IN THE LAND COURT OF QUEENSLAND
HELD AT: BRISBANE NUMBER: LA2005/1797

Appellants: **DAVID JAMES MACKENZIE**

AND

Respondent: **MINISTER FOR NATURAL RESOURCES, MINES AND WATER**

# RESPONDENT'S PRELIMINARY SUBMISSIONS

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## Introduction

1. The purpose of these preliminary submissions is to explain the respondent's understanding of the nature of the appeal and why some of the grounds of appeal raised by the appellant are not relevant.

## Factual background

2. The appellant, Mr Mackenzie, applied for a tree clearing permit under the *Land Act 1994* ("**Land Act**") on 5 November 2001. The land the subject of the application is located north east of Augathella within the Warrego catchment and is described as Lot 1884 on PH204 ("**the land**"). The land is a pastoral lease and the property is known as "Khyber" and the proposed clearing is for grazing purposes. The application was for broadscale clearing of 3,727 ha of remnant vegetation.




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3. The application was refused in an original decision on 20 August 2004 and a review decision on 8 November 2005. The refusal was for a number of reasons, including issues related to regional ecosystems, biodiversity and clearing of commercial timber. Mr Mackenzie subsequently appealed to the Land Court against the refusal under s 427 of the Land Act.

**Brief history to explain the statutory context of the appeal**

4. A brief history of the regulation of tree clearing in Queensland helps explain the statutory context of the appeal.[1] Prior to the 1990s there were few controls on land clearing in Queensland.[2]

5. In late 1997, a system to control vegetation clearing on the 65% of Queensland held as leasehold and other State lands commenced under the Chapter 5, Part 6 of the Land Act. The system required a tree clearing permit to be obtained for clearing trees on leasehold and other State lands other than in specified circumstances such as constructing a fence as part of routine management.

6. In late 2000, using a new mapping and classification system, a separate regime commenced in the *Vegetation Management Act 1999* ("**VMA**") and *Integrated Planning Act 1997* ("**IPA**") to regulate vegetation management on the 30% of Queensland held as freehold land and freeholding leases. The policy for assessing applications on leasehold and other State lands under the Land Act was also amended at that time to be consistent with the new mapping and classification system.

7. On 16 May 2003, a moratorium[3] on tree clearing applications under the Land Act and for development applications for vegetation management under the IPA was imposed under the *Vegetation (Application for Clearing) Act 2003* ("**VACA**").

8. In early 2004 major reforms to the vegetation management regime in Queensland were introduced in the *Vegetation Management and Other Legislation Amendment Act 2004* ("**VMOLA 2004**"). The reforms commenced on 21 May 2004. A major part of the reform package is a policy commitment to phase out broadscale land clearing of remnant vegetation by 31 December 2006. A transitional cap of 500,000 hectares of broadscale clearing was allocated by a ballot spread across seven regions in the State that was held on 17 September 2004.[4]

9. The reforms in VMOLA 2004 have also removed the system of vegetation clearing laws for State lands from Chapter 5, Part 6 of the Land Act, and placed the control of vegetation management of most State lands in the VMA and IPA

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[1] See generally McGrath C, "Queensland's new vegetation management regime" (2004/2005) 10 (46) *Queensland Environmental Practice Reported* 26; and McGrath C, *Synopsis of the Queensland Environmental Legal System* (4th ed, Environmental Law Publishing, Brisbane, 2006), p 28. Available at http://www.envlaw.com.au/publications.html (viewed 13 July 2006).

[2] Some controls have existed for a considerable time though. For example, s 231 of the *Land Act* 1897 (Qld), then s 198 of the *Land Act* 1910 (Qld), and then s 250 of the *Land Act* 1962 (Qld) prohibited the ringbarking or destruction of timber on leasehold land without a permit.

[3] Subject to limited exceptions.

[4] See s 5 of the *Vegetation Management Regulation* 2000 (Qld).

system. Vegetation management on approximately 95% of land in Queensland is now regulated under this system.[5]

10. The purpose of the VMA is stated in s 3. Section 3(1)(a) states the purpose of the Act is to regulate the clearing of vegetation in a way that conserves remnant *endangered* regional ecosystems, remnant *of concern* regional ecosystems, and remnant *not of concern* regional ecosystems.

11. Section 77 of the VMA provides a critical transitional provision for applications for tree clearing permits under the now repealed Chapter 5, Part 6 of the Land Act. It provides that applications made prior to the moratorium imposed by the VACA must be dealt with under the Land Act as in force on 20 May 2004.

12. In addition to s 77 of the VMA, s 20 of the *Acts Interpretation Act 1954* provides general principles for saving the operation of repealed Acts.

**Regional ecosystems**

13. A brief explanation of the regional ecosystem ("**RE**") mapping used in the basis for vegetation management in Queensland is necessary to explain the legal context of the issues in dispute in the appeal. Under this system, Queensland is divided into 13 bioregions based on broad landscape patterns that reflect the major underlying geology, climate patterns and broad groupings of plants and animals.[6]

14. The VMA defines a "regional ecosystem" to mean "a vegetation community in a bioregion that is consistently associated with a particular combination of geology, landform and soil." REs are each assigned a unique three digit code reflecting bioregion, land zone and dominant vegetation. For example, brigalow-belah shrubby open forest on clay plains in the Brigalow Belt Bioregion is classified as "RE 11.4.3". The formal description of this RE is "*Acacia harpophylla* and/or *Casuarina cristata* shrubby open forest on Cainozoic clay plains".

15. The conservation status of each RE is based on its current extent in a bioregion. REs are classified as under the *Vegetation Management Regulation 2000* as:

> ***endangered regional ecosystem*** means a regional ecosystem that is prescribed under a regulation and has either—
> (a) less than 10% of its pre-clearing extent remaining; or
> (b) 10% to 30% of its pre-clearing extent remaining and the remnant vegetation remaining is less than 10,000ha.
>
> ***of concern regional ecosystem*** means a regional ecosystem that is prescribed under a regulation and has either—
> (a) 10% to 30% of its pre-clearing extent remaining; or
> (b) more than 30% of its pre-clearing extent remaining and the remnant vegetation remaining is less than 10,000ha.

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[5] Vegetation management in national parks and State forests continues to be regulated under the *National Parks Act 1992* and the *Forestry Act 1959* respectively, which accounts for approximately 5% of the State.

[6] See Sattler P and Williams R, *The Conservation Status of Queensland's Bioregional Ecosystems* (EPA, Brisbane, 1999), Ch 1; and Neldner VJ, Wilson BA, Thompson EJ, Dillewaard HA, *Methodology for Survey and Mapping of Regional Ecosystems and Vegetation Communities in Queensland – Version 3.1* (EPA, Brisbane, 2005), pp 13-36.

> ***not of concern regional ecosystem*** means a regional ecosystem that is prescribed under a regulation and has more than 30% of its pre-clearing extent remaining and the remnant vegetation remaining is more than 10,000ha.

16. The *Vegetation Management Regulation 2000* prescribes *endangered*, *of concern*, and *not of concern* REs in Schedules 1-5. Subs 2(6) of the regulation states:

> A reference in schedules 1 to 5 to a regional ecosystem number for a regional ecosystem is a reference to the regional ecosystem number and the description for the ecosystem that are established under the Regional Ecosystem Description Database.[7]

17. The footnote to subs 2(6) of the *Vegetation Management Regulation 2000* refers to the Environmental Protection Agency ("**EPA**") website. Relevant extracts of that website are provided in Tab 9 of the Respondent's Book of Authorities. That website notes that:

> Regional ecosystems were defined by Sattler and Williams (1999) as vegetation communities in a bioregion that are consistently associated with a particular combination of geology, landform and soil. Readers should refer to this publication for background information about regional ecosystems and the bioregional planning framework used in Queensland. …
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> For further clarification of and mapping methods for remnant vegetation see Neldner et al. (2005).

18. Relevant extracts from the two additional publications referred to on the EPA website in describing the RE classification system, Sattler and Williams (1999) and Neldner et al (2005), are provided in Tabs 10 and 11 of the Respondent's Book of Authorities. These publications are extrinsic material that may be referred to in interpreting the meaning of RE classifications under the *Vegetation Management Regulation 2000*.[8]

19. With this brief explanation of the legislative history of vegetation management laws in Queensland and RE mapping the specific legislative provisions and policies relevant to this appeal under the Land Act can be considered.

## Legislative scheme of the Land Act

20. Section 252 of the Land Act, as in force at 20 May 2004, states the objects of tree management under the Act as follows:

> **252 Object of part**
> The object of this part is to manage trees on [State land] consistent with the following principles—
> (a) to maintain the productivity of the land;
> (b) to allow the development of the land;
> (c) to prevent land degradation;
> (d) to maintain biodiversity;
> (e) to maintain the environmental and amenity values of the landscape;
> (f) to maintain the scientific, recreation and tourism values of the land;
> (g) to ensure public safety.

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[7] The Regional Ecosystem Description Database is a database containing regional ecosystem numbers and descriptions that is maintained by the Queensland Herbarium, Environmental Protection Agency, Brisbane. The database is available on the Environmental Protection Agency's website at <www.epa.qld.gov.au/nature_conservation/biodiversity/regional_ecosystems>.

[8] Which is permissible in interpreting the regulation under s 14B of the *Acts Interpretation Act 1954*.

21. Sections 254-258 and 268-270 of the Land Act provide that a tree clearing permit is needed to clear a tree on leasehold and other State lands except in limited circumstances not relevant to this case.

22. Section 260 states how an application for a tree clearing permit is made. Subsection 260(2) allows the chief executive to ask the applicant for a Property Vegetation Management Plan ("**PVMP**"). Prior to 2000, a PVMP was called a "Tree Management Plan". The Land Act was amended in 2000 to change the name of Tree Management Plans to PVMP for consistency with the VMA; however, the substance of subs 260(2) and 261 remained unchanged.

23. Section 262 states the matters the chief executive must consider:

> **262 Issues chief executive must consider**
> **(1)** In deciding whether to issue a tree clearing permit, and in deciding on any conditions to be imposed, the chief executive must consider the following issues having regard to the object of this part—
> (a) the protection of restricted vegetation types and areas of heritage value;
> (b) the existence of any native title;
> (c) the protection of environmentally sensitive areas;
> (ca) any effect of the clearing on land degradation;
> (d) the protection of important tree resources;
> (e) the protection of water catchments;
> (f) the protection of scenic, visual and landscape values;
> (g) the economic and social benefits in the development of the land to increase or maintain livestock or agricultural production;
> (h) the economic and social benefits in clearing trees to accommodate buildings, development works and utilities;
> (i) the economic and social benefits in harvesting timber for structural improvements in developing land where the timber is situated;
> (j) public safety and fire management.
> **(2)** The chief executive must also consider the following issues in evaluating an application—
> (a) the purpose and conditions of the lease, licence, permit or reserve;
> (b) the species or types of trees proposed to be cleared;
> (c) the existence and extent of commercial timber on the land proposed to be cleared;
> (d) the existence and extent of environmentally sensitive areas on the land proposed to be cleared;
> (e) the extent of the proposed tree clearing and the proportion of the land already cleared;
> (f) the extent of clearing in a catchment and the likely impact of clearing and follow-up operations on land in a catchment;
> (g) the proposed land use after the initial clearing of the trees;
> (h) the way the trees are to be cleared;
> (i) the likely follow-up operations in the control of regrowth;
> (j) the value for beekeeping purposes of the trees on the land proposed to be cleared;
> (k) the heritage or cultural value of the trees on the land proposed to be cleared;
> (l) the information contained in any property vegetation management plan lodged;
> (m) any relevant local guidelines for broadscale tree clearing;
> (n) if there are no relevant local guidelines for broadscale tree clearing—the contents of any broadscale tree clearing policy document;
> (o) whether the applicant has been convicted of a tree clearing offence in the relevant period, regardless of whether the offence was committed before the relevant period;
> (p) other issues the chief executive considers relevant.
> **(3)** In this section—

> **"relevant period"** means the period, starting after the commencement of this definition, of 5 years immediately before the application is made.

24. Section 263 of the Land Act states the chief executive may issue a tree clearing permit with or without conditions; however, subs 263(3) states:

> **(3)** The chief executive may issue a tree clearing permit inconsistent with guidelines for broadscale tree clearing only if the chief executive is satisfied special circumstances exist.

25. Section 264 provides for the terms of tree clearing permits to be limited to 5 years; however, this is now subject to subs 77(5) of the VMA which states the term of a tree clearing permit issued under the transitional provisions must end no later than 31 December 2006.

26. Section 271 allows the Governor in Council to approve a broadscale tree clearing policy document. The policy is notified in the gazette. Subs 271(5) states that a policy document under this section is not subordinate legislation. Three policies were in fact made under this section in September 2000, September 2002, and May 2003. With limited exceptions that are generally not material to this case, the three versions of the broadscale tree clearing policy were materially the same.

27. Section 272 allows the Minister to approve local guidelines for broadscale tree clearing applying to areas of the State. Subs 273(2) provides that the local guidelines must not be inconsistent with a broadscale tree clearing policy approved by the Governor in Council under s 271.

28. At the date on which Mr Mackenzie lodged his application for a tree clearing permit, 5 November 2001, no local guidelines were approved relevant to the land and the *Broadscale Tree Clearing Policy for State Lands* (September 2000) ("**the 2000 policy**") was in force for the whole of the State.

**Nature of the appeal**

29. The Land Act establishes a procedure for internal review of an original decision and appeal to the Court in Chapter 7, Part 3. Section 422 specifies that every appeal against an original decision under the Land Act must be, in first instance, by way of an application for internal review. Subsection 429(1) states that in deciding the appeal the Court has the same powers as the decision maker.

30. Subsection 429(2) of the Land Act states that for an appeal in the Court the appeal is "by way of rehearing". Subsections 429(1) and (3) also provide the Court with wide powers to do justice in the appeal.

31. The phrase used in subsection 429(2), that the appeal is "by way of rehearing", leaves it unclear whether the nature of the appeal is a rehearing on the record or a hearing *de novo*.[9] In a rehearing on the record an appellate court has power to draw inferences from primary facts, including facts found and facts not disputed, which is as complete as that of the primary decision-maker. On the other hand, an appeal under that form of procedure does not normally involve a rehearing of

[9] A hearing *de novo* is also referred to as "a hearing anew". See, for example, s 4.1.52 of the IPA in relation to planning appeals to the Planning and Environment Court.

witnesses and is subject to limitations on the re-exercise of discretions.[10] In addition, in a hearing *de novo* a court normally considers the law and facts at the date of the hearing.

32. The distinction between a rehearing on the record and a hearing *de novo* leads to fundamentally different questions being addressed by the Court. The primary question in a rehearing on the record would be whether the exercise of discretion by the respondent's delegate miscarried in some way or was otherwise manifestly in error? In contrast, in a hearing anew the review decision is not binding in any way and the question for the Court is not whether the respondent's delegate erred in any way but, rather, what is the correct decision that the Court should make in light of the evidence and statutory requirements?

33. The principles for resolving whether the appeal is a rehearing on the record or a hearing *de novo* were explained by Thomas JA[11] in *Aldrich v Ross* [2000] QCA 501; [2001] 2 Qd R 235 at 248-249 [18]-[21] in considering an appeal from a police disciplinary tribunal and a single judge of the Supreme Court:

> [18] In determining the approach that an appellate tribunal should take in performing its task the courts have often sought indicia that tend to identify it as a recognised type. In 1976 Glass JA[12] was able to identify six distinct types of appeal. That classification, with respect, remains helpful, but it is not comprehensive, and subcategories and differences in the principles to be applied may be found within the types that his Honour identified. The spawning of multiple administrative and quasi-judicial tribunals to serve particular purposes has made it increasingly difficult to make general statements or to identify determinative criteria that characterise a given appeal. It is natural that counsel and courts search for such features and in some of the cases to which reference will be made it was possible in the end to identify the essential nature of the appeal by reference to one or two defining features. …
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> > "[I]n the end the answer will depend on an examination of the legislative provisions rather than upon an endeavour to classify the administrative authority as one which is entrusted with an executive or quasi-judicial function, classifications which are too general to be of decisive assistance. Primarily it is a question of elucidating the legislative intent, a question which in the circumstances of this case is not greatly illuminated by the Delphic utterance that the appeal is by way of rehearing."[13]
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> [19] In *Sperway* Mason J contrasted two situations which might be thought to represent opposite ends of the spectrum in an exercise of the present kind. Firstly his Honour referred to proceedings where it is difficult to think that an appeal in the strict sense could be feasible –
>
> > "The nature of the proceeding before the administrative authority may be of such a character as to lead to the conclusion that it was not intended that the court was to be confined to the materials before the authority. There may be no provision for a hearing at first instance or for a record to be made of what takes place there. The authority may not be bound to apply the rules of evidence or the issues which arise may be non-justiciable. Again, the authority may not be required to furnish reasons for its decision. In all these cases there may be ground for saying that an appeal calls for an exercise of original jurisdiction or for a hearing de novo."[14]
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> [20] His Honour then contrasted cases where a tribunal's procedures are much closer to those of courts –

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[10] As set out in *House v The King* (1936) 55 CLR 499 at 504-505.
[11] With whom Pincus JA and Muir J agreed.
[12] in *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281, 297.
[13] *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616, 621-622 per Mason J ("*Sperway*").
[14] Ibid at 621.

> "The authority may be required to determine justiciable issues formulated in advance; to conduct a hearing, at which the parties may be represented by barristers and solicitors, involving the giving of oral evidence on oath which is subject to cross-examination; to keep a transcript record; to apply the rules of evidence; and to give reasons for its determination. In such a case a direction that the appeal is to be by way of rehearing may well assume a different significance."[15]
>
> [21] The legislation in the present matter does not readily satisfy either of these descriptions. It is necessary then to understand the structure, powers and duties of both the original and the appellate tribunal.

34. The nature of the appeal in this case reflects the first situation for appeals by way of rehearing identified by Mason J in *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621-622.

35. Considering the principles stated by Mason J and Thomas JA, the respondent submits that the structure, powers and duties of both the original decision-maker and the Court under the Land Act, indicate that the nature of this appeal is by way of hearing *de novo.*

36. At common law, an appeal by way of hearing *de novo* considers the law and facts as at the date of the hearing: *Aldrich v Ross* [2000] QCA 501; [2001] 2 Qd R 235 at 251-252 [28]. This situation is altered in the Planning and Environment Court for planning appeals under the IPA. Although subs 4.1.52(1) of the states that "an appeal is by way of hearing anew", subs 4.1.52(2)(a) provides that the Court must:

> must decide the appeal based on the laws and policies applying when the application was made, but may give weight to any new laws and policies the court considers appropriate

37. There is no section of the Land Act similar to subs 4.1.52(2)(a) of the IPA and, therefore, the position at common law applies. The appeal must be decided in accordance with the law and facts at the date of the hearing of the appeal.

38. While s 20 of the *Acts Interpretation Act 1954* provides some savings for matters under repealed legislation, there is no accrued right to a particular decision in cases such as this where the discretion is effectively at large and, therefore, no accrued right to have a particular policy applied: *Kentlee Pty Ltd v Prince Consort Pty Ltd* [1998] 1 QdR 162 at 181.

39. Given that the Court is required to apply the law and facts at the date of the hearing, it would seem strange if the Court was to apply a policy relevant at another date. As there is no statutory provision in the Land Act similar to subs 4.1.52(2)(a) of the IPA, the relevant policy would appear to be the policy in force at 20 May 2004, which is the *Broadscale Tree Clearing Policy for State Lands* (May 2003) ("**the 2003 policy**").

40. There does not appear to be a material difference between the 2000 policy and the 2003 policy for the purposes of this appeal.

41. Despite the *prima facie* application of the 2003 policy as a question of law, the Minister considers that the most appropriate policy to be applied in the circumstances of this case is the 2000 policy. However, either the 2000 policy or

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[15] Ibid at 621.

2003 policy may be applied and will not affect the evidence already filed by the parties.

42. The Minister, therefore, submits that the 2000 policy is the most appropriate in the circumstances. The subsequent question becomes what is the policy's status and to what extent is the Court bound to apply it?

**Status of policy**

43. The role of Court in this case is somewhat unusual for administrative decisions in Queensland. In particular, it is somewhat unusual in Queensland for a Court to exercise *de novo* merits review of administrative decisions exercising a broad discretion such as under s 262 of the Land Act that are subject to statements of government policy. Planning appeals in the Planning and Environment Court under the IPA are different in nature. Under the IPA the Planning and Environment Court is constrained by the relevant planning scheme and other planning instruments but may make a decision inconsistent with the planning scheme where there are sufficient planning grounds to do so.[16]

44. Section 262 of the Land Act provides a range of criteria that the chief executive "must consider … having regard to the object of this part". A requirement "to consider" a matter is a relatively loose obligation. As Black CJ stated in *Tickner v Chapman* (1995) 57 FCR 451 at 462:

> The meaning of 'consider' used as a transitive verb referring to the consideration of some thing is given in the *Oxford English Dictionary*, 2nd ed. as 'to contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of.' Consideration of a document such as a representation or a submission (there is little, if any, difference between the two for these purposes) involves an active intellectual process directed at that representation or submission.

45. The considerations stated in s 262 are very broad and no weighting is attached to them by the statute other than via the objects of tree management stated in s 252.

46. The type of administrative review undertaken by the Court under s 429 of the Land Act is similar in nature to many appeals in the Administrative Appeals Tribunal ("**AAT**"). For this reason the principles applied by the AAT to the application of government policy in administrative appeals may be of guidance in this appeal.

47. As noted above, subs 263(3) of the Land Act provides that "the chief executive may issue a tree clearing permit inconsistent with guidelines for broadscale tree clearing only if the chief executive is satisfied special circumstances exist."

48. Considering the structure of the decision making powers and status of local guidelines and broadscale tree clearing policies in the Land Act, it would appear that subs 262(3) applies to both local guidelines approved under s 272 and broadscale tree clearing policies approved under s 271. Indeed, it would seem strange if the chief executive was bound by Ministerial-level policy but not bound

[16] See ss 3.5.13 and 3.5.14 of the IPA, which constrain the discretion of assessment managers and the Planning and Environment Court. See *Woolworths Ltd v Maryborough City Council* [2005] QCA 262 at [23]-[25].

by policy approved by the Governor in Council. Such an approach would also be inconsistent with the over-riding effect of broadscale tree clearing policies provided by subs 273(2).

49. If subs 263(3) were not considered to bind the chief executive[17] to apply the broadscale tree clearing policies "only if the chief executive is satisfied special circumstances exist", the principles established for the application of government policy in administrative appeals in the AAT leads, effectively, to the same result.

50. The seminal decision for the application of government policy in determining administrative appeals in the AAT is that of Brennan J in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634. In that case his Honour held at 645:

> When the Tribunal is reviewing the exercise of a discretionary power reposed in a Minister, and the Minister has adopted a general policy to guide him in the exercise of the power, the Tribunal will ordinarily apply that policy in reviewing the decision, unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case. Where the policy would ordinarily be applied, an argument against the policy itself or against its application in the particular case will be considered, but cogent reasons will have to be shown against its application, especially if the policy is shown to have been exposed to parliamentary scrutiny.

51. Subsequent cases have emphasised the distinction, partially implicit in the comments of Brennan J, between high-level political policies and low-level departmental guidelines or policies. The former will generally be given great weight[18] particularly if the policy is given a special status through legislation.[19]

52. Similarly, the Planning and Environment Court has repeatedly stressed its limited role in reviewing planning schemes and government policy in planning appeals. As Brabazon DCJ said in *Edgarange Pty Ltd v Brisbane City Council* [2001] QPEC 062; [2002] QPELR 183 at 196-197, [99]:

> the Council, and not this Court, is the planning authority … It is not the Court's function to substitute planning strategies, which in a particular appeal might seem to be attractive, for those which the planning authority in a careful and proper way has seen fit to adopt (to note the words of this Court in *Elan Corporation Pty Ltd v BCC* (1990) QPLR 209-211). See also the Court of Appeal in discussing such issues in *Holts Hill Quarries Pty Ltd v Gold Coast City Council & Ors* (2001) QPELR 5.[20]

53. Considering these matters and the policies and statutory scheme relevant to this appeal it is apparent that the broad criteria stated in s 262 of the Land Act should be applied through the relevant local guidelines and broadscale tree clearing policies.

54. The local guidelines and broadscale tree clearing policies are made in recognition of the inherent difficulty in reconciling the development and environmental

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[17] And, thereby, the Court as the Court has only the same powers as the decision maker under s 429(1) of the Land Act.
[18] See, for example, *Re Aston and Secretary, Department of Primary Industries* (1985) 8 ALD 366.
[19] For example, see *Re Donlon and Pharmacy Restructuring Authority* (1992) 28 ALD 791; *Minister for Human Services and Health v Haddad* (1995) 137 ALR 391; and *Rokobatini v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 583.
[20] [2000] QCA 268 at [41]-[45] per Davies JA, Muir and Douglas JJ.

considerations in s 262 of the Land Act. The 2000 policy, for example, states its purpose on page 2 as follows:

> The purpose of this policy is to provide a framework for the management of vegetation that:
>
> 2.1. reconciles environmental objectives in vegetation management including the maintenance of regional biodiversity and the sustainable economic development of land;
>
> 2.2. allows sufficient flexibility to provide for additional protection of environmental values in local and regional circumstances - within a consistent statewide framework;
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> 2.3. provides planning certainty for landholders and the community;
>
> 2.4. encourages business innovation, best practice in property management and planning and long-term farm profitability; and
>
> 2.5. has an integrated planning base.

55. The local guidelines and broadscale tree clearing policies are all based around a similar structure of identifying the environmental aspects of the land the subject of a tree clearing permit to be protected, leaving other areas to be developed. This is the balance that the policies strike between the development and environmental considerations in s 262 of the Land Act. This approach is necessary in part because environmental matters such as biodiversity cannot be readily valued in an economic sense and trying to balance the economic value of land clearing against environmental matters is, therefore, largely meaningless.

56. In summary, the Land Act provides a statutory basis for local guidelines and broadscale tree clearing policies. Both are advertised in the government gazette. The local guidelines are at a Ministerial level while the broadscale tree clearing policies are approved by the Governor in Council. The local guidelines and broadscale tree clearing policies are not inconsistent with the exercise of the broad discretion under s 262 of the Land Act. The local guidelines and broadscale tree clearing policies inherently provide the balance to be struck across the broad range of issues addressed in s 262 consistently with the objects identified in s 252. Given these matters, it is submitted that the Court should apply the 2000 policy unless there are special circumstances or cogent reasons why a different approach should be adopted.

**Principles for interpreting policy**

57. To say that the Court is to generally follow the 2000 policy in deciding the appeal does not resolve the difficulty that might arise in interpreting the policy. It is submitted that, according to the normal principles for interpreting legal documents of this type, the policy should be interpreted based on its plain meaning and the objects of the policy and tree management under the Land Act stated in s 252 of the Act.

**Onus in the appeal**

58. The Land Act is silent on which party bears the onus of proving its case in the appeal[21] but, given the structure of the application and appeal process, logically

[21] Contrast this with 4.1.50 of the *Integrated Planning Act 1997*.

the appellant bears the onus of proving that the application for a tree clearing permit should be approved.

**Ultimate question for the Court in the appeal**

59. The respondent submits that, considering the objects and structure of the Land Act in relation to tree management, in deciding the appeal the ultimate question for the Court is whether the appellant has proven that the appeal should be allowed in light of the considerations specified in section 262 of the Land Act and the 2000 policy. The relevant standard of proof is the civil standard of the balance of probabilities.

**Grounds 1 and 2 of the appeal are irrelevant**

60. As the appeal is by way of hearing *de novo*, grounds 1 and 2 of the Notice of Appeal are irrelevant. These grounds state:

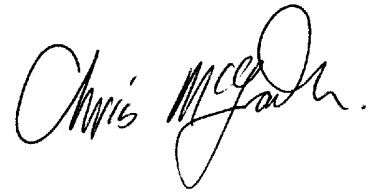
    1. The internal review of the original decision to refuse the grant of a tree clearing permit has taken into account irrelevant considerations.

    2. The internal review of the original decision to refuse the grant of a tree clearing permit has failed to take into account relevant considerations.

61. Grounds 1 and 2 of the appeal deal with matters that would be relevant in judicial review proceedings but are irrelevant in a hearing *de novo*.

**Conclusion**

62. Despite the fact that section 429 states the appeal is "by way of rehearing", having regard to the structure, powers and duties of both the original decision-maker and the Court, the nature of the appeal is a hearing *de novo*. The onus in the appeal lies on the appellant to prove the application for a tree clearing permit should be granted in light of the criteria specified in the Land Act and the 2000 policy.



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**28 August 2006**