[redacted] v. [redacted] v [redacted] [2008] QDC 275 (28 November 2008)

Last Updated: 5 December 2008

DISTRICT COURT OF QUEENSLAND

CITATION: [redacted] *v* [redacted] *v* [redacted] [2008] QDC 275

PARTIES: [redacted]

(Appellant)

v

[redacted]

(Respondent)

[redacted]

(Appellant)

v

[redacted]

(Respondent)

FILE NOS: Appeals 79/06 and 80/06

PROCEEDING: Appeals from Magistrates Court at Southport

DELIVERED ON:	28 November 2008
DELIVERED AT:	Southport
HEARING DATES:	26, 27 & 28 May and 20, 21, 22 & 23 October 2008
JUDGE:	C.F. Wall Q.C.
ORDERS:	Appeals against conviction by each appellant allowed; convictions set aside and in lieu thereof the complaint against each appellant dismissed.
CATCHWORDS:	Appeal – Magistrates Court – prosecution by local authority – individual and corporate defendants – separate consideration of case against each required – limitation period for prosecution – within 1 year after the commission of the offence – whether evidence established offence within limitation period – duplicity – damaged or permitted damage to protected vegetation – corporate liability – power to amend complaints at summary hearing – proof of local law.
LEGISLATION:	*Local Government Act* 1993 Sections 874, 898, 1080, 1117 *Justices Act* 1886 Sections 43, 47, 48 *Local Law 6* (Vegetation Management) (Gold Coast City Council) Sections 3, 24 *Interim Local Law 6* (Gold Coast City Council) Sections 5, 30 *Statutory Instruments Act* 1992 Section 7 *Evidence Act* 1977 Section 43
CASES:	*Bernard Elsey Pty Ltd v Commissioner of Taxation* [1969] HCA 46; (1969) 121 CLR 119

Bowman v Brown (2004) QPELR 416

Broome v Chenoweth [1946] HCA 53; (1946) 73 CLR 583

Chappel v A Ross & Sons Pty Ltd [1969] VicRp 48; (1969) VR 376

Commonwealth DPP v Hart (No. 2)[2005] QCA 51; (2005) 2 Qd. R 246

Dever v Creevey (1993) 1 Qd R 232

EPA v CSR Ltd [2001] NSWLEC 41; (2001) 114 LGERA 217

Flanagan v Remick [2001] VSC 507; (2001) 127 A. Crim R. 534

Fred Wakefield Pty Ltd v Dowd (1979) 20 SASR 328

G J Coles & Coy Ltd v Goldsworthy (1985) 57 LGRA 123 *Hackwill v Kay* [1960] VicRp 98; [1960] VR 632

Hamilton v Whitehead [1988] HCA 65; (1988) 166 CLR 121

Hamzy v R (1994) 74 A. Crim R 341

Hornsby Shire Council v Winsloe (1998) 101 LGERA 117

Iannella v French [1968] HCA 14; (1968) 119 CLR 84

Johnson v Miller [1937] HCA 77; (1937) 59 CLR 467

Kerr v Hannon [1992] VicRp 3; [1992] 1 VR 43

Laird v Mitchell [1930] St. R. Qd 38

Marshall v Averay [2007] QPELR 137

Miller v Williams (1990) 53 SASR 82

Mitchell v Myers [1955] WALawRp 6; (1955) 57 WALR 49

R v Traino (1987) 45 SASR 473

Taylor v EPA [2000] NSWCCA 71; (2000) 113 LGERA 116

Walsh v Tattersall [1996] HCA 26; (1996) 139 ALR 27

COUNSEL Appellants - Mr D H Denton SC

Mr G R Allen

Respondent - Mr C L Hughes SC

Mr N S Skoien

SOLICITORS: Appellants- Deacons Lawyers

Respondent - Michael Sing Lawyers

Introduction

[1] These are appeals by [redacted] (hereinafter called the defendants) against convictions in the Magistrates Court at Southport on 20 January 2006. Each has also appealed against fines of $35,000 and $50,000 respectively imposed on them on a later date. The complaints were heard together and together with a complaint against [redacted] wife which was in identical terms to the complaint against him.

[2] As amended at the hearing, and so far as is presently relevant, each complaint was in the following terms:

Gold Coast City Council

~~Interim~~ Local Law 6 (Vegetation Management)

~~Section 5(1)~~

"**The Complaint** of [redacted] Manager Health and Regulatory Services to [sic] GOLD COAST CITY COUNCIL of Surfers Paradise in the State of Queensland made this 12th day of February 2004, for and on behalf of the said Council, before the undersigned, a Justice of the Peace for the said State, who says that on a date between December 2000 and November 2003, upon land located at ~~220~~ Petsch Creek Road, Tallebudgera Valley in the State of Queensland which land is more particularly described as Lot ~~3~~ **2 & 3** RP 168625 County Ward Parish Tallebudgera...

[redacted] as owner of the property did, in breach of Local Law damage, or ~~cause~~ **permit** to be damaged, protected vegetation (namely trees equal to or in excess of four metres in height and/or in excess of forty centimetres in girth DBH (Diameter Breadth Height) measured 1.3 metres above average ground level)

contrary to section ~~5(1)~~ **3** and section ~~30~~ **24** of Local Law 6 (Vegetation Management) in such case made and provided:

PARTICULARS

1. Approximately 97,100 square metres of vegetation have been damaged or destroyed on Lots 220 and 238 Petsch Creek Road, Tallebudgera. Based on a minimum average of 9 trees per 25 square metre area being protected vegetation within the meaning of the Local Law 6, this equates to an estimated total of 34,956 trees destroyed or damaged on the said properties.

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1. Approximately 97,100 square metres of vegetation have been damaged or destroyed on Lots 220 and 238 Petsch Creek Road, Tallebudgera. Based on a minimum average of 9 trees per 25 square metre area being protected vegetation within the meaning of the Local Law 6, this equates to an estimated total of 34,956 trees destroyed or damaged on the said properties."

[3] [redacted] and his wife owned Lot 3 and [redacted] owned Lot 2. Lot 3 was situated at 220 Petsch Creek Road and Lot 2 at 238 Petsch Creek Road.

[4] The prosecution alleged the widespread destruction of trees (protected vegetation) "caused by poisoning by or at the direction of [redacted]' (T 53, 318, 321 & 322).

[5] Each defendant was found "guilty as charged." [redacted] was found not guilty).

[6] [redacted] did not give evidence at the hearing. The number of trees alleged to have been damaged – 34,956 – was the result of a calculation by Joseph Hance, Environmental Assessment Officer of the Gold Coast City Council.

Legislation

[7] Section 24(1) of Local Law 6 provides:

"A person must not damage or permit to be damaged protected vegetation".

[8] Local Law 6 in s 3 contained the following definitions:

"damage" to vegetation includes destruction of the vegetation or interference with its natural growth including, but not limited to, ringbarking, cutting down, topping, lopping, removing or poisoning.

"protected vegetation" means vegetation throughout the City that is:

(a) equal to or in excess of 40 centimetres in girth DBA (Diameter Breast Height) (measured at 1.3 metres above average ground level)

"vegetation" means a tree or trees...

[9] The limitation period for each complaint is governed by s 1080 Local Government Act which is in the following terms:

"1080 Limitation on time for starting summary proceedings

A proceeding for an offence against this Act by way of summary proceedings under the *Justices Act 1886* must start —

(a) within 1 year after the commission of the offence; or

(b) within 6 months after the offence comes to the complainant's knowledge, but within 2 years after the commission of the offence."

[10] See also s 52 Justices Act. Section 1080 is a law relating to these particular prosecutions for the purposes of s 52.

[11] Para (a) of s 1080 applied here because there was no evidence as to "the complainant's knowledge" — para (b) — because the complainant [redacted] did not give evidence. Mr Hughes SC conceded (T 7-32) that there was no evidence of when each offence came to the knowledge of [redacted]

[12] The limitation period was therefore 12 months back from the date of each complaint (12 February 2004) that is, no further back than 13 February 2003. In the present case it was incumbent upon the prosecution to prove damage between 13 February 2003 and November 2003 i.e. between 13 February and 1 November 2003. November was the last month particularised by the prosecution.

[13] The definition of "damage" in Local Law 6 places emphasis on the act causing the destruction or

interference with the natural growth of the vegetation. That destruction or interference can be caused by ringbarking, cutting down, topping, lopping, removing or poisoning. These are acts which cause the destruction or interference.

[14] In the present case the act is poisoning which results in the later destruction of the vegetation or interference with its natural growth. The poisoning is the act which constitutes the offence.

[15] The gravamen of the offence is damaging protected vegetation. That is committed by an act which has a consequence – the destruction of or interference with the natural growth of the vegetation. The offence is not committed by reference to the consequence; it is committed by reference to the act having or causing that consequence.

[16] In a case such as the present it may be difficult for a complainant to come within s 1080(a) hence s 1080(b). In the case of s 1080(b) if the complainant observes a dead or dying tree he has 6 months to start proceedings provided he can prove that the tree was poisoned no more than 2 years ago/previously and that the tree was dead or dying because of that poisoning. To gain the benefit of s 1080(b) there must be evidence of when the offence came to the complainant's knowledge. In the present cases the complainant did not give evidence and therefore had to rely on s 1080(a). In effect this required proof by the complainant that trees were fatally poisoned between 13 February and November 2003 and this represented an almost insurmountable hurdle for the prosecution to overcome more so since the preponderance of the evidence established poisoning before 13 February 2003.

[17] Section 1080 is only capable of sensible interpretation if, in the context of the present case, the offence it speaks of is the doing of an act or permitting that act to be done. In the present case that act is the act of poisoning a protected tree causing it to die or causing interference with its natural growth. The act is poisoning with either of those consequences. The act – the offence – is not either of those consequences notwithstanding that either consequence must be proved to have occurred as a result of the act of poisoning. This was the way the prosecution approached the offence.

[18] If the offence referred to in s 1080 is the consequence of an act rather than the act having that consequence there would be little point in having the section expressed in the terms in which it is.

[19] Put simply the offence is constituted by the act having the result not the result of that act.

[20] On the first day of the hearing the defence requested from the prosecution "some particulars of what date (between December 2000 and November 2003) it is that's alleged in the complaint" (T 20). None were provided. The prosecution said they couldn't "particularise a particular weekend or a day" (T 35-36).

[21] Also on the first day, in opposition to the prosecution's application to amend the complaints, the defence referred to s 1080 (T 15) and submitted that the conduct complained of, occurring on an unspecified date (or dates) between December 2000 and November 2003, was "plainly and clearly outside any 12 months time limit" (T 33) and that "no offence known to law was charged" and "that in this present form the complaints can't be the subject of a prosecution" and should be dismissed (T 34). The prosecution disagreed (T 35).

[22] On 15 June 2005 the magistrate allowed the complaints to be amended but did not refer to the limitation period perhaps preferring to see how the evidence came out. It was though a matter that had to be dealt with at some point.

Findings by the magistrate

[23] In convicting the defendants the magistrate said and made findings as follows:

(1) The time when the trees were cut or poisoned was in dispute. (Cutting or poisoning may have been what the magistrate had in mind when dealing with "damage").

(2) The first matter in dispute was - was the damage done with a pick to the trees after the year 2000? (This is wrong, the issue was – had the prosecution proved that the defendant damaged protected vegetation between 13 February 2003 and November 2003? The magistrate initially distinguished between damage to trees and damage to protected vegetation [he said "the complaints arose as a result of there being extensive damage to trees and protected vegetation which was reported to the council"] but then referred only to damage to trees perhaps meaning trees which came with the definition of protected vegetation but possibly encompassing trees which did and trees which did not).

(3) In 2000 witnesses did not see signs or evidence of trees having been poisoned on "the property" (The magistrate in describing it thus did not distinguish between Lot 2 and Lot 3).

(4) In May 2001 an external inspection (by Hance) showed some significant size trees were dead.

(5) In June 2003 Hance observed the majority of trees of significant size appeared to have a chop mark.

(6) Mr Ison (an agricultural scientist called by the Council) considered the holes on the trees to be more recent than the year 2000 (Ison inspected the properties – Lots 2 & 3 – on 19 November 2003 (T 149)).

(7) Dr Olson (a field botanist and ecologist called by the Council) conducted an inspection in December 2004. He gave evidence of a majority of the trees being killed prior to December 2003. From the photographic exhibits between 2001 and 2003 there was a dramatic decline in the canopy... he calculated the vegetation was dead for at least 2 years before he saw it (i.e. prior to or by December 2002).

(8) Damage was done to a substantial number of trees in late 1999 and 2000; further trees were damaged and poisoned after the dates of the council inspection in 2000 (those inspections took place in May, July and December 2000).

(9) In relation to the large trees which were damaged prior to 2000 poison was continually applied, not only to the undergrowth but to such an extent also there to cause these large trees to die.

(10) There was an intention by [redacted] to destroy trees as defined in Local Law 6.

(11) Viewing photographic exhibits showing change from 2001 and 2003 one can see a marked change over the period consistent with the poisoning of the vegetation. (He did not make any finding as to when

that poisoning occurred).

(12) Hance calculated approximately 99,100m² or 10 hectares of vegetation had been destroyed and approximately 34,000 trees in number.

(13) Extensive damage (was) done over 10 hectares and over 30,000 trees (were) destroyed.

(14) The various pictorial exhibits show severe damage to a great number of trees over a large area and are consistent with a person's attempt to clear the area of all vegetation. (Again no finding was made as to when the damage was caused).

(15) The defendant [redacted] and the company [redacted] are found "guilty as charged."

[24] The fact that the defence contended that no protected vegetation was damaged by the defendants after 2000 did not, because of s 1080(a) and the earlier objection taken by the defence referred to in para [21] relieve the magistrate from considering whether it had been proved that the defendants damaged or permitted to be damaged protected vegetation between 13 February 2003 and November 2003. It is not correct to submit, as did Mr Hughes (T 7-35, 36), that because the primary thrust of the defence was that no damage was caused after 2000 the prosecution need only prove damage between December 2000 and November 2003. Mr Hughes also conceded that this issue was not addressed by the magistrate but submitted (T 7-32,33) that this was because it was not argued before him. It was in fact argued on the application to amend the complaints. Regardless of how the defence was conducted it was incumbent upon the prosecution to prove the elements of the offence charged and that included proving that the defendants caused damage within the limitation period. The defence case was that no damage had been caused then. The prosecution was required to prove that it had been. It was not sufficient proof of that element that damage may have been caused in 2001, 2002 and 2003 before 13 February. It is not the same as not taking a point at trial which if taken could have then been cured by the prosecution, as to which see Bowman v Brown (2004) QPELR 416 at 428 and Dever v Creevey (1993) 1 Qd R 232 (see para [122]). Here the prosecution apparently called all the evidence it could about when the damage was caused.

The evidence relevant to the limitation period

[25] In a Memorandum by Gordon Coutts, Local Law officer, Gold Coast City Council, dated 24 June 2002, ex 21, "Subject:- 220 and 238 Petsch Creek Road, Tallebudgera Valley" Mr Coutts said:-

1. "The "property" was inspected by Coutts, James Brooks, Local Law officer and Joe Hance, Environmental Assessment officer on 19 June 2003.

2. "A great number of trees appear to have died. A dozen trees were inspected closely and most appeared to have been poisoned. Trees were numbered and photographed (ex 15). Poisoning was determined as cuts had been made by an implement, and marks on the trees were all consistent, generally between one and three on each tree. The trees were long dead and Joe Hance said it was impossible to determine when the trees had been poisoned. A great number of trees appear to have been killed off in this way and would number in the hundreds."

3. "[redacted] stated that he had not damaged, poisoned or removed any trees since the (first) court hearing" (which is a reference to an earlier prosecution on 17 May 2001 and damage to trees caused before the end of 2000).

[26] In evidence Hance said of this inspection:

– "at that time most of the significant vegetation was dead or dying or in the stages of death or dying" (T 100).

– "basically what I saw in 2003 was the majority of the significant vegetation was dead, dying or in a state of severe decline. When I went back in 2004 (January – T 105) there was a bit more progression because there wasn't much left to die" (T 106).

– he couldn't make a judgment on how long the cuts or marks shown in the photos, ex 15, had been there because of the death of the trees; he couldn't say if they were a year old, a month old or 2 years old. The (same) tree in photos 1 and 3 "has probably been dead less than 2 years" or "2 years or less" (T 121).

– that he didn't particularly notice the age of the marks, chops or cuts but "they didn't look as though they'd been done the day before or that they were obviously fresh" (T 133).

– he returned to "the site" in January 2004 "to quantify the number of protected trees that had been destroyed" (T 105). He said "Basically what I saw in 2003 was the majority of the significant vegetation was dead, dying or in a state of severe decline. When I went back in 2004 there was a bit more progression because there wasn't much left to die" (T 106).

[27] In evidence Mr Coutts said of the inspection – that he "saw evidence of death of trees on a rather wide scale... Quite a large number of significant trees had died or appeared to be dying" (T 211). By "significant trees" he meant those described in the Local Law has having a girth greater than 40cm and exceeding 4m in height. Apart from those trees there was other smaller vegetation that were also dead or dying (T 219).

He said the memo ex 21 was "an accurate account of the site inspection and the events (he) saw that day" (T 213).

[28] Raymond Ison gave evidence of his inspection of "the property" – Lots 2 and 3 – on 19 November 2003 (T 149). He said the majority of the native vegetation "was dead." He said [sic] "The mature trees were principally dead with some of them still contained some dead leaves. The odd tree that had some green and some dead leaves and very very few trees had still had significant green leaves... It was only the native vegetation that was showed the death or severe stress" (T 150).

He then gave this evidence [sic]:

"... were all of the mature native trees on the site bare or did some of them have leaves on them? - - Some of them had some leaves.

Was that indicative that they were dead or what state were they in the ones that had some leaves? - - I'd say they were dying (T 150).

... the native vegetation which you saw as being dead or dying. Did any of those answer these dimensions either in excess of 4 metres or 40cm girth at breast height? - - yes they did. The majority of those larger trees were clearly well in excess of that definition.

... How may are we talking about...? - - 10 or 20,000 trees (but he didn't inspect every tree to assess the type of damage to each) (T 176-177).

He said (T 177) that he looked at a small section of the property and assumed the balance of it was the same.

Mr Ison took 18 photos – ex 19 (T 157). He said the dead tree in photo 6 "looks like it's been dead for a while..." (T 157).

He explained what was shown in each photo in the order in which they are in ex 19 (T 158-163) and then gave this evidence –

"Well, now I take it from those photographs, you were satisfied that some of the interference to the trees was recent, aged within 3 months of your visit? - - Yes, some of that damage – a lot of the damage would have occurred progressively from – there had been some evidence of further damage in the last few months" (T 163).

It seems that by "damage" Mr Ison meant "destruction" or "death".

In cross-examination he was asked whether he could say when the (same) tree shown in photos 14 and 17 died. He said:

"No I can't be sure when that particular tree died because I can't see the top of it.

Sometime ago, I would suggest. Sometime prior... to 19 November 2003. It's not a recent death? - - That's possible" (T 169).

He was then referred to photo 17 and was asked whether the tree on the right hand side of the photo was dead or dying. He said:

"I can't be sure... but from my memory... the majority of those trees in that area were dead so it's a high probability it would be dead" (T 169).

Later he said (T 172):

"I was only seeking to comment on the damage I observed on the site on the day. So, I can't really comment on historical damage".

Mr Ison said (T 153-161) that he saw evidence "on the property" of a relatively recent fire – light, not intense – on the property", probably around August 2003; "it definitely wouldn't have been 12 months prior" to his inspection. He said "it was just in the last few months."

He said he was able to say that there was damage that occurred prior to the fire and damage that occurred after the fire (T 172). He said (T 173) that "a number of the trees had had cut marks put into the tree after the fire."

He continued (by reference to the tree stumps shown in photos 8, 9 and 10)

"... the damage that appears to have occurred after the fire **in the cutting down of the tree? - - Yes**

You're not suggesting any damage other than the cutting down of the tree after the fire? - - No, after the fire the tree had been completely severed and had fallen over" (T 173).

(The case against the defendants involved damage as a result of chopping and poisoning, not cutting down trees).

He said he couldn't be sure when the damage – the removal of bark – shown in photo 7 occurred but it may have been done "in the last 12 months, maybe 2 years at the most,... within the last 2 years" (T 174-175).

He could not be sure when the trees shown in photo 4 died (T 175).

He said the damage shown in his photos (ex 19) would have occurred 6 – 12 months after the poison (herbicide) was applied "but that depends on the size of the tree and the amount of herbicide that's applied" (T 180). He said "I don't believe all these trees would have all been treated and died in the same period of time" and that not all of the trees in the area uphill above the lowest fire break were protected vegetation (T 181).

By reference to the photos, ex 9, taken by Wesley Palmer on 11 October 2003 Mr Ison said "clearly the bulk of the trees are dead" in those photos, "so there's clearly been – something has caused the death of the plants across the whole property in that time" (without specifying the time) (T 186-187).

[29] None of this evidence by Mr Ison was referred to by the magistrate.

[30] Dr Michael Olson didn't go onto Lots 2 or 3 but inspected them from Petsch Creek Road and the council reserve to the north of the land on 10 December 2004, nearly 10 months after the date of the complaints.

[31] He observed "extensive areas where canopy trees had been killed by artificial means – the bases of the dead and dying trees had penetrating wounds obviously caused by some metallic object, some with axe, some with – looked like a geological pick, which is a standard technique for applying herbicides..." (T 224).

[32] He gave this evidence at T 226 –

"Are you able to assist by estimating when in your opinion, or over what period, the trees that you examined in December 2004 were likely to have been poisoned? - - Whilst I'd be unable without a series of remote images to give the time frame, **certainly the majority of the trees had been killed well in excess of 12 months prior to any visit**... probably the better part of 90% of the canopy was dead at the time of my site inspection. And 90% of that canopy **would have been dead for at least 12 months, possibly 2 years**.

He was shown the 2001 and March 2003 aerial photographs (ex 4) and asked whether they assisted him in forming "a view as to when the trees were subject to poisoning". He answered (T 228) –

"The majority of trees (standing dead trees) in this area... were killed prior to 2003. But there have been subsequent tree deaths but... of a magnitude at least less than the number of trees that would be killed prior to 2003".

He then compared the March 2003 aerial photo (ex 4) with ex 2, a photo taken in October 2003. He referred (T 228) to the lack of definition and said:

"...it would certainly appear that there are a greater number of individuals in the canopy (in ex 4 than ex 2). So it would appear there's been loss of canopy vegetation and foliage between the March photograph and ... October 2003. So a further loss of canopy individuals. The precise quantum could be done as a photogrametric exercise".

(Such photogrametric evidence was not put before the court and the qualifications of Mr Ison and Dr Olson to express opinions comparing photographs must be doubted).

Dr Olson next gave this evidence at (T 228-229):

"And what does that tell us about the likelihood of when poison was applied or whether poison was applied in the period prior to or between when those photographs were taken? - - As I said, I think the majority of canopy individuals on part of the site had been removed **in the interim**. And those were... progressive periods of canopy death exhibited on the site."

Mr Hughes submitted (T 7-37, 39) that "interim" meant the period between the two dates and that this evidence established damage between those dates but I read the evidence as more related to canopy death rather than when damage was caused. The answer seems more related to canopy removal or death than the likely date/s of the application of poison.

Dr Olson also gave this evidence –

"The photograph indicated to you that the standing dead timber you saw in December 2004 was healthy in 2001? - - yes, the majority of them" (T 236).

"... certainly the evidence that I saw was that... the entire canopy was dying" (T 238).

Dr Olson took photos – ex 23 – and some of them show damage to non-protected vegetation, see eg T 240.

He then gave this evidence (T 241-243):

"And did I also understand your evidence correctly to be that the vegetation could possibly have been dead for up to two years prior to your seeing it in December 2004? - - Some of the individuals may have been dead. It's difficult because there may have been some dead stag trees in the area, and they have lost all but their larger limbs.

Okay? - - So, they may have been dead for some time.

All right. And am I right in thinking it's impossible to be precise about when vegetation of that kind – it was obviously dead when you saw it? - - Mmm.

When it was killed, when it finally died? - - Certainly if we had a sequence-----

There's the photographs? - - ----- of aerial photographs.

You could pinpoint it? - - Yes. We know that it was alive in 2001. We know that the majority of it was – or the canopy and the understorey or the shrub layer -----

Yes?-- ----- was dead in 2003...

Yes, but what you don't know is the exact state of its health in 2001? - - With respect to?

The trees that you saw that were dead in 2004 and when you've -----? – The ones in -----

----- compared them with the 2001 aerial photographs? -- yeah, the 2001 aerial photograph indicates a healthy canopy in the trees that were clearly dead in the 2003 photographs.....

And you can't say when any Tordon or other herbicides were applied to any of those trees? - - To the majority of them? No, I can only-----

Yes?-- ----- say that the ones that I saw had recently -----

That the recent ones, yes?-- ----- had the herbicide application.

Yes, but the ones that you said the majority that were well in excess of 12 months dead prior to your visit and some cases possibly up to two years, you can't say-----? --I can't give you a date-----

No?-- ----- when it was applied.

No?-- But yeah, the same penetrative wounds were evident in the trunks of those. Some of them the bark had been completely lost, the tallow wood, for instance. The bark had been lost but you could still see the penetrative wounds where the only reason for those penetrative wounds would be for the application of herbicide.

Right? -- This – it wasn't a damage from an insect or-----

No, no, no?-- ----- any other natural means.

No? -- Yeah.

But you can't pinpoint when that occurred --No.

When that took place? -- No.

No? -- Some time after 2001 is -- yeah.

Well, you don't know that. All you know is that in 2001 the canopy was still alive? -- Yes.

Yes. You don't -- that doesn't mean that the herbicide wasn't administered before then? It would have had to have been administered very -----

At some time? -- No, No-----

But you don't know when, and you can't say when? -- Maybe within a day or two or a week perhaps, prior to that aerial photograph. But yeah, there's certainly-----

But if it had been administered months before-----?-- You would see it on the 2001 aerial photograph, yes.

If the dose that was administered was sufficient to kill it within that period of time. If the dose was sufficient to do that-----? --Yes, if-----

-----job, but it wasn't?-- If you're applying a dose to kill the trees, it would be readily apparent in the 2001 photographs-----

If the dose-----?-- -----it had applied within a couple of months, yes.

----- if the dose is sufficient to achieve that result-----? --Yes.

-----to kill the tree. If the dose is insufficient, it won't. The tree will still appear to be healthy? -- That is correct. If you applied the herbicide incorrectly.

Yes? -- Such a low concentration that -- yeah.

RE-EXAMINATION

MR HUGHES: Dr Olsen, just a propos of the last questions you were asked, if dose had been applied some months before, for example, the aerial photograph taken on 5 May 2001, I take it then it would not have been a sufficient dose to have killed the vegetation from what you saw in that aerial photograph of May 2001? -- No, of course not.

So, it would have had to have been – there would have had to have been a subsequent application of poison to kill the canopy to provide what we see in the photographs taken in October, Exhibit 2 and Exhibit 9 in the photographs taken in 2003? -- That is correct if there had been some herbicide application prior to that date it would not have killed the trees. That is correct."

[33] [redacted] gave evidence that no tree poisoning occurred after 2000. He said (T 277) that a total of 573 dead trees (trees killed) had been counted. In late 1999/early 2000 Cameron Stumer said that instructed by [redacted] he poisoned some of the trees. Thomas Dye said he worked for [redacted] from July 2000 until October/November 2003 but didn't cut and poison any trees.

[34] Mr Hughes agreed (T 6-17, 18) that it did not follow from rejection by the magistrate of this evidence by [redacted] that the defendants were guilty. He agreed that the magistrate was then required to consider whether the prosecution's evidence was sufficient to establish the charges.

[35] To summarise the prosecution's evidence –

Coutts and Hance: The trees were long dead by 19 June 2003 and it was then impossible to tell when they had been poisoned.

[36] Ison: Most of the native vegetation – 10 or 20,000 trees (protected vegetation) – was dead or dying by 19 November 2003 and may have been damaged 6 – 12 months or up to 2 years before then.

[37] Olson (who didn't go onto the land): Most trees would have been killed well before December 2003; most would have been dead by then, possibly by December 2002; most of the trees in the March 2003 photograph (ex 4) were killed prior to 2003; most of the vegetation was dead in 2003; it was poisoned sometime after 2001, he can't say when.

Hance calculations

[38] On council land adjoining the defendants land he counted the number of (protected) trees within 6 x 25m² plots (2 each of sparse, medium and heavy vegetation density) which were indicative of what was on the defendants land in 2001 and then calculated the average number of trees per plot. He then used the Council's easy map system (on a computer) and a ruler measurement device to determine the area of damage most noticeable on the defendants land and multiplied that by the average number of trees arriving at an area of 97,000m² of damaged vegetation. The area was calculated using an October 2001 aerial photograph within the easy map system. By this method he calculated the damage at "34,000 plus trees" (T 107). Most of the dead or dying trees (80%) were on Lot 2 ([redacted] land) and very little (maybe 20% at the most) were on Lot 3 [redacted] land).

[39] Using 34,000 (as the total number of dead or dying trees on Lots 2 & 3) 20% is 6,800 (on Lot 3) and 80% is 27,000 (on Lot 2).

[40] The calculations of Mr Hance did not bear upon the issue of when the damage calculated by him was caused, in particular it did not establish any damage occurring between 13 February 2003 and 1 November 2003. Mr Hughes conceded this to be so and submitted that one had to look at the photos and other evidence to establish that (T 6-31).

Was the evidence sufficient?

[41] Each of [redacted] and [redacted] were found "guilty as charged", that is, of "damaging or permitting to be damaged" 34,956 trees. Such a finding is understandable in the case of [redacted] as the offending alleged against him was said to have occurred on Lots 2 and 3 but it makes no sense in the case of [redacted] Pty Ltd because its offending was limited to what occurred only on Lot 2.

[42] The magistrate did not at all consider the limitation period or the evidence bearing on it; nor did he make any findings of when particular damage was caused other than that it occurred between the dates charged. He did not refer to the definition of damage or make any finding as to what if any damage had been caused between 13 February 2003 and November 2003. The respondent cannot exclude the fact that damage to the trees – the acts of poisoning – may have been caused or done before 13 February 2003.

[43] Proof of damage within the limitation period is an "essential factual ingredient" in the charges. See Taylor v EPA [2000] NSWCCA 71; (2000) 113 LGERA 116 at 125-126 and Johnson v Miller [1937] HCA 77; (1937) 59 CLR 467 at 486 and 489-490 per Dixon J.

[44] In Hackwill v Kay [1960] VicRp 98; [1960] VR 632 the Victorian Full Court said at p.634:

"The question, however, remains whether in this case the date was an essential part of the offence. Here the statute provides that an information for this offence 'shall be laid within 12 months from the time when the matter of such information arose *and not afterwards*'. The date of the alleged offence is therefore a most material matter and is, in our opinion, part of the essence of the offence."

[45] This case and Johnson v Miller were followed by Nathan J. in Kerr v Hannon [1992] VicRp 3; [1992] 1 VR 43. His Honour said at pp. 45-46:

"Both cases are binding authority for the proposition that where an information must be laid within a specified time from the date upon which it is alleged the offence was committed, it must contain that date or other particulars which would enable the defendant to ascertain the date. In the event of an information failing to do so, an amendment to insert the missing particulars made after the expiration of the time limit cannot be permitted. It would amount to the laying of a fresh information outside the time limit and thus be invalid.....

It has never been a principle of the common law that a defendant should be asked to assume or calculate particulars of an offence. It is the Crown which asserts a breach of the Act, and it must particularise with clarity, albeit briefly, the nature of the offence and the time at which it was committed."

[46] The difficulty for the respondent is highlighted by the respondent's submission (para 3.22):

"...that in the **absence of reliable evidence on the subject land itself** (Mr Hance's evidence) was based, as it had to be, upon the examination of adjoining land which was identified to be comparable to the subject land (in terms of its vegetated state prior to clearing)."

[47] This difficulty is also apparent from the respondent's submissions (para 3.31) that the damage (to the trees):

"would naturally take place over an extended period of time"

and (para 3.32) that the:

"destruction and death of the very substantial number of trees constituting the 'protected vegetation' in this case would necessarily have occurred over time..."

and (para 3.33) that the case against the defendants was:

"that between December 2000 and November 2003 the identified trees were damaged"

and (para 3.34) that the complaints were not defective:

"because of the way in which they identified a period of time (represented by outer limits) during which defending [sic] conduct occurred"

and by the submissions of Mr Hughes (T 7-17):

"that the damage to protected vegetation (involved) actions on various dates between 2000 and November 2003"

and (T 4-19) that many trees were damaged and natural growth was interfered with over a period of time and (T 7-25) that it is not possible to tell from "guilty as charged" when the damage was caused other than that it was caused in 2001, 2002 and 2003 up to November. He conceded he could not exclude the fact that it may have

been caused before 13 February 2003. He contended though that the evidence established that some of it had occurred after 13 February 2003 but none of this was referred to by the magistrate and in my view the evidence did not in fact go this far. See also the submission of Mr Hughes referred to in para [62].

[48] Mr Hughes (T 7-36,37) also said he couldn't say that 30,000 trees (or over 30,000 trees) were damaged between 13 February 2003 and November 2003 and he agreed that the appellants were each sentenced on the basis of damaging 30,000 trees. For this reason he conceded that the appellants would have to at least succeed on their appeals against sentence. This concession however is enough to also dispose of the appeals against conviction.

[49] The fact that it was not put to Mr Hance in cross-examination that any of his calculations of area or numbers of trees were wrong (respondent's submissions para 3.21) is not an answer to the argument of the appellants.

[50] Likewise I am unable to agree with the respondent (para 4.1 footnote 71) that there was an obligation on [redacted] to "explain" the "matter of tree numbers" and give a reason "as to why he sat on his hands during the trial". The defendants were entitled to do just that.

[51] It is clear that each defendant was convicted of damaging or permitting to be damaged protected vegetation outside the limitation period and for that reason alone the convictions cannot stand and must be set aside.

[52] Because the evidence does not in my view establish any damage occurring within the limitation period no point would be achieved by sending the matters back to the Magistrates Court. At best for the prosecution the evidence may have possibly established a reduction in canopy cover during the limitation period as a result of damage caused outside the limitation period.

[53] The ground of appeal relying on these matters in each appeal has been made out.

Duplicity

[54] The appellants contended that each complaint was duplicitous in that it contained a charge of more than one offence.

[55] Section 43 Justices Act provides:

"43 Matter of complaint

(1) Every complaint shall be for 1 matter only, and not for 2 or more matters except —

(a) in the case of indictable offences — if the matters of complaint are such that they may be charged in 1 indictment;

(b) in cases other than cases of indictable offences — if the matters of complaint—

(i) are alleged to be constituted by the same act or omission on the part of the defendant; or

(ii) are alleged to be constituted by a series of acts done or omitted to be done in the prosecution of a single purpose; or

(iii) are founded on substantially the same facts; or

(iv) are, or form part of, a series of offences or matters of complaint of the same or a similar character;

(c) when otherwise expressly provided.

(2) When 2 or more matters of complaint are joined in the 1 complaint each matter of complaint shall be set out in a separate paragraph.

(3) At the hearing of a complaint in which 2 or more matters of complaint have been joined but which does not comply with the provisions of this section —

(a) if an objection is taken to the complaint on the ground of such noncompliance—the court shall require the complainant to choose 1 matter of complaint on which to proceed at that hearing;

(b) if no such objection is taken to the complaint—the court may proceed with the hearing and may determine the matters of complaint, and may convict or acquit the defendant in accordance with such determination.

(4) If, at the hearing of a complaint, it appears to the court that a defendant may be prejudiced or embarrassed in the defendant's defence because the complaint contains more than 1 matter of complaint or that for any other reason it is desirable that 1 or more matters of complaint should be heard separately, the court may order that such 1 or more matters of complaint be heard separately."

[56] The damage to protected vegetation relied on by the prosecution was destruction of the vegetation or interference with its natural growth by cuts to tree trunks and concurrent application of poison and perhaps subsequent repeat application/s of poison.

[57] The magistrate did not refer to the definition of "damage". He referred only to "trees" being cut or poisoned.

[58] What was alleged against each defendant was damaging or permitting to be damaged protected vegetation between December 2000 and November 2003.

[59] In my view a complaint that the defendants damaged protected vegetation between two dates by systematically cutting and poisoning the vegetation would comply with s 43 as would a similar complaint that the defendants permitted protected vegetation to be damaged. See Laird v Mitchell [1930] St. R. Qd 38 at 44.

[60] Section 43(1)(b) includes situations where the charge laid, although evidenced by multiple acts, represents a single offence. Depending on the circumstances it would allow conduct constituted by activity over time to be properly charged in one matter of complaint. The prosecution case was that all of the trees were not damaged on the one date but on different dates between December 2000 and November 2003.

[61] The matters of complaint — the damage — were alleged by the prosecution to be constituted by a series of acts — cuts and application of poison to more than one protected tree — done in the prosecution of a singe purpose — to clear the land — or formed part of a series of offences or matters of complaint of the same or similar character, see s 43(1)(b)(ii) and (iv). The allegation in each complaint that the defendants damaged or permitted to be damaged protected vegetation on a date rather than dates between the time alleged was clearly a misnomer. The prosecution case involved a series of acts committed for a single purpose over a period of time (T 7-15).

[62] Mr Hughes submitted (T 7-17) that the offence alleged in each complaint was a continuing offence involving damage to protected vegetation by a course of unlawful conduct involving actions on various dates between December 2000 and November 2003 i.e. "the one transaction evidenced by multiple acts" and "conduct constituted by activity over time", see Walsh v Tattersall [1996] HCA 26; (1996) 139 ALR 27 at 48-49.

[63] In EPA v CSR Ltd [2001] NSWLEC 41; (2001) 114 LGERA 217 relied on by the respondent, it was held that a limitation period of 3 years in s 12 Environmental Offences & Penalties Act in respect of a continuing offence commenced to run from the day upon which the commission of the offence ceased. The offence in that case was negligently causing a substance to leak in a manner which harmed or was likely to harm the environment without lawful authority. The NSW Court of Appeal had previously decided that such an offence may be a continuing offence. Whether or not it is "depends upon findings at trial as to whether the offence is a continuing one" (228) and in the present case whilst no such findings were made by the magistrate I think that the offence could possibly be described as "continuing" but only if confined to a series of acts done in the prosecution of a single purpose or a series of offences or matters of complaint (i.e. separate acts) of the same or a similar character as required by s 43(1)(b) Justices Act.

[64] Approached this way EPA v CSR Ltd is distinguishable from the present case. In the present case what was alleged was a series of acts (chopping and poisoning trees) amounting to damage as defined in Local Law 6 done in the prosecution of a single purpose or forming part of a series of offences or matters of complaint of the same or a similar character. Those acts of poisoning were said to have destroyed or interfered with the natural growth of the vegetation. The prosecution was required to prove that those acts occurred within the limitation period. It was not sufficient to prove an act outside the limitation period which destroyed or interfered with the natural growth of vegetation within the limitation period.

[65] Effectively what was alleged here was the poisoning of trees – by many separate acts of poisoning the trees – which destroyed them or interfered with their natural growth. This is not the same as effluent leaking from a pond owned by CSR Ltd.

[66] In my view a complaint alleging that the defendants damaged or permitted to be damaged protected vegetation would be for two matters of complaint and would not comply with s 43, see Walsh v Tattersall (supra) at 47-50 and 52-53 per Kirby J.

[67] The facts required to prove that the defendants damaged protected vegetation are different from those required to prove that the defendants permitted protected vegetation to be damaged.

[68] The complaint against [redacted] alleged some or all of the following:

(1) that he damaged protected vegetation on Lots 2 and 3 or

(2) that he permitted protected vegetation to be damaged on Lots 2 and 3

[69] The complaint against [redacted] Pty Ltd alleged:

(1) that it damaged protected vegetation on Lot 2 or

(2) that it permitted protected vegetation to be damaged on Lot 2

[70] The complaint against [redacted] also alleged that he committed the offences as owner of Lots 2 & 3. He and his wife owned only Lot 3, [redacted] Pty Ltd owned Lot 2. Ownership is not an element of the offences and the allegation of ownership is, I consider, unnecessary surplusage and was not something essential to the charge against [redacted]

[71] An objection based on duplicity may be taken for the first time on appeal, Walsh v Tattersall (supra) at 28, 48 and 52-53, R v Traino (1987) 45 SASR 473 at 475 and Hamzy v R (1994) 74 A. Crim R 341 at 344.

[72] In Traino at 475 King CJ said:

"... duplicity is a ground available to a convicted person on appeal, notwithstanding failure to take the objection at trial, and if duplicity is shown on the appeal the appellate Court will set aside the conviction... if the result is uncertainty as to the criminal act of which the appellant has been convicted."

[73] The present cases were further complicated by the particulars provided in each complaint which were in identical terms. The defendants were each found "guilty as charged". Each could not have damaged approximately 34,956 trees. The allegations against [redacted] were in respect only of Lot 2 and clearly involved less than 34,956 trees. The magistrate did not distinguish between damaging and permitting to be damaged or consider the extent of the vegetation damaged by [redacted] on the one hand, and that which he permitted (and how and by whom) to be damaged on the other hand, or how [redacted] Pty Ltd itself damaged vegetation on the one hand and the extent (and how and by what means) it permitted vegetation to be damaged on the other hand (probably by others and if so by whom).

[74] The errors inherent in the way the magistrate approached the complaints and the evidence (or its absence) are highlighted by what happened after conviction.

[75] After the defendants had been found "guilty as charged" they applied to re-open the case so that more precise evidence of the number of trees damaged could be led. The magistrate refused this application.

[76] During the sentencing proceedings application was made by the defence to call "one or perhaps two witnesses" to give evidence about the number of trees damaged and over what area. The magistrate refused this application saying (T 33, 28 February 2007):

"On the day when the decision was given, specific findings of guilt were made in respect of [redacted] and the company [redacted] and they were found guilty in accordance to the complaint [sic]. My only interpretation can be that the numbers stated in the complaint of the number of trees that was the subject of my finding [sic]."

[77] The defendants were sentenced (on 8 March 2007) on the basis that "substantial damage (had) been done." The magistrate also said (T 8):

"Whilst numbers of trees may be a guide in relation to sentencing, and may give some indication of amounts of penalty, it is not the only consideration. The damage to this particular area as shown in the exhibits and report, are a matter of substantial import and there does appear to be substantial damage."

[78] I'm not sure what the "report" was.

[79] In sentencing [redacted] the magistrate said (T 2-3):

"Facts generally in relation to the case was [sic] that between December 2000 and November 200[redacted] was involved in the poisoning of vegetation on the property and by himself, **his wife** and his company [redacted] Pty Ltd. The vegetation included trees that were located on lots 2 and 3, as referred to in the complaints and between the two lots, a total of 34,956 trees were damaged. Submissions by the council of the effect that 80 per cent of the trees damaged by [redacted] was in respect of land owned by the company, of which he is a director, and 20 per cent were on the land on which [redacted] and his partner owned [sic]."

[80] There was no evidence whatsoever that [redacted] "was involved in the poisoning" and in fact that magistrate on 20 January 2006 found her not guilty of the same charge of which he convicted her husband.

[81] In sentencing [redacted] Pty Ltd the magistrate said (T 10-11):

"The company was found guilty on the facts as outlined in the complaint. There are two defendants charged with **the offence**, though it appears from the evidence produced, [redacted] Pty Limited is the company controlled by the first defendant as its director.....

It does appear substantial damage has been caused to the vegetation and this vegetation will take many years to re-grow even by process of remediation."

[82] Each defendant was sentenced on the basis of that he/it "damaged or caused (not permitted) to be damaged protected vegetation", (nothing though really turns on "caused" as opposed to "permitted").

[83] Apart from referring to the submissions made by the respondent

"to the effect that 80% of the trees damaged by [redacted] was in respect of land owned by the company of which he is a director and 20% were on land which he owned"

and saying that

"between the two lots a total of 34,956 trees were damaged"

the magistrate made no findings referable to each complaint.

[84] In his ruling on 5 April 2007 on an application for costs the magistrate added to the confusion about what the defendants had been convicted of by saying (T 8-9):

(1) Each defendant owned one of the lots which made up a total of 97,100m² and the defendant was the director of the defendant company which owned the other lot [sic]

(2) No number of trees were nominated in respect of either of the complaints

(3) Both defendants were found guilty as charged. No specific finding was made as to the number of trees injured or destroyed in respect of any complaint

(4) The defendants were sentenced on the basis of 34,956 trees being injured or destroyed

[85] In my view each complaint here is bad for duplicity. There "is uncertainty as to the criminal act of which each defendant has been convicted" and for which each was to be sentenced. This is another ground for setting aside the convictions. It is not possible to say what each defendant did — damaged or permitted — or how much damage each did or permitted to be done. The absence of specificity in the evidence is another reason for not sending the matter back to the Magistrates Court.

[86] Section 43(3)(b) does not permit a duplicitous conviction. It "does not authorise the entry of a conviction in the alternative nor displace the fundamental rule that the conviction itself shall not be double" (Iannella v French [1968] HCA 14; (1968) 119 CLR 84 at 91). The appellant in that case was convicted of having wilfully demanded or wilfully recovered rents and that was bad for duplicity. In the present case the defendants were convicted of damaging protected vegetation or permitting protected vegetation to be damaged and those convictions are equally bad for duplicity and cannot stand. A charge against an individual of damaging protected vegetation is a charge that the individual himself did the damage. A charge that he permitted protected vegetation to be damaged is a charge that he permitted someone else to do the damage. There are different elements in each offence. A defendant cannot by the same act damage protected vegetation and permit someone else to do so.

[87] The ground of appeal relying on duplicity in each appeal has been made out.

[redacted]

[88] [redacted] was charged with damaging protected vegetation or permitting protected vegetation to be damaged. [redacted] were the only shareholders of the company and were 2 of 3 directors of the company. [redacted] gave evidence that it was a family company used to acquire Lot 2 and that he and his wife controlled what "it does" and "what happens with its assets" (T 281). This was some evidence that [redacted] may have been the directing mind and will of the company and had effective control of it. None of this evidence was considered by the magistrate or if it was he didn't say so. There was also [redacted] affirmative answer to a double barrelled question – "And you and your wife control

what [redacted] does. You control what happens with its assets, correct?". The only other evidence about [redacted] was that it owned Lot 2. None of this evidence was considered by the magistrate or if it was he didn't refer to it.

[89] I agree with the appellants (paras 323-324) that the complainant was required to prove

(1) that [redacted] did or permitted acts which caused the damage and

(2) if [redacted] permitted acts which caused the damage, that damage was done by someone else, e.g. an employee (or someone else) on behalf of [redacted]

[90] There was no evidence that [redacted] itself did any acts causing damage. The magistrate did not consider what was meant by "permit" or the way in which (if any) [redacted] permitted (and by whom) damage to be done to vegetation. Ownership simpliciter of Lot 2 by [redacted] was not sufficient to establish guilt.

[91] I agree with the appellants (para 335) that in the case of a company some other "person" must perform the requisite act or acts which caused damage. The prosecution's case appears to have been that that other person was [redacted] but it may have been or also been Cameron Stumer or Thomas Dye but in the case of these two there was no evidence that they were employed by or acted for [redacted]. Mr Hughes submitted (T 7-22) that not all of the damage was done by [redacted] some was done by Dye or Stumer. The evidence of [redacted] t T 277 (Q... the poisoning that you didn't do, you directed employees of yours or employees of [redacted] to do, correct -- A. yes, if you want to call them that) does not necessarily implicate [redacted] and, in any event, it was not considered by the magistrate. In fact the magistrate referred (T 8) to Dye as "a former employee of the defendant" (probably meaning Mr [redacted] and to Stumer as "the defendants nephew". Even if Stumer and Dye were employed by [redacted] there was no evidence that they did anything to protected vegetation between 13 February and November 2003.

[92] The paucity of evidence against [redacted] apart from ownership of Lot 2 and the failure of the magistrate to consider issues such as are referred to in cases such as Chappell v A Ross & Sons Pty Ltd [1969] VicRp 48; (1969) VR 376 at 382-383, Miller v Williams (1990) 53 SASR 82 at 90, Hamilton v Whitehead [1988] HCA 65; (1988) 166 CLR 121 at 127, Commonwealth DPP v Hart (No.2) [2005] QCA 51; [2005] 2 Qd.R 246 at para [22] and Bernard Elsey Pty Ltd v Commissioner of Taxation [1969] HCA 46; (1969) 121 CLR 119 at 121 (referred to in paras 331-343 of the appellants submissions) meant that the case against [redacted] was not adequately dealt with or proved. In fact it was not considered at all. The magistrate did not at all address the issue of the case against [redacted] or consider it separately from that against [redacted]

[93] In these circumstances I am unable to agree with the respondent (paras 3.45 and 3.46) that the evidence which I have referred to was sufficient to establish the "culpability of the corporate appellant". No other evidence was relied upon or referred to. Mr Hughes submitted (T 7-23) that [redacted] status as a director of [redacted] meant that his actions and his state of mind are "that of the company." Reference was made to G J Coles & Coy Ltd v Goldsworthy (1985) 57 LGRA 123. These are matters which

should have been considered by the magistrate but weren't.

[94] Finally, the magistrate said when finding [redacted] not guilty of the same charge faced by her husband

"The fact that she was a director of the company at the time is not an implication of guilt"

It is not clear what "implication" he considered [redacted] directorship had in the case against him.

[95] The magistrate did say (T 16, 8 March 2007) when the defendants sought clarification as to how he arrived at the fines he imposed

"Without the assistance of [redacted] the company could not have committed the offence"

but he made no such finding when he found the company "guilty as charged."

[96] The ground of appeal relying on these matters has been made out.

Amendment of the complaints

[97] Two Statutory Instruments are relevant here – Interim Local Law 6 (ILL6) and Local Law 6 (LL6). ILL6 was made on 7 March 1997 and expired on 14 September 1998. LL6 commenced on 18 December 1998 (the argument about whether this was proved is not relevant to this point).

[98] Mr Hughes submitted that the complaints as originally framed in fact charged an offence against LL6 and could be amended. Mr Denton SC submitted that they charged an offence against ILL6 and could not be amended because any amendment would create a new and different offence - one against LL6 - out of time (see s 1080 Local Government Act 1993). Mr Hughes conceded that if the amendments created a new offence it would have been out of time.

[99] The complaints therefore need to be examined to determine what in fact they alleged. It is necessary to look at what was charged rather than the difference between ILL6 and LL6. The differences are highlighted at para 133 of the appellants written submissions.

[100] The complaints against each defendant were in the same terms and it will be simpler if I refer to one rather than both. The substance of the charge against each defendant before amendment was that on a date between December 2000 and November 2003 upon (certain specified land) he/it

"...did, in breach of Local Law damage or cause to be damaged protected vegetation (namely trees equal to or in excess of 4 metres in height and/or in excess of 40 cms in girth DBH (Diameter Breadth Height) measured at 1.3 metres above average ground level) contrary to s 5(1) and s 30 of Local Law 6 (Vegetarian Management)..."

[101] Leaving aside for the moment the reference to ss 5(1) and 30, in my opinion the complaint in fact alleged an offence against LL6 albeit in somewhat confusing terms, eg:

(1) there is no requirement that the defendant be the owner of the property on which the protected vegetation was destroyed

(2) LL6 refers to DBA not DBH and to "Breast" not "Breadth"

(3) the charge contains no reference to the zoning of the land which is referred to in LL6 in the context of protected vegetation equal to or in excess of 4 metres in height being located in areas particularly zoned

(4) the offence is contained in s 24(1) of LL6 not s 30. Section 24(1) makes it an offence for a person to damage or permit to be damaged protected vegetation. Section 30 of LL6 provides that the holder of a permit must ensure that the conditions of the permit are complied with otherwise an offence is committed

(5) s 5(1) of LL6 provides that the local government may make a vegetation protection order to protect vegetation on freehold land and clearly has nothing to do with the change.

[102] In addition the heading of the complaint stated:

"Gold Coast City Council

Interim Local Law 6 (Vegetation Management)

Section 5(1)"

Section 5(1) of ILL6 made it an offence for a person to damage protected vegetation. It did not create an offence of permitting protected vegetation to be damaged.

[103] So far as is presently relevant the Magistrate, on application by the complainant, allowed the following amendments to the complaints:

(1) delete "Interim" and "Section 5(1)" in the heading

(2) delete "cause" and insert instead "permit"

(3) delete "5(1)" and "30" and insert instead "3" and "24"

[104] Amendments (1) and (3) were made on the first day of the hearing and amendment (2) on the fifth day. Amendment (2) was not opposed by the defendants (see T 326).

[105] ILL6 did not have a s 30 and the definition of "protected vegetation" in s 3(1) was different to that in LL6 in two respects viz:

(1) the measurement was 1.5 meters [sic] above average ground level not 1.3 metres as in LL6 and

(2) the zoned areas were stated to be "under the Albert Shire Planning Scheme only" whereas LL6 refers to "the Planning Scheme as at the date at the making of this Local Law".

[106] The offence charged in the complaints alleged a height of 1.3 metres above average ground level which was the height specified in the LL6 definition.

[107] The date of the offence, being after ILL6 expired, is also suggestive of the offence being one against

LL6 rather than ILL6.

[108] In the circumstances I agree with the respondent (submissions para 3.10, footnote 51) that in so far as there was incorrect reference to the provisions of ILL6 it was quite apparent that the allegations in the complaint did not raise an allegation of a breach of ILL6. ILL6 did not have a s 30.

[109] In my view Mr Hughes was correct to categorise the complaints as alleging an offence against LL6 not ILL6 and accordingly they were able to be amended. I think that each complaint "clearly indicates" an offence (against LL6) and that the references to "Interim," "cause," "Section 5(1)" and "Section 30" are the result of "some slip or clumsiness" on the part of the drafter and are capable of amendment, Broome v Chenoweth [1946] HCA 53; (1946) 73 CLR 583 at 601 per Dixon J and Hornsby Shire Council v Winsloe (1998) 101 LGERA 117 at 138. I think that each complaint "on its face" and "in pith and substance" disclosed an offence against LL6 not ILL6, Fred Wakefield Pty Ltd v Dowd (1979) 20 SASR 328 at 330 & 331. Each complaint was merely "varied"; in its original form it particularised with sufficient "clarity the nature of the offence charged", Kerr v Hanon [1992] VicRp 3; (1992) 1 VR 43 at 45 & 46. In my view the offence charged effectively "remained the same (or essentially the same) as before and after the amendment(s)", Flanagan v Remick [2001] VSC 507; (2001) 127 A. Crim. R. 534 at 540, 543 and 544. The amendments did not "change" the offence. The amendments did not create "a new offence unrelated to that charged" in the complaint, Mitchell v Myers [1955] WALawRp 6; (1955) 57 WALR 49 at 52.

[110] The offence charged in each complaint is, in my view, sufficiently described by reference only to the words used in s 24 (1) of LL6 and to this extent s 47(1) Justices Act is satisfied.

[111] I agree with the respondent (submissions para 1.8) that the amendments sought, in effect, two changes to the charges: first, a correction of the identification of the relevant local law and local law provisions and second, a modification of the precise details of the street address and proper description of the subject land. These amendments did not charge a new, different offence.

[112] The power to amend is contained in s 48(a) Justices Act and the Magistrate found that the "substance" of the offence was not changed by the amendments nor was the "essential wording of the offence". See also s 47(1). In the circumstances (and apart from duplicity) the decision of the Magistrate to allow the amendments was correct.

[113] This ground has not been made out.

Proof of Local Law

[114] The defendants submitted that the respondent proved only the content of LL6 (by tendering a certified copy, ex 1) and not its making.

Section 898(3) Local Government Act provides, so far as is relevant:

"898(3) In a proceeding a copy of the Gazette or newspaper containing a notice about the making of a local law is –

(a) evidence of the matters stated in the notice; and

(b) evidence that the local law has been properly made."

[115] The relevant notice published in the Gazette on 18 December 1998 is in the following terms (taken from p 95 of the appellants submissions):

"***Local Government Act* 1993**

GOLD COAST CITY COUNCIL

(MAKING OF LOCAL LAW)

NOTICE (No. 4) 1998

Short Title

1. This notice may be cited as the *Gold Coast City Council (Making of Local Law) Notice (No. 4) 1998.*

Commencement

2. This notice commences on the date it is published in the Gazette.

Making of Interim Local Law

3. Pursuant to the provisions of the Local Government Act 1993, the Gold Coast City Council made Local Law No. 6 (Vegetation Management), by resolution on 11 December 1998.

Inspection

4. A certified copy of the local law is open to inspection at the Local Government's public office and at the Department's State Office."

The notice was in accordance with s 874(1) *Local Government Act* 1993.

[116] Clearly the local law which was made was not an "Interim" Local Law, but I don't think anything turns on this error. The certification by the Respondent's CEO on the last page of ex 1 refers to the publication in the Gazette on 18 December 1998 as being in relation to LL6 and para 3 of the notice refers to Local Law No. 6 not Interim Local Law No. 6.

[117] Section 1117(3) Local Government Act provides that such a certificate "is evidence... of the matters contained in the certificate", here that ex 1 (LL6) was made in accordance with the provisions of the Local Government Act 1993 by the Respondent and published in the Gazette on 18 December 1998.

[118] A copy of the Gazette notice was not tendered in the Magistrates Court. The Gazette notice deals with the making of the Local Law and the appellants submit that this could only be proved by tendering the Gazette notice.

[119] For the reasons given by McGill SC, DCJ in Marshall v Averay [2007] QPELR 137 at pages 150-153 (with which I agree) the making, content and application of LL6 at the relevant times was sufficiently proved and it was not necessary for the Gazette notice to be tendered.

[120] The defendants submitted that s 898(3) applies to the exclusion of s 43(b) Evidence Act (relied on by McGill SC DCJ) with the result that the failure to tender the Gazette notice was fatal to the prosecution. In my view both provisions are capable of application; s 898(3) does not exclude or impliedly repeal s 43(b) in its application to the present circumstances rather s 43(b) adds to the matters dealt with by s 898(3). Section 43(b) provides for the taking of judicial notice of statutory instruments (which includes a local law, s 7 Statutory Instruments Act (1992)) which is different to and in addition to what s 898(3) deals with.

[121] Mr Hughes alternatively submitted that this point, not having been taken in the Magistrates Court, could not be taken on appeal.

[122] In criminal prosecutions matters requiring proof must be proved unless admitted. This matter was not admitted but if the point had been taken at trial the Gazette notice could then have been tendered. See Bowman v Brown (2004) QPELR 416 at 428 and Dever v Creevey (1993) 1 Qd. R. 232. In relation to this aspect there is I think substance in the point taken by Mr Hughes.

[123] This ground also has not been made out.

Other grounds of appeal

[124] In the circumstances it is not necessary to consider these.

Result

[125] In the case of each of [redacted] the appeals against conviction will be allowed, the decision of the magistrate to convict each will be set aside and in lieu thereof the complaint against each will be dismissed.

[126] I will hear the parties as to further consequential orders.