
Note: See rule 44.03.3.

B24/2026

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **REDLAND CITY COUNCIL**
Appellant

and

DARREN BURNS
Respondent

RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION FOR INTERNET PUBLICATION

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

Part II: CONCISE STATEMENT OF THE ISSUES

2. This appeal raises two issues, each concerning the operation of s 22(2) of the *Criminal Code (Qld)* (***Code***):

   (a) whether an offence against s 162 of the *Planning Act 2016* (Qld) (***Planning Act***) of carrying out prohibited development, in the form charged, is *an offence relating to property* within the meaning of s 22(2) (***the first issue***); and

   (b) whether, having regard in particular to the cultural activity exemption in item 1(1)(5) of Sch 21 to the *Planning Regulation 2017* (Qld) (***cultural activity exemption***), the respondent's conduct in causing the clearing of the vegetation was an act *with respect to property in the exercise of an honest claim of right* within the meaning of s 22(2) (***the second issue***).

3. Each issue should be answered in the affirmative, and the appeal should be dismissed.

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

4. The respondent has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and contends that the appeal does not involve a matter arising under the *Constitution* or involving its interpretation.

Part IV: CONTESTED FACTS

5. The respondent accepts the appellant's narrative of facts in Part V of the appellant's

submissions, subject only to the following observations and emphases.

6. The respondent is a Quandamooka man and a member of the group of Aboriginal Australians recognised by a consent determination of the Federal Court (**Determination**) as holding both exclusive and non-exclusive native title rights and interests on Minjerribah (North Stradbroke Island).[1] The area the subject of the charge under s 162 of the *Planning Act* falls within the determination area the subject of non-exclusive native title rights.

7. The non-exclusive rights recognised by the Determination relevantly include rights to live and be present on the area[2] and to take, use, share and exchange Traditional Natural Resources (which includes plants) for personal, domestic and non-commercial communal purposes.[3]

8. At trial, the respondent gave evidence (which was accepted by the District Court Judge and not displaced by the Court of Appeal) that he honestly believed that, as a Quandamooka man, he was entitled to clear vegetation for building purposes on land other than freehold in accordance with a right which all Quandamooka People had to do so based on historical practices which he considered to be native title rights.[4] He also gave evidence that his belief encompassed the use of modern means in the exercise of those rights, including engaging a contractor and using an excavator.

9. In particular, the respondent gave evidence that:

> "Well, it's – it's an adaptive practice, your Honour. We have adapted. We have grown … the excavator is just like a stronger stick for cleaning the land. … We're allowed to adapt and grow."[5]

10. The District Court Judge found that the appellant had not excluded, to the criminal standard, that the respondent honestly held the belief described in paragraph [8] above. The Court of Appeal majority (Doyle JA, Bond JA agreeing) held that that finding was

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1 *Delaney on behalf of the Quandamooka People v State of Queensland* [2011] FCA 741 (**Determination**); see Court of Appeal Reasons for Judgment (**COA RJ**) at [6]-[7], Core Appeal Book (**CAB**) 90-91.

2 Determination, cl 3(b)(i); "live" as defined in cl 13 ("to reside and for that purpose to erect shelters and temporary structures but does not include a right to construct permanent structures").

3 Determination, cl 3(b)(ii); "Traditional Natural Resources" as defined in cl 13 (including "plants" as defined in the *Nature Conservation Act 1992* (Qld)).

4 COA RJ at [102]-[103], CAB 113; District Court Reasons for Judgment (**DC RJ**) at [223], CAB 81.

5 COA RJ at [198], CAB 133, quoting T3-96 (Transcript of Proceedings, Magistrate's Court, 6 December 2023). See also Appellant's Book of Further Materials (**ABFM**) at 93.

open on the evidence.[6]

Part V: ARGUMENT IN ANSWER

The first issue

11. The appellant contends that the phrase "offence relating to property" in s 22(2) of the *Code* must be read as only applying if "the offence provision proscribes the infringement of proprietary rights of others, or causes [sic] another to part with property"[7] (***the appellant's primary submission on the first issue***). It is clear that the offence provision in this case would not satisfy that description. Accordingly, if the appellant's contention in this respect is correct then the appeal should succeed.

12. The appellant makes a further contention that "whether the offence is one 'relating to property' must be discernible on the face of the offence provision".[8] It is submitted that the Court need not decide whether that contention is correct. If the appellant's submission on the first issue is rejected, then the status of the offence as one "relating to property" is discernible on the face of the offence provision. That provision (s 162 of the *Planning Act*) proscribes carrying out of prohibited development. The definition of development[9] makes clear that it involves acts or omissions relating to things that answer the description of "property", as defined by s 1 of the *Code*. Those are acts or omissions relating to property which render a person who commits them liable to punishment under s 162 of the *Planning Act*. They are thereby offences, within the meaning of s 2 of the *Code*, relating to property.

13. Therefore, unless the appellant's primary submission on the first issue is accepted, then the offence can be said to be one that is "relating to property".

Textual reasons why the appellant's primary submission on the first issue is flawed

14. The immediate textual difficulty confronting the appellant's primary submission is the ordinary reading of the phrase "offence relating to property" in s 22(2) of the *Code*, read

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6 DC RJ at [206], CAB 78; COA RJ at [183], CAB 130 (Doyle JA). Cf COA RJ at [29], CAB 98 (Bowskill CJ, observing only that the Magistrate had not made any contrary finding because s 22(2) was not addressed below).

7 Appellant's Submissions (**AS**) at [53(b)].

8 AS at [53(a)].

9 Defined in Sch 2 to the *Planning Act* to mean carrying out building work, plumbing or drainage work, or operational work, reconfiguring a lot, or making a material change of use of premises (in each case, conduct in relation to property), and "premises" is itself defined to include land. See also AS at [15].

with other material provisions of the *Code*.

15. "Relating to" is a phrase of well-recognised wide import, capable of encompassing both direct and indirect connections between two subject matters; the degree of connection required is to be discerned from the text, context and purpose, but the starting point is breadth, not narrowness.[10] The width of the expression in this context is compounded by the definition of "property" in s 1 of the *Code*. Whilst that definition includes things "capable of ownership", it includes other things not limited by that phrase, such as electrical or other energy, gas and water; a plant; and certain animals and things produced by animals. When those things are read into the phrase "offence relating to property", there is nothing in the text that confines the phrase to acts or omissions involving infringement with property rights or causing someone to part with property. For example, when the words "electrical or other energy" are read into the phrase, it reads "offence relating to electrical or other energy". Substantial narrowing of that phrase is required before an "offence relating to electrical or other energy" is only committed when the proprietary rights of others are infringed or someone is parted from their property.

Wider context

16. The intervener seeks to draw support from the heading to Part 6 of the *Code*.[11] The intervener invokes the principle that words are presumed to bear the same meaning throughout a statute.[12] Since "offences relating to property" appears both in the heading to Part 6 and in s 22(2), it is said that "an offence relating to property" in s 22(2) should take its meaning from the character of Part 6 offences.

17. Departure from that principle is permissible where reason to do so is discernible from the statute itself.[13] Part 6 is headed "Offences Relating to Property and Contracts" and has four divisions. They are "Stealing and like offences" (Div 1); "Injuries to property" (Div 2); "Forgery and like offences" (Div 3); and "Offences connected with trade and

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10 *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 620 (Taylor J); *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 376 (McHugh J); *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 at 483 (Clarke JA) and 487 (Handley JA); *Joye v Beach Petroleum NL* (1996) 67 FCR 275 at 285 (Beaumont and Lehane JJ); *Bull v The Queen* (2000) 201 CLR 443 at 474-475 [106] (McHugh, Gummow and Hayne JJ); *Minister for Home Affairs v DLZ18* (2020) 270 CLR 372 at 397 [43] (the Court).

11 Intervener's Submissions (**IS**) at [12]-[17].

12 *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 (Mason J).

13 *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 (Mason J); *The King v Jacobs Group (Australia) Pty Ltd* (2023) 280 CLR 170 at 181 [25] (the plurality).

breach of contract" (Div 4). That structure does not support the narrow construction. Division 4, "offences connected with trade and breach of contract", comprises offences that do not inherently involve the infringement of another's proprietary or possessory rights. More tellingly, the fraud offence under s 408C(1) of the *Code*, within Part 6, extends to gaining a benefit or advantage for any person (para (d)); causing a detriment, pecuniary or otherwise, to any person (para (e)); and inducing a person to do an act which that person is lawfully entitled to abstain from doing (or the inverse) (paras (f)-(g)). None of those paragraphs have as an element the causing of another to part with property or the infringement of another's proprietary rights. The Part 6 heading, therefore, does not describe the coherent narrow class the intervener needs.

18. It has always been thus with Part 6 of the *Code*. Sections 399-401, contained within Part 6 as originally enacted, provided for offences involving concealing of documents with intent to defraud. None of those offences had as their elements infringement of proprietary rights of others, or causing another to part with property. Likewise, s 432, also contained within the original Part 6 of the *Code*, proscribed the use of "witchcraft" and other like practices to discover where something supposed to have been stolen might be found.

19. Part 6 of the Code has never described a coherent class of "offences relating to property" with the common feature that the offences contained within it have had as an element the causing of another to part with property or the infringement of another's proprietary rights.

20. The evolution of the definition of property in s 1 of the *Code* since 1899 points in the same direction. When s 22(2) was enacted, the definition of "property" in s 1 of the *Code* encompassed "every thing, animate or inanimate, capable of being the subject of ownership". As outlined above, the definition now embraces a wide variety of things without reference to their susceptibility of ownership. It is difficult in that context to draw from the heading of Part 6 an exhaustive definition of "offences relating to property".

21. The further contextual difficulty with the use of Part 6 to limit the expression "offences relating to property" is s 36 of the *Code*. By s 36, the operation of s 22 is general; it applies to any offence against the statute law of Queensland, and is not confined to the offences collected in Part 6 of the *Code*. Reading Part 6 as limiting s 22 would seem to conflict with s 36.

Historical context

22. It has long been the case that ignorance of the law does not excuse criminal conduct. The common law presumes every person to know, or to be able to ascertain, the content of the law. That the presumption is in part a fiction is obvious; but the rule it sustains is indispensable. The criminal law shapes conduct by deterrence, and it can perform that function only as its proscriptions come to be known and obeyed. The rule that ignorance of the law affords no excuse is what induces the citizen to acquaint themselves with the law's commands, and what denies any premium to ignorance of them; without it, the criminal law would be disabled from performing its educative and deterrent function, and the ordered functioning of a society that depends upon a known and observed law would be imperilled.[14]

23. However, the law has long recognised that it would be unjust to hold a person criminally responsible for an act or omission done under an honest belief that he or she was entitled, under the civil law, to do. That qualification is important because, while the basic proscriptions of the criminal law may fairly be expected to be known, the same cannot be said of the private rights upon which the lawfulness of conduct may depend. Offences relating to property, in particular, "often 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".[15] To visit criminal punishment upon a person who has acted honestly upon a mistaken view of such private rights, and without any intention to defraud, would make the criminal law "unjustly oppressive".[16] It would expose the person to conviction not for conduct that is offensive or immoral, but because of a legal mistake about their private rights.[17]

24. The honest claim of right for which s 22(2) provides was based upon the common law plea of claim of right, but it was deliberately reformulated for the purposes of the *Code* and given a wider operation.[18]

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14 *Walden v Hensler* (1987) 163 CLR 561 (***Walden***) at 569-570 (Brennan J).
15 *Walden* at 570 (Brennan J).
16 *Walden* at 570 (Brennan J).
17 *Walden* at 570 (Brennan J).
18 Section 22(2) was based on the common law defence: see, *Brennan v The King* (1936) 55 CLR 253 at 263 (Dixon and Evatt JJ); *Charlie v The Queen* (1999) 199 CLR 387 at 393-394 [14] (Kirby J); *R v Dayney (No 2)* (2023) 13 QR 650 at 672 [46] (Dalton JA). See also the marginal notes in Sir Samuel Walker Griffith, *Draft of a Code of Criminal Law* (Draft Code, Government Printer, 1897) at cll 24-25. However, the Code provision was given a wider operation: see, *Walden* at 573 (Brennan J).

25. In his letter to the Queensland Attorney-General accompanying the 1897 Draft Code, Sir Samuel Griffith wrote that he had "attempted to state specifically all the conditions which can operate at Common Law as justification or excuse for acts prima facie criminal, but ha[d] not formally excluded other possible Common Law defences".[19] The provision appeared as cl 25 of that Draft, in terms materially identical to the provision as enacted and was annotated in the margin as deriving from the common law. That formulation was not an attempt to codify the common law plea in its narrowest form. At common law, the plea had arisen chiefly in answer to charges of larceny, but it had also been recognised in cases of trespass and wilful damage; the common law had not confined it to those categories by definition. Griffith chose the expression "an offence relating to property", a formulation broader than any of those common law categories, and one containing no words of restriction. That choice was deliberate. As the second reading speech for the Criminal Code Bill confirmed, the provisions of Chapter V received the "most careful and anxious consideration" of the draftsman and the Commission.[20] The narrow construction would restore a restriction that the drafters did not impose.

26. The wider formulation adopted in the *Code*, together with s 136, has enabled s 22(2) the flexibility to embrace a multitude of offences enacted by Queensland statutes, other than the *Code*, as part of the expansion of the regulatory State in the 20th and 21st centuries. The text of the section, read with s 22(1), has enabled it to embrace offences which do not involve an element of causing another to part with property or infringe another's proprietary rights, whilst also remaining true to the underlying rationale of the common law plea.

27. Pivotal is the maintenance by s 22(1) of the principle that ignorance of the law is no excuse. The contrast between the use of the word "law" in s 22(1) and "right" in s 22(2) justifies the conclusion that the section only recognises claims of right under the civil law, and not merely ignorance of the criminal law.

28. Thus, a claim that engages s 22(2) must be a claim of right, not a claim to a freedom from prohibition, nor to an immunity from the criminal law. It must be a claim to a private right arising under the civil law. Further, the right claimed must be one which, if well founded,

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19 Letter from Sir Samuel Griffith to the Queensland Attorney-General, 29 October 1897, at VII, reproduced in Sir Samuel Griffith, *Draft of a Code of Criminal Law* (Draft Code, Government Printer, 1897).

20 Queensland, *Parliamentary Debates*, Legislative Assembly, 21 September 1899, at 108 (Arthur Rutledge, Attorney-General).

would provide an answer to the charge.[21] These conclusions necessarily follow from the declaration in s 22(1) that ignorance of the law supplies no excuse from criminal liability. Unless the claim is to a private right which, if well founded, would provide an answer to the charge then the claim amounts to nothing more than ignorance of the law.

29. Confined in this way, s 22(2) operates on nothing more than a mistaken belief as to the private law which, as distinct from ignorance of the law, is historically recognised as a basis to excuse criminal liability because to do otherwise would be "unjustly oppressive".

Giving effect to all words in section 22(2)

30. Section 22(2) imposes two similar, but distinct phrases, namely "an offence relating to property", and an act done "with respect to … property". Parliament having used two different expressions, each is to be given work to do.[22] The appellant and the intervener contend that it is the wider construction adopted by the Court of Appeal which offends that principle. They say that, unless their interpretation is accepted, "an offence relating to property" is subsumed by "with respect to … property" and left with nothing distinct to do. The contention should be rejected. As Doyle JA of the Court of Appeal identified, the two phrases are subsumed into each other if the narrower construction is adopted.[23]

31. Effect may be given to each of the distinct phrases in s 22(2) once it is identified that they have separate purposes. The purpose of the phrase "an offence relating to property" is to identify the class of offences to which s 22(2) is capable of applying.

32. In contrast, the purpose of the phrase "with respect to … property" is not to identify the offences to which that the section applies. Instead, the phrase forms part of the wording of the section that articulates the effect of the section on criminal liability once it applies. This can be seen once the phrase is read with the other relevant words of the section. In particular, those words are: "a person is not criminally responsible … for an act done or omitted to be done by the person with respect to any property in the exercise of an honest

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21 *Walden* at 580-581 (Deane J), 592-593 (Dawson J), 608-609 (Gaudron J); *Macleod v The Queen* (2003) 214 CLR 230 at 243-244 [41] (Gleeson CJ, Gummow and Hayne JJ); *R v Waine* [2006] 1 Qd R 458 at 463 [30] (Keane JA, McMurdo P and Wilson J agreeing); *Scriven v Sargent (No 2)* [2018] 1 Qd R 282 at 286-287 [26] (Boddice J, Morrison JA and Dalton J agreeing).

22 *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 (Griffith CJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] (McHugh, Gummow, Kirby and Hayne JJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 192 [97] (Gummow, Hayne, Crennan and Bell JJ); *Northern Land Council v Quall* (2020) 271 CLR 394 at 424 [61] (Kiefel CJ, Gageler and Keane JJ).

23 COA RJ at [130], CAB 119.

claim of right". Thus, once the purpose of the phrase "with respect to … property" is understood, there can be no overlap with the phrase "an offence relating to property". The two phrases deal with different subjects.

Previous authority

33. The single previous decision of this Court on s 22(2), *Walden v Hensler*,[24] produced no ratio on either the meaning of "an offence relating to property" or the operation of an honest claim of right founded on the customs of an Aboriginal community. Across the five sets of reasons, the only member of the Court expressly to favour the narrow construction now urged by the appellant and the intervener was Brennan J.

10 34. No member of the majority in *Walden v Hensler* other than Brennan J adopted the narrow construction. Justice Brennan alone held that "an offence relating to property" was confined to conduct causing another to part with property, or infringing another's rights over or in respect of property.[25] Justice Deane, also in the majority, declined to adopt that narrower interpretation, holding that the offence there in question was properly to be described as an offence relating to property.[26] Justice Toohey held that an offence is an "offence relating to property" whenever it can truly be said to relate to property.[27] Justice Gaudron proceeded on the same footing, holding that the keeping of birds capable of being the subject of ownership was an act with respect to property to which s 22 could apply.[28] Justice Dawson, while not deciding the question expressly, appeared to reason
20 upon the later elements of s 22(2) in a way that presupposed the first limb was satisfied.[29]

35. Since *Walden v Hensler*, the weight of authority in the Code States did not follow the narrow construction favoured by Brennan J in *Walden*,[30] including *Stevenson v Yasso* and *Molina v Zaknich*.[31]

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24 (1987) 163 CLR 561.

25 *Walden* at 574 (Brennan J). Compare *R v Cunliffe* [2004] QCA 293 at [16]-[17] (McPherson JA), which was preferred by Bowskill CJ in the Court of Appeal, but is on its facts distinguishable – the production of a dangerous drug is an activity independent of any proprietary interest, and the appellant in Cunliffe asserted no "right" in the relevant sense.

26 *Walden* at 580.

27 *Walden* at 599.

28 *Walden* at 605-606.

29 *Walden* at 592-593. See COA RJ at [139] (Doyle JA), CAB 121.

30 Compare *R v Young* [2020] QCA 3 at [164] (the Court), where the wider view was not in issue, and the Court's brief reference to Brennan J's narrow formulation was in obiter and not an unequivocal endorsement. See COA RJ at [148]-[150], CAB 123.

31 COA RJ [48]-[52], CAB 103-104.

36. Thus, while there is no authoritative ratio determinative of the construction of the phrase "offence relating to property",[32] the weight of authority favours rejection of the construction urged by the appellant and intervener. Rejection of the construction favoured by Brennan J in *Walden v Hensler* has even more force now given that, at the time of this Court's consideration of s 22(2) in that case, the definition of property in the *Code* had not yet expanded to include things identified without reference to their susceptibility of ownership.[33] In contrast, the more confined definition of property was referred to by his Honour in his reasoning that identified interference with another's property rights as a necessary ingredient of the phrase "offence relating to property".[34] That reasoning cannot have the same force now that property rights no longer have the same significance in the definition of property in the *Code*.

Conclusion on the first issue

37. For the foregoing reasons, the appellant's primary submission on the first issue should be rejected. On that basis, it should be concluded that the offence with which the respondent was charged is an offence "relating to property" within the meaning of s 22(2) of the *Code*.

The second issue

38. The appellant and intervener conflate two separate questions in dealing with this issue. The first question is whether the respondent's mistaken belief that what he did was within the scope of his rights under the Determination was a claim of private right under the civil law.

39. The second question is whether the respondent would be absolved from criminal responsibility if his mistaken claim of right was well founded.

40. For the reasons developed above, both the first and second questions must be answered in the respondent's favour in order for his reliance on s 22(2) to succeed. Whether they are so answered involves distinct and separate issues. The first question turns on the

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32 *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 314 (Mason CJ, Wilson, Dawson and Toohey JJ); *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 562-563 [112] (Gaudron, McHugh and Gummow JJ); *Stevenson v Yasso* [2006] 2 Qd R 150 at 180 [103] (McPherson JA); *Molina v Zaknich* (2001) 24 WAR 562 at 576 [82], 579 [97], [101] (McKechnie J, with whom Malcolm CJ and Templeman J agreed).

33 Even by the time of the reprint of the *Code* in 1994, seven years after the decision in *Walden*, that was the case.

34 *Walden* at 574.

characterisation of the respondent's claim of right under the Determination. The second question turns on whether the law governing the offence prescribed by s 162 of the *Planning Act* would absolve a person from criminal responsibility for contravening that section if the claim were well founded.

41. The relevance of the "cultural activity exemption" under item 1(1)(5) of Sch 21 to the *Planning Regulation 2017* is that, on the respondent's construction, it absolves a person from criminal responsibility for contravening s 162 of the *Planning Act* for conduct in the exercise of a native title right. The submissions of the appellant and intervener to the effect that the section is not a private right under the civil law are, therefore, misdirected.[35] It is clear that the section does not *create* a private right under the civil law. However, what the section does do, on its proper construction, is *give effect to* private rights under the civil law, namely, native title rights, such that acts done in pursuance of those rights are absolved from criminal responsibility for contraventions of s 162 of the *Planning Act*.

Native title is a private right under the civil law

42. A private right is distinctly owed to a particular legal person or persons, separately from the public at large, such that only those persons who hold those rights may enforce them. In contrast, a public right is an expression that describes legal relations involving the public generally rather than any specific person or persons, such that they are only enforceable by the Attorney-General, either ex officio or on the relation of another person, on behalf of the public at large.[36]

43. So understood, native title rights are private rights arising under the civil law, being rights enjoyed by particular persons who may themselves enforce them. The intervener accepts as much.[37] That is the very thing the respondent claimed: a right, founded in the traditional laws and customs of the Quandamooka People, to clear vegetation for the purpose of building.

44. Further, this is a case where the rationale of s 22(2) applies with particular force. Persons should not be punished for honest mistakes about the content of their private rights; the

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35 AS at [62]; IS at [41], [47]-[48].

36 *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519 at 557-559 [85]-[88] (Edelman J).

37 IS at [39]: "Native title rights are … private rights recognised by our system of law. 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"(footnote omitted). See also IS at [36], adopting *Walden* at 608-609 (Gaudron J).

more so where, as with native title, the content of those rights is determined by traditional laws and customs. Those traditional laws and customs may, and do, adapt to modern circumstances, and there may be difficult questions about whether a modern adaptation is so far removed from historical practices as to no longer reflect traditional law and custom.[38] That is consistent with the respondent's own evidence, accepted as honest, that the engagement of a contractor and the use of an excavator comprised an "adaptive practice" falling within the same body of rights.

45. Accordingly, the ambit of native title rights may "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".[39] Nor is it an answer that the Determination records the native title rights of the Quandamooka People for the area, and does not record a right to clear vegetation for building. The Determination is the authoritative record of native title rights;[40] but s 22(2) is concerned with an honest belief (even if mistaken or unreasonable) about their content, not with whether the respondent's understanding conformed to the record. The respondent's evidence, accepted below, was that he had not read the Determination.[41] His belief that his native title rights extended to clearing vegetation for building was thus an honest, if mistaken, belief about the content of a private right, the very kind of mistake s 22(2) accommodates. That the belief did not conform to the Determination as recorded does not convert it into ignorance of the criminal law.

The cultural activity exemption

46. The cultural activity exemption absolves a contravention of s 162 of the *Planning Act* when that contravention is constituted by a "traditional Aboriginal or Torres Strait Islander cultural activity, other than a commercial activity". The ordinary reading of the term "culture" embraces the "distinctive ideas, customs, social behaviour, products, or way of life of a particular nation, society, people, or period … [h]ence: a society or group characterised by such customs".[42]

47. Native title is more than just an assortment of jural rights; it is "a perception of socially

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38 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 455 [82]-[83] (Gleeson CJ, Gummow and Hayne JJ).
39 *Walden* at 570 (Brennan J).
40 Though determinations of native title remain subject to later variation: *Native Title Act 1993* (Cth), ss 13(1)(b) and 13(5).
41 DC RJ at [135], CAB 62; ABFM 112.
42 *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9 at [195] (Charlesworth J).

constituted fact",[43] an important part of which "is the spiritual, cultural and social connection with the land".[44] It thereby gives effect to the traditional laws and customs of Aboriginal and Torres Strait Islander peoples.[45] Those laws and customs form part of the distinctive ideas and customs by which traditional Aboriginal and Torres Strait Islander societies are characterised, thereby forming part of their culture:

> "Law and custom arise out of and, in important respects, go to define a particular society. In this context, "society" is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs."[46]

10 48. The continued subsistence of a society's body of law and customs requires their continual observance and vitality.[47] If that body of law and custom ceases to be observed then it will cease to exist.[48] The society from which that body of law and custom derived will have then lost the normative system that had united and defined that society.

49. Thus, the exercise of native title rights is more than an exercise of jural rights. It is the expression and maintenance of traditional Aboriginal and Torres Strait Islander culture, including those peoples' spiritual, cultural and social connection with the land. It is itself a traditional Aboriginal or Torres Strait Islander cultural activity.

50. The language of the cultural activity exemption which refers to a "traditional … cultural activity", is, therefore, apt to refer to the exercise of a native title right . The exemption
20 thus absolves the exercise of such rights from criminal responsibility for a breach of s 162 of the *Planning Act*. The respondent's claim that his actions were authorised by native title was to a private right which, if well founded, would provide an answer to the charge

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43 *Yanner v Eaton* (1999) 201 CLR 351 at 358 [38] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), quoting K Gray and S F Gray, "The Idea of Property in Land", in Bright and Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press, 1998) 15 at 27.

44 *Fortescue Metals Group v Warrie* (2019) 273 FCR 350 at 479 [478] (Robertson and Griffiths JJ); *Commonwealth of Australia v Yunupingu* (2025) 99 ALJR 519; 421 ALR 604 at 644 [142] (Gordon J); *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 188 (Toohey J). See also *Stuart v South Australia* (2025) 99 ALJR 731; 422 ALR 279 at 287 [26], 296 [53] (Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ) where this Court determined that "spiritual" or "cultural" connection may be sufficient to establish the requirement of "connection" in s 223(1)(b) of the *Native Title Act 1993* (Cth).

45 *Native Title Act 1993* (Cth), s 223.

46 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, at 445 [49] (Gleeson CJ, Gummow and Hayne JJ).

47 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 444-445 [47] (Gleeson CJ, Gummow and Hayne JJ).

48 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 444-445 [47] (Gleeson CJ, Gummow and Hayne JJ).

that he contravened s 162 of the *Planning Act*.

51. The appellant and intervener's submissions on the second issue should be rejected, and the appeal should be dismissed.

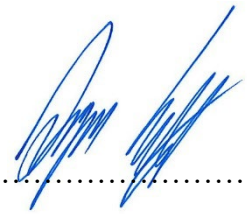
Part VI: NOTICE OF CONTENTION OR NOTICE OF CROSS-APPEAL

52. The respondent has not filed a notice of contention or notice of cross-appeal.

Part VII: ESTIMATE OF TIME FOR ORAL ARGUMENT

53. It is estimated that 2 hours will be required for the presentation of the respondent's oral argument.

10 Dated 4 June 2026



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ANNEXURE TO RESPONDENT'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2024, the Respondent 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
1.	*Criminal Code Act 1899* (Qld)	Current as at 26 February 2020	Schedule 1 (Criminal Code), ss 1, 2, 22, 36, Part 6	Act in force on the date of the offence.	
2.	*Criminal Code Act 1899* (Qld)	As enacted	Schedule 1 (Criminal Code), ss 399-401, s 432, Part VI	For illustrative purposes.	
3.	*Planning Act 2016* (Qld)	Current as at 19 March 2020	ss 43, 44, 161, 162, Schedule 2	Act in force on the date of the offence.	
4.	*Planning Regulation 2017* (Qld)	Current as at 27 March 2020	s 19, Schedule 10 (Part 3), Schedule 21 (Part 1, item 1(1)(5)), Schedule 24 (definitions of "exempt clearing work", "prescribed land" and "native vegetation")	Regulation in force on the date of the offence.	
5.	*Native Title Act 1993* (Cth)	Current as at 26 February 2020	ss 211, 223, 225	Act in force on the date of the offence.	
6.	*Justices Act 1886* (Qld)	Current as at 20 September 2023	ss 222, 223, 225	Act in force when the appeal to the District Court was instituted.	7 March 2024
7.	*Acts Interpretation Act 1954* (Qld)	Current as at 26 February 2020	s 13A	Act in force on the date of the offence.	
8.	*Vegetation Management*	Current as at 19 March 2020	ss 3, 8, 22A; Schedule (definition of	Act in force on the date of the offence.	

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
	Act 1999 (Qld)		"native vegetation")		
9.	*Nature Conservation Act 1992* (Qld)	Current as at 19 March 2020	Schedule (definition of "plants")	Act in force on the date of the offence.	