

# LAND COURT OF QUEENSLAND

CITATION: *Mackenzie v Minister for Natural Resources, Mines and Water* [2006] QLC 0057

PARTIES: David James Mackenzie  
(appellant)  
v.  
Minister for Natural Resources, Mines and Water  
(respondent)

FILE NO: LA2005/1797

DIVISION: Land Court of Queensland

DELIVERED ON: 15 September 2006

DELIVERED AT: Brisbane

HEARD AT: Brisbane

PROCEEDING: An appeal under s.263(4A) of the *Land Act 1994* against the Minister's review decision confirming the original decision to refuse to issue a tree clearing permit.

MEMBER: Mr JJ Trickett, President

ORDERS:

- 1. The review decision is set aside.**
- 2. The Court substitutes the review decision with a decision that Tree Clearing Permit No. 2006/001433, as attached to this order, issue with the conditions shown in that permit.**
- 3. Costs of this matter are reserved.**
- 4. Any further submissions responding to the parties' written submissions on costs be filed within seven (7) days.**

CATCHWORDS: Appeal against review decision – Tree clearing permit – Nature of appeal – Hearing *de novo* *Land Act 1994*, s.427, 429.

Broad acre tree clearing – Broadscale Tree Clearing Policy 2000 – Regional Ecosystem Mapping – Conservation status – *Land Act 1994*, *Vegetation Management Act 1999* – *Vegetation Management Regulation 2000*.

APPEARANCES: Mr P Sheridan, of counsel, for the appellant, instructed by Devine Agribusiness  
Mr C McGrath, of counsel, for the respondent, instructed by the Crown Solicitor

- [1] This is an appeal by the lessee of State leasehold land under s.427 of the *Land Act 1994* against the Minister's review decision confirming the original decision to refuse to issue a tree clearing permit.

### **Background**

- [2] Mr D J Mackenzie is the lessee of a Pastoral Holding known as "Khyber", containing an area of 28,550 hectares and situated approximately 50 kilometres north-east of Augathella.
- [3] On 5 November 2001, Mr Mackenzie applied for a tree clearing permit under s.260 of the *Land Act 1994* ("the *Land Act*") to clear approximately 3,727 hectares of remnant vegetation. After inspection by officers of the Department of Natural Resources and Mines ("the Department") and revision of the regional ecosystem mapping, the application was refused in a decision given on 7 July 2004.
- [4] Mr Mackenzie commenced the appeal process by way of an application for internal review on 20 August 2004. On 29 September 2005 an internal review decision confirmed the original decision to refuse to issue a tree clearing permit. The reasons given for the refusal included issues relating to regional ecosystems, biodiversity and commercial timber. On 8 November 2005, Mr Mackenzie appealed to the Land Court against the review decision under s.427 of the *Land Act*.

### **The Legislative Background**

- [5] The clearing of vegetation on Crown leasehold land has been regulated for well over 100 years. However, in late 1997, a new system to control vegetation clearing on leasehold and other State lands commenced under Chapter 5 Part 6 of the *Land Act*. Under this system, a tree clearing permit is required for clearing trees on such lands, other than in specified circumstances such as routine management.
- [6] In late 2000, the *Land Act* was amended to be consistent with a new mapping and classification system which commenced under the *Vegetation Management Act 1999* ("the *Vegetation Act*") and the *Integrated Planning Act 1997* ("IPA") to regulate vegetation clearing on freehold land and freeholding leases. Then on 16 May 2003, a moratorium 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*").

[7] Major changes to the vegetation management regime in Queensland were introduced in the *Vegetation Management and Other Legislation Amendment Act 2004* ("*VMOLA*"), which commenced on 21 May 2004. That Act removed the system of vegetation clearing laws on State lands from the *Land Act* and placed the control of vegetation management in the *Vegetation Act* and *IPA* system.

[8] However, under the transitional provisions in Part 6 of the *Vegetation Act*, an existing application (pre *VACA*) must be dealt with under the *Land Act* as in force on 20 May 2004: s.77. However, s.77(5) provides that despite s.264 of the *Land Act* (which limits tree clearing permit to a term of not more than five years), the term of a tree clearing permit for an existing application must end no later than 31 December 2006. This applies to the appellant's application, the subject of this appeal.

[9] Under the provisions of the *Land Act* as in force on 20 May 2004, following a properly made application for a tree clearing permit, s.262 requires that in deciding whether to issue such a permit and deciding on what conditions be imposed, the Chief Executive of the Department is required to consider the issues listed in sub-sections (1) and (2), including other issues that Chief Executive considers relevant. Many of the issues listed are relevant to this appeal.

[10] The Act then goes on to state that the Chief Executive may issue a tree clearing permit with or without conditions or refuse to issue a tree clearing permit: s.263(1)(a) and (b). However, s.263(3) provides:

"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."

[11] Under s.271, the Governor in Council may approve a broadscale tree clearing policy document, which must include the issues to be covered in local guidelines, which are listed in sub-section (2). The Governor in Council's approval must be notified by gazette. However, sub-section (5) provides that a policy document is not subordinate legislation.

[12] Section 272 requires the Minister to approve local guidelines for broadscale tree clearing applying to areas of the State. However, s.273(2) provides that the local guidelines must not be inconsistent with the broadscale tree clearing policy document.

[13] I was informed that as at 5 November 2001, the date on which the appellant lodged his application for a tree clearing permit, no local guidelines were approved relevant to the land and the broadscale tree clearing policy for State lands (September 2000) was in

force for the whole of the State. Since then two other policies have been approved, in September 2002 and May 2003.

### **The Nature of the Appeal**

- [14] Because of the transitional provisions of the *Vegetation Act*, the provisions of the *Land Act* as in force on 20 May 2004, apply in this case. Under s.422 of that Act, every appeal against an original decision must be, in the first instance, by way of an application for internal review. A person who is dissatisfied with the review decision may appeal to the Land Court against the decision: s.427.
- [15] In deciding an appeal, the Land Court has the same powers as the decision maker: s.429(1). An appeal is by way of rehearing: s.429(2). In deciding the appeal, the Court may either –
- (a) confirm the review decision; or
  - (b) set aside the review decision and substitute another decision; or
  - (c) set aside the review decision and return the issue to the Minister with directions the Court considers appropriate: s.429(3).
- [16] There was an issue between the parties as to whether "by way of rehearing" in s.429(2) required that the appeal be a rehearing on the record, or a hearing *de novo*. Counsel for the appellant submitted that it should be a rehearing on the record, as a hearing *de novo* would require the Court to consider the law and facts as at the date of the hearing. Such an interpretation, it was submitted, would mean that the appellant would suffer considerable disadvantage because of the legislative change that had occurred during the extended period between the lodgement of the application and the appeal date.
- [17] On the other hand, counsel for the respondent argued that the appeal is by way of a hearing *de novo*. The Court in such circumstances would not be limited to the evidence on the record or to the issue of whether the respondent's delegate erred in making the review decision.
- [18] After consideration of the submissions and the cases referred to by counsel for the respondent, particularly the judgment of Mason J in *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616, at 621–622, I have come to the conclusion that this appeal is a hearing *de novo*.
- [19] The Court is therefore required to apply the law and facts at the date of hearing. However, I cannot see that this will greatly disadvantage the appellant because of the legislative changes that have occurred. The transitional provisions require that this appeal be dealt with under the provisions of the *Land Act* in force on 20 May 2004. In addition, the respondent concedes that the 2000 Broadscale Tree Clearing Policy for

State Lands should be applied, because there does not appear to be any material difference between the 2000 policy and 2003 policy for the purposes of this appeal.

[20] However, the question arises as to the status of this policy. It is therefore necessary to consider whether it is merely a statement of Government policy regarding tree clearing or whether it is linked to the statutory scheme.

### **The Effect of the Broadscale Tree Clearing Policy**

[21] This policy document was approved by the Governor in Council pursuant to s.271 of the *Land Act*. However, sub-section (5) of that section states that a policy document is not subordinate legislation. Of significance is s.262 of the *Land Act*, which provides a range of issues that the Chief Executive must consider in deciding whether to issue a tree clearing permit, including in s.262(2)(m) "*any relevant local guidelines for broadscale tree clearing;*" and s.262(2)(n) "*if there are no relevant local guidelines for broadscale tree clearing – the contents of any broadscale tree clearing policy document*". Section 263(3) allows the Chief Executive to issue a tree clearing permit which is inconsistent with the guidelines for broadscale tree clearing only if the Chief Executive is satisfied that special circumstances exist. Clearly then, the Chief Executive is bound by the guidelines for broadscale tree clearing, except where satisfied special circumstances exist. Here there are no local guidelines, but if there were, such guidelines cannot be inconsistent with the broadscale tree clearing policy document: s.273(2).

[22] Therefore, I accept the submission of counsel for the respondent, that s.262(3) applies to both the local guidelines approved under s.272 and the broadscale tree clearing policies approved by the Governor in Council under s.271. By virtue of s.273(2), the policy document clearly has overriding effect. I also accept that the issues which the Chief Executive must consider in s.262 are to be applied in this case through the broadscale tree clearing policy.

[23] The 2000 broadscale tree clearing policy has the stated purpose of providing 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."

[24] Among the outcomes which the policy seeks to achieve are the following:

- 5.1.1. Maintaining or enhancing the conservation status of regional ecosystems.
- 5.1.2. Protecting remnant *endangered* and *of concern* regional ecosystems from clearing.
- 5.1.3. Retention of at least 30% of the pre clearing (or original) extent of remnant vegetation on a bioregional basis."

[25] At 10.1.1., the policy establishes that the "Zones for Tree Clearing Guidelines" are the 13 bioregions of Queensland. The two relevant in this case are the Brigalow Belt and the Mulga Lands. At 10.2.1., the policy states that at the broad landscape scale, the native vegetation community to be used in this policy and in the local guidelines is a *regional ecosystem* as defined in the *Vegetation Management Act 1999*. At 10.2.2., the policy states that *Regional Ecosystem Maps* and *Remnant Maps* certified for use under the *Vegetation Management Act 1999* will be used in applying this policy and local guidelines.

[26] Appendix 2 of the policy sets out a code for the clearing of vegetation and the means of achieving the purposes of the code. For example:

**"Purpose 1 The protection of remnant *endangered* regional ecosystems**

Purpose 1 is achieved by not clearing in any remnant *endangered* regional ecosystem except where the chief executive is satisfied that:

- a) the clearing is necessary to prevent the remnant *endangered* regional ecosystem from a threatening process; or
- b) the clearing is essential for establishing a necessary fence, road or other built infrastructure and no suitable alternative site exists; or
- c) the vegetation is not part of a remnant *endangered* regional ecosystem.

**Purpose 2 The protection of remnant *of concern* regional ecosystems**

Purpose 2 is achieved by not clearing in any remnant *of concern* regional ecosystem except where the chief executive is satisfied that:

- a) the clearing is necessary to protect the *of concern* regional ecosystem from a threatening process; or
- b) the clearing is essential for establishing a necessary fence, road, or other built infrastructure and no suitable alternative site exists; or
- c) the vegetation is not part of a remnant *of concern* regional ecosystem."

[27] The *Vegetation Act* contains the following relevant definitions:

**"*regional ecosystem*** means a vegetation community in a bioregion that is consistently associated with a particular combination of geology, landform, and soil."

**"*regional ecosystem map*** –

- 1. a *regional ecosystem map* means a map –
  - (a) certified by the chief executive as the regional ecosystem map for a particular area; and
  - (b) maintained by the department for the purpose of showing, for the area –
    - (i) remnant endangered regional ecosystems; and
    - (ii) remnant of concern regional ecosystems; and
    - (iii) remnant not of concern regional ecosystems; and
    - (iv) numbers that reference regional ecosystems."

**"*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 10000 ha."

*"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 10000 ha."

*"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 10000 ha."

[28] The *Vegetation Management Regulation 2000* sets out the *endangered, of concern* and *not of concern* regional ecosystems in each of Queensland's bioregions in Schedules 1, 2 and 3: Regulation 2(1), (2) and (3).

[29] Regulation 2(6) provides as follows:

"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."

[30] A footnote to that regulation states:

"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."

A reference is also given to the EPA's website.

[31] I was provided with extracts from the website containing an explanation of the regional ecosystem framework based on a three-part numbering system consisting of the bioregion, the land zone and the vegetation. That explanation contains references to publications by Sattler and Williams (1999) and Neldner et al (2005). Extracts from those two publications were also provided by the respondent, with a submission that they are extrinsic material that may be referred to in interpreting the meaning of the regional ecosystem classifications under the *Vegetation Management Regulation 2000*. (See s.14B of the *Acts Interpretation Act 1954*.) I accept that submission.

[32] In this regard, I note that at pages 22 and 23 of the Neldner publication, after explaining the procedure used by the Queensland Herbarium to classify an area to the correct regional ecosystem from information and data from a large number of sources, the authors conclude by saying that:

"A regional ecosystem determination is generally possible from these data sources, however a field inspection may be necessary."

[33] In my view, the Broadscale Tree Clearing Policy is linked to the statutory scheme. It addresses the various issues which the decision maker is required to consider under s.262 of the *Land Act*. Although there is some discretion to depart from the policy, under s.263(3), the policy must be applied unless special circumstances exist.

## **The Remaining Issues in this Appeal**

- [34] On 5 November 2001, the appellant made an application for a permit to clear 3,727 hectares of remnant vegetation on "Khyber". On 30 August 2006, leave was granted by the court to amend the application area to 2,555 hectares to exclude areas of commercial timber on the south-east boundary of the property.
- [35] The area has been further reduced as a result of biodiversity constraints, which were agreed to by the experts for both parties, Mr Delaney for the appellant and Mr Chenoweth, for the respondent. The area was further reduced by watercourse buffers in accordance with the Broadscale Tree Clearing Policy.
- [36] The only remaining issues in dispute are between the vegetation experts, Dr Ian Beale for the appellant and Dr Don Butler for the respondent. Both experts inspected the relevant areas of "Khyber". While Dr Beale does not dispute the conservation status of the regional ecosystems which are classified as *endangered*, he disputes the accuracy of Dr Butler's classification and mapping of the areas in five polygons.

## **The Evidence of the Experts**

- [37] Dr Beale had been instructed by the appellant to provide his opinion of the regional ecosystem mapping in the amended application area. He gave evidence that he inspected the relevant area of "Khyber" on two occasions, on horseback on 4 March 2005 and by motorcycle on 15 August 2006. In addition to his ground truthing inspections, Dr Beale was assisted by aerial photographs, satellite imagery, a 1978 version of a land use study and various versions of the regional ecosystem mapping.
- [38] Dr Beale agreed with much of the latest version of the regional ecosystem mapping amended by Dr Butler. However, he disagreed with the mapping in five areas which he identified as Polygons 1 to 5. Polygons 1, 2 and 3, either in whole or in part, are areas classified by the regional ecosystem mapping as *endangered*. Polygons 4 and 5 are in areas classified as *not of concern*, (RE 6.5.9 dominantly), however as that ecosystem was considered by Dr Butler to be below the threshold of 30% of its pre-clearing extent, it was regarded by him as *of concern*.
- [39] It emerged in evidence that Dr Beale relied heavily on the Western Arid Region Land Use Study (WARLUS) undertaken by the Department of Primary Industries in the 1970's. WARLUS Part 4 (Turner 1978), according to Dr Beale "... provides the best reference manual from which to classify land and vegetation units in the subject area."
- [40] Dr Butler had classified the area in Dr Beale's Polygon 1 as comprising three regional ecosystems, 11.4.3, 11.4.7 and 6.5.9. He described the majority of Polygon 1 as supporting a canopy of poplar box over a diverse scrub layer, interspersed with numerous

groves of brigalow. However, Dr Beale was of the opinion that Polygon 1 should be mapped as re 11.5.3, poplar box, ironbark on sand plains, a regional ecosystem which is *not of concern*. Based on his inspection, Dr Beale did not think the area was clay plain and while there was scattered brigalow and belah, they were not significant.

[41] Dr Butler contended that the aerial photography clearly shows that Dr Beale had disregarded some substantial areas of very dense brigalow and belah, particularly in the north-east and central south of the polygon. His observations showed that outside the very dense patches of brigalow and belah there was quite dense brigalow and belah fitting RE 11.4.3.

[42] In contrast to Dr Beale's finding that the area is a sandy plain, Dr Butler observed that the soil surface texture associated with most of the poplar box dominated vegetation within Polygon 1 was a sandy clay. He explained that this suggested that the soil is a texture-contrast soil, a soil with a sandy or loamy surface horizon, overlying a clay sub-soil. The presence of dense brigalow, including some areas of gilgai development, was further evidence of the prominence of clay in this landform. Dr Butler explained that the main indicator of the area being landzone 4 (deep and clayey soils) as distinct from landzone 5 (deep and sandy soils) was provided by the groves of brigalow that occur throughout the poplar box woodland in that polygon.

[43] Dr Beale's Polygon 2 had been mapped by Dr Butler as containing regional ecosystems 11.4.3, 6.5.9 and 11.7.1. However, Dr Beale was of the opinion that it should be mapped as RE 6.5.18 because the dominant vegetation was mulga, poplar box, ironbark and false sandalwood on a sandy plain, rather than clay. There was, he said, insignificant brigalow and belah present.

[44] Dr Butler described Polygon 2 as generally sandier than Polygon 1 and also shallower. He observed substantial areas of brigalow with emergent blackbutt in the north-western section. He was confident of his classification of that area as RE 11.4.3. He also explained why his classification of part of the polygon as RE 11.7.1, was correct.

[45] Dr Butler agreed that the dominant vegetation is mulga. He said that the key difference between what he classified as RE 6.5.9 and RE 6.5.18, as classified by Dr Beale, is the diversity of other trees as emergents or in the canopy in RE 6.5.9, while RE 6.5.18 is basically mulga with poplar box emergents. Dr Butler said he classified the mulga as RE 6.5.9 because it often had trees other than poplar box or silver leafed ironbark as emergents or in the canopy.

[46] Dr Beale's Polygon 3 had been mapped by Dr Butler as containing predominantly RE 6.5.9, but including regional ecosystems 11.4.7, 11.10.7 and 11.7.1. Dr Beale was of the

opinion that the area is not clay plain and that the presence of brigalow and belah is not significant. He also thought that the classification as RE 11.7.1 was erroneous as he saw no steep scarp. In Dr Beale's opinion, the areas dominated by mulga should not be RE 6.5.9, but should be RE 6.5.18/11.10.7 because the area was predominantly sandy plain. He based his assessment mostly on satellite imagery and aerial photographs.

[47] Dr Butler did not agree, referring to his comments regarding Dr Beale's assessments of various regional ecosystems in the other polygons.

[48] Dr Beale's Polygon 4 had been mapped by Dr Butler as RE 6.5.9, a *not of concern* regional ecosystem. However, because of the threshold issue, RE 6.5.9 has become *of concern*. Dr Beale thought that it should be classified as RE 6.5.18, predominantly mulga box and ironbark; although mulga was the dominant vegetation, there was an absence of understorey.

[49] Dr Butler was confident that he had appropriately mapped this area as RE 6.5.9, not RE 6.5.18, for the reasons he gave for Polygon 2.

[50] Dr Beale's Polygon 5 was also mapped by Dr Butler as RE 6.5.9, but including RE 6.7.1. Dr Beale had not inspected this area, but had relied on an aerial photograph. He thought that the area should be mapped as RE 11.5.3, poplar box, ironbark on sand plains dominated by box. On the other hand, Dr Butler was confident of his mapping of the area as mulga with emergents that include poplar box. It also supports bendee, RE 6.7.1.

[51] Dr Butler had traversed Polygon 5 on his inspection. Dr Beale had not and conceded that as he had ground truthed the area, Dr Butler was in a better position to assess the correct regional ecosystem.

### **The Evidence Considered**

[52] Dr Beale agreed with much of Dr Butler's mapping, being satisfied with the accuracy of most of the areas outside the five polygons. The area occupied by Polygons 1 and 2 had been mapped by Dr Butler as *endangered*, part of the area occupied by Polygon 3 as *endangered* and part as *of concern* because it was below the threshold, but part of it was *not of concern*. Dr Butler assessed the areas occupied by Polygons 4 and 5 as *of concern*, because they were below the threshold. Dr Beale had assessed the areas of all five polygons as *not of concern*. In his opinion, the whole of the areas in those five polygons could be cleared.

[53] Dr Beale made it clear that he had little confidence in the accuracy of the regional ecosystem mapping. He considered that it needed more ground truthing. He assessed the five polygons with the assistance of satellite imagery, aerial photographs and a GIS program in conjunction with his inspections. He did not use a stereoscope.

- [54] Dr Beale knows the country and the land types well. He has lived and worked extensively in the Mitchell/Charleville area. However, he relied heavily on the 1978 version of the WARLUS broadscale mapping system. There is evidence that the WARLUS system of vegetation and land mapping has been incorporated into the more modern version of regional ecosystem mapping used by Dr Butler.
- [55] Dr Butler clearly had made comprehensive records of his inspection of the area, which he applied to his interpretation of the aerial photography, satellite mapping and other material, including WARLUS. Where he and Dr Beale differed, Dr Butler gave detailed and convincing reasons for his mapping.
- [56] On the other hand, although he took some notes of his 2005 inspection, Dr Beale did not write a report or produce a species list. He said that he was tying the GPS points to the aerial photographs. What notes he took, he provided to Mr Kenny of Devine Agribusiness. However, no disclosure of those documents was made.
- [57] On his second inspection by motorcycle, Dr Beale said he found it difficult to take detailed notes of species, but he considered that he had sufficient to tell what type of country he was going through and why he did not agree with Dr Butler's mapping. In cross-examination he said, "I am reasonably sure I told you what I saw."
- [58] One major area of dispute was Dr Butler's statement that the endangered regional ecosystems on "Khyber" occur on a plateau of red earth. Dr Beale's contention was that this was more likely to indicate sandy mulga dominant species than clay plains supporting brigalow and belah. However, I find Dr Butler's evidence more convincing, that the vegetation is consistent with texture contrast soils, with a sandy or loamy surface horizon (which gives the area the red colour), overlaying a clay subsoil.
- [59] It seems to me that the essential difference between Dr Butler and Dr Beale is whether the area mapped as *endangered* regional ecosystems in Polygons 1, 2 and 3, should be classified as landzone 4 (clay) or landzone 5 (sand) and the type of vegetation that grows on those landforms. After considering the whole of the evidence, I have come to the conclusion that the evidence of Dr Butler is to be preferred.

### **The Threshold Issue**

- [60] Dr Butler had classified Polygons 4 and 5 as RE 6.5.9, a *not of concern* regional ecosystem. Other areas outside the *endangered* area were also assessed as RE 6.5.9. However, Dr Butler gave evidence that data provided by the Department from the Electronic Land and Vegetation Administration System, identifies that RE 6.5.9 is currently at the threshold of changing conservation status from *not of concern* to *of concern*. This was demonstrated by the following data:

Pre-clearing extent	231,027 ha
Mapped extent as at 2003	89,366 ha
Threshold (30% of pre-clearing)	69,308 ha
Approved extent to date	26,238 ha
Remnant above threshold	-7,755 ha

[61] Dr Butler concludes that based on the information provided and his own investigations of the site, clearing of the areas of RE 6.5.9 would further reduce the extent of this regional ecosystem below the 30% threshold and change its conservation status to *of concern*.

[62] On the other hand, Dr Beale argued that the area of 26,238 hectares approved since 2003 is unlikely to be cleared before the moratorium date of 31 December 2006. He based his opinion on data supplied by the Queensland Herbarium, which showed that the annual rate of clearing in the years 2000, 2001 and 2003 averaged 1.03%. At that rate of clearing, he concluded that the 30% threshold would not be exceeded prior to 31 December 2006, at which time all broadacre clearing must stop, whether permits were granted or not. Therefore, in Dr Beale's opinion the conservation status of RE 6.5.9 would remain *not of concern*, as there would be still more than 30% of the pre-clearing extent remaining by 31 December 2006.

[63] In my view, Dr Beale's argument may have some validity if that rate of clearing had continued since 2003. However, I have no evidence of the area of RE 6.5.9 that has been cleared in that period. The evidence is that an area of 26,238 hectares has been approved for clearing since the 2003 regional ecosystem mapping.

[64] With the approaching moratorium on broadscale tree clearing, it must be assumed that any landowner with approval to clear remnant vegetation would endeavour to do so before that date. I am therefore of the view that the threshold of 69,308 hectares is likely to be exceeded before the moratorium date. Therefore, I find that regional ecosystem 6.5.9 is *of concern* and cannot be cleared.

## **Decision**

[65] Before the conclusion of the hearing on 30 August 2006, a series of seven maps was admitted as Exhibit 15. These maps show each of the areas excluded for reasons of commercial timber, watercourse buffers, biodiversity corridors and *endangered* and *of concern* regional ecosystems (as mapped by Dr Butler). The final map shows what can be cleared, an area of approximately 1,385 hectares. This map shows a reasonably large consolidated area in the north-west of "Khyber". However, to the east of the biodiversity corridor several smaller and scattered areas are able to be cleared.

[66] On 7 September 2006, I delivered my decision in this matter, allowing the appeal and giving brief preliminary reasons why I preferred the evidence of Dr Butler in respect of the disputed areas. I also ordered that the respondent prepare a tree clearing permit in accordance with the Court's preliminary reasons and that the parties confer as to the appropriate conditions. I also requested that the parties consider whether it was possible to consolidate some of the scattered areas to the east of the biodiversity corridor.

[67] When the hearing resumed, I was told that there had been minor alterations to one of the areas to the east of the biodiversity corridor, but that the final calculation of the area that can be cleared is 1,373 hectares. The appellant did not dispute the calculation of the area or the conditions of the tree clearing permit.

[68] Finally, I received written submissions and heard argument from both parties as to costs.

**Orders:**

1. The review decision is set aside.
2. The Court substitutes the review decision with a decision that Tree Clearing Permit No. 2006/001433, as attached to this order, issue with the conditions shown in that permit.
3. Costs of this matter are reserved.
4. Any further submissions responding to the parties' written submissions on costs be filed within seven (7) days.

**JJ TRICKETT**

**PRESIDENT OF THE LAND COURT**