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Department of Environment and Climate Change v Olmwood Pty Limited [2010] NSWLEC 15 (9 February 2010)

Last Updated: 12 February 2010

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: Department of Environment and Climate Change v Olmwood Pty Limited [\[2010\] NSWLEC 15](#)

PARTIES: PROSECUTOR Department of Environment and Climate Change
DEFENDANT Olmwood Pty Limited

FILE NUMBER(S): 50041 of 2008

CATCHWORDS: PROSECUTION :- whether native vegetation cleared - whether vegetation regrowth within meaning of [Native Vegetation Act 2003](#) - whether defendant has onus of proving on balance of probabilities that vegetation regrowth - impact of sandmining on vegetation on property - whether aerial photographs and SPOT5 image analysis proved continuity of vegetation cover

DEVELOPMENT CONSENT :- whether development consent granted for clearing native vegetation - whether consent lapsed - whether survey work relied on for physical commencement in breach of condition of consent - whether development consent granted on land zoned for possible coastal acquisition land - absence of Minister's consent for clearing native vegetation

PROSECUTION :- whether defendant caused or permitted clearing to be carried out - whether defendant landholder discharged onus of proof it bears under [s 44](#) of the [Native Vegetation Act 2003](#)

LEGISLATION CITED: Clean Waters Act 1970 (repealed)[Environmental Planning and Assessment Act 1979 s 76, 76A, 76B, 79C, 80, 80A, 95](#)Greater Taree Local Environmental Plan 1995 [Interpretation Act 1987 s 6, 7, 21](#)[National Parks and Wildlife Act 1974 s 98, Pt 8A, 159A](#)[Native Vegetation Act 2003 s 5, 6, 7, 9, 10, 12, 13, 18, 19, 36, 44](#)[Native Vegetation Conservation Act 1997 s 12, 14, 21](#) (repealed)Mining Act 1973 Rivers & Foreshores Improvement Act 1948 Pt 3A (repealed)State Environmental Planning Policy No. 26 – Littoral RainforestState Environmental Planning Policy No 46 - Protection and Management of Native Vegetation Sch 3 (repealed) Occupational Health and Safety Act 1985 (Vic) Protection of the Environment Operations Act 1997 s 144Threatened Species Act 1997 Sch 1[Water Management Act 2000](#)

CASES CITED: Abbott v State of Western Australia [\[2005\] WASCA 42; \(2005\) 152 A Crim R 186](#) Alphacell Ltd v Woodward [1972] AC 724Blacktown City Council v Pace [\(2002\) 121 LGERA 432](#)Broad v Parish [\[1941\] HCA 25; \(1941\) 64 CLR 588](#)Birdon Contracting Pty Ltd v Hawkesbury City Council [\[2009\] NSWLEC 85](#)Biwazu Pty Ltd v Cessnock City Council [\[2004\] NSWLEC 411](#)Chugg v Pacific Dunlop Ltd [\[1990\] HCA 41; \(1990\) 170 CLR 249](#) Coalcliff Community Association Inc v Minister for Urban Affairs and Planning [\(1999\) 106 LGERA 243](#) Coffs Harbour City Council v Hickey [\[2004\] NSWLEC 531](#)Colonial Mutual Life Assurance Society Ltd v Producers & Citizens Co-operative Assurance Co of Australia Ltd [\[1931\] HCA 53; \(1931\) 46 CLR 41](#)Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth) [\[1981\] HCA 26; \(1981\) 147 CLR 297](#)Detala Pty Ltd v Byron Shire Council [\(2002\) 133 LGERA 1](#) Director of Public Prosecutions v United Telecasters Sydney Limited [\[1990\] HCA 5; \(1990\) 168 CLR 594](#) Director-General of the Department of Land and Water Conservation v Bailey [\[2003\] NSWCCA 361; \(2003\) 136 LGERA 242](#)Director-General of the Department of Environment and Climate Change v Hudson [\[2009\] NSWLEC 4; \(2009\) 165 LGERA 256](#) Director-General, Department of Environment and Climate Change v Jack & Bill Issa Pty Ltd (No 5) [\[2009\] NSWLEC 232](#)Environment Agency v Empress Car Co (Abertillery) Ltd

[\[1998\] UKHL 5](#); [\[1999\] 2 AC 22](#) Environment Protection Authority v Multiplex Constructions Pty Ltd [\[2000\] NSWLEC 6](#); [\(2000\) 112 LGERA 1](#)GPT RE Ltd v Belmorgan Property Development Pty Ltd [\[2008\] NSWCA 256](#); [\(2008\) 72 NSWLR 647](#) Garrett v Freeman [\[2007\] NSWLEC 389](#)Green v Kogarah Municipal Council [\(2001\) 115 LGERA 231](#) Hanwood Pastoral Co Pty Limited v Director-General, Department of Natural Resources [\(2005\) 144 LGERA 139](#)Hardt v Environment Protection Authority [\[2007\] NSWCCA 338](#); [\(2007\) 156 LGERA 337](#)Hughes v R [\(1983\) 49 ALR 110](#)Hunter Development & Brokerage Pty Limited v Cessnock City Council [\(2005\) 149 LGERA 460](#)Iron Gates Developments Pty Ltd v Richmond-Evans Environmental Society Inc [\(1992\) 81 LGERA 132](#) Kindimindi Investments Pty Ltd v Lane Cove Council [\[2006\] NSWCA 23](#); [\(2006\) 143 LGERA 277](#) Majury v Sunbeam Corporation Ltd [\[1974\] 1 NSWLR 659](#)Miller v Minister of Pensions [\[1947\] 2 All ER 372](#)Miller v Williams [\(1990\) 53 SASR 82](#) R v Adams [\[1935\] HCA 62](#); [\(1935\) 53 CLR 563](#) R v Carr-Briant (1943) 41 LGR 183 R v Hunt [\[1987\] AC 352](#)R v Jasper [\[2003\] NSWCCA 186](#); [\(2003\) 139 A Crim R 329](#)R v Lonie [\[1999\] NSWCCA 319](#)Sheldrake v Director of Public Prosecutions [\[2004\] All ER\(D\) 169](#) (Oct)Tesco Supermarkets Ltd v Natrass [\[1971\] UKHL 1](#); [\[1972\] AC 153](#) The Corporation of the City of Adelaide v The Australasian Performing Right Association Ltd [\[1928\] HCA 10](#); [\(1928\) 40 CLR 481](#)Vines v Djordjevitch [\[1955\] HCA 19](#); [\(1959\) 91 CLR 512](#) Vitality Care Pty Ltd v Director-General, Department of Natural Resources [\(2006\) 151 LGERA 15](#)Wollongong City Council v Ensile Pty Ltd [\(2008\) 71 NSWLR 563](#)Woolmington v Director of Public Prosecutions [\[1935\] UKHL 1](#); [\[1935\] AC 462](#) Young v Warringah Shire Council [\(2001\) 117 LGERA 62](#)

TEXTS CITED: The Macquarie Dictionary, 3rd ed (The Macquarie Library Pty Ltd, 2001)The New Shorter Oxford Dictionary (Clarendon Press, 1993)

CORAM: Pain J

DATES OF HEARING: 3 August 20094 August 20095 August 20096 August 20097 August 200910 August 200911 August 200912 August 2009

JUDGMENT DATE: 9 February 2010

LEGAL REPRESENTATIVES

PROSECUTOR Mr S Rushton SC with Mr E
Muston SOLICITOR Department of Environment and Climate Change

DEFENDANT Mr J Ireland QC with Ms P Lane SOLICITOR McGirr
James Hall & Associates

JUDGMENT:

THE LAND AND

ENVIRONMENT COURT

OF NEW SOUTH WALES

Pain J

9 February 2010

**50041 of 2008 Department of Environment and Climate Change v
Olmwood Pty Limited**

JUDGMENT

1. **Her Honour:** The Defendant Olmwood Pty Limited is charged with the offence that it cleared native vegetation contrary to s 12(1) of the *Native Vegetation Act 2003* (the NV Act) between about 1 December 2006 and 31 December 2006 on or near a property near Old Bar, being Lot 1 DP594864 (the property). The Defendant has owned the property since January 2005. The Defendant has pleaded not guilty.
2. The clearing is alleged to have taken place over an area of approximately 10 hectares. The alleged clearing was undertaken by a contractor, V & S Flemming Pty Limited (V & S Flemming), using machinery including an excavator. The alleged clearing is of nine species of native vegetation.

Relevant provisions of the [Native Vegetation Act 2003](#)

1. The offence is under [Pt 3](#) Div 1 s 12(1) of the NV Act. The NV Act

Pt 2, Key concepts, contains the following relevant provisions:

6 Meaning of native vegetation

(1) For the purposes of this Act, native vegetation means any of the following types of indigenous vegetation:

- (a) trees (including any sapling or shrub, or any scrub),*
- (b) understorey plants,*
- (c) groundcover (being any type of herbaceous vegetation),*
- (d) plants occurring in a wetland.*

*(2) Vegetation is **indigenous** if it is of a species of vegetation, or if it comprises species of vegetation, that existed in the State before European settlement.*

...

Clearing is defined in s 7 of the NV Act as one or more of the following:

- (a) cutting down, felling, thinning, logging or removing native vegetation;*
- (b) killing, destroying, poisoning, ringbarking, uprooting or burning native vegetation.*

9 Meanings of remnant native vegetation and regrowth

(1) For the purposes of this Act, remnant native vegetation means any native vegetation other than regrowth.

(2) For the purposes of this Act, regrowth means any native vegetation that has regrown since the earlier of the following dates:

- (a) 1 January 1983 in the case of land in the Western Division and 1 January 1990 in the case of other land,*

...