



# HIGH COURT OF AUSTRALIA

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### Details of Filing

File Number: B24/2026  
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B24/2026

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

BETWEEN:

**REDLAND CITY COUNCIL**

Appellant

and

**DARREN BURNS**

Respondent

**RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS**

## Part I: Certification

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

## Part II: Propositions to be advanced in oral argument

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### A The claim must be one which, if well-founded, would exclude criminal responsibility

2. The apparent tension between sub-ss (1) and (2) of s 22 of the *Criminal Code* (Qld) is resolved by reading sub-s (2) as qualifying sub-s (1). Subsection (1) excludes as an excuse “ignorance of the law”. Subsection (2) qualifies that exclusion for acts or omissions done “in the exercise of an honest claim of right and without intention to defraud” (**JBA v1 p 29**).
3. That structure supplies the textual foundation for two related requirements: the defence must be based on a claim of a private right under the civil law (**Respondent’s Amended Submissions [27]-[28]; JBA v1 p 29**), as opposed to ignorance of the criminal law; and the claim must be one which, if well-founded, would exclude criminal responsibility for the offence charged (**RAS [28]**).
4. Implicit in an “honest claim of right” is an honest belief that what is being done is lawful *because of* a right under the civil law. If a claim, even where well-founded, would not absolve the accused of criminal responsibility, the accused’s belief in the lawfulness of the act must rest, at least in part, on ignorance of the law, which sub-s (1) excludes.
5. That requirement is drawn from *Walden v Hensler* (1987) 163 CLR 561:
  - per Deane J at 580-581: an honest belief of a special entitlement to do the act with respect to property “will only constitute a defence under s 22 of the Code if that entitlement would, if well-founded, preclude what was done from constituting a breach of the relevant criminal law which an accused is assumed to know”; applied at 583 (the claim there would not, if well-founded, have absolved, because the prohibition on keeping fauna applied regardless of ownership or traditional hunting rights) (**JBA v3 p 183**);
  - per Dawson J, rejecting the defence on the same basis, at 593-594: s 54(1)(a) of the *Fauna Conservation Act 1974* (Qld) imposed a prohibition “of general application irrespective of any proprietary or lesser right in the fauna” and so afforded “no scope for the exercise of any claim of right” (**JBA v3 p 196**).

6. The requirement also answers the concern underlying Brennan J's narrower construction of "offence relating to property" (at 573-575, adopting *Pearce v Paskov* [1968] WAR 66 at 72 (**JBA v4 p 430**)), namely, that on the "wider interpretation", the section would defeat the exclusion of ignorance of the law as an excuse (574-575) (**JBA v3 pp 176-178**) (**RAS [27]-[29]**).
7. Once s 22(2) is confined to claims which, if well-founded, would absolve criminal responsibility, Brennan J's justification for the narrower construction falls away.

## **B Section 162 is an offence relating to property**

8. Section 162 of the *Planning Act 2016* (Qld) makes it an offence to carry out "prohibited development". Each limb of "development" in sch 2 – building work; plumbing or drainage work; operational work; reconfiguring a lot; a material change of use of premises – involves doing things with respect to real property. "Premises" means a building or other structure, or land (**JBA v1 pp 248, 255-256, 268**) (**RAS [12]**).
9. Doyle JA correctly concluded that the charged offence is an offence relating to property. The cascading definitions lead "to a prohibition upon operational works on prescribed land, being clearing of native vegetation"; "[t]he very thing charged is the destruction of vegetation on land", and it relates to property "whether one regards the property concerned as the land or the vegetation": **CAB 124 [153]-[154]**, agreeing with the District Court judge's reasons (see at **CAB 77 [202]**).

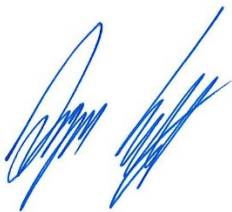
## **C The respondent's claim if well-founded, would have absolved him of criminal responsibility**

10. The respondent cleared the land for his family and believed he was "within his rights to do it"; the rights he invoked were rights of connection to country and native title ("its native title land"): **CAB 60 [126]-[127]**; see also **CAB 63 [137]-[138]** (**RAS [8]-[9]**).
11. The District Court found "at the time Mr Burns cleared the land for building, he believed he was entitled to clear land for building purposes on land (other than freehold land) in accordance with a right that all Quandamooka people had to do so, based on historical practices, which he considered to be native title rights": **CAB 80-82 [222]-[223]**.
12. If the clearing was "exempt clearing work", no offence was committed. "Exempt clearing work" is defined in sch 24 of the *Planning Regulation 2017* (Qld) relevantly

by reference to sch 21, pt 1, item 1(1)(5): “a traditional Aboriginal or Torres Strait Islander cultural activity, other than a commercial activity”.

13. An act done in the exercise of a native title right is itself such an activity (**RAS [50]**). Native title rights and interests are, by definition, rights “possessed under the traditional laws acknowledged, and the traditional customs observed”, by the peoples concerned: *Native Title Act 1993* (Cth), s 223(1)(a) (**JBA v2 p 15**). Rights of that character are “the creatures of the laws and customs of a particular society”: *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 445 [49]-[50] (Gleeson CJ, Gummow and Hayne JJ) (**JBA v3 p 73**) (**RAS [46]-[49]**).
14. It follows, as the District Court Judge found, that the respondent’s “belief as to his claim of right was one which if correct, would have given rise to the cultural activity exemption”. Had he been correct in his belief “that he had a traditional right to blaze, clear and build”, the clearing “would have fallen within the scope of exempt clearing work” and so outside the offence: **CAB 83 [233]**. The claim was therefore one which, if well-founded, would have excluded criminal responsibility (**RAS [41], [50]**).
15. The defence under s 22(2) was engaged. The appeal should be dismissed.

Dated: 4 August 2026



**Angus Scott KC**

**Andrew Preston**

**Jade-Ann Reeves**