

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA
DISTRICT REGISTRY

NO SAD 182 OF 2007

MINISTER FOR ENVIRONMENT HERITAGE AND THE
ARTS
Applicant

ROCKY LAMATTINA & SONS PTY LTD

ACN 007 420 822
First Respondent

ROCCO LAMATTINA
Second Respondent

STATEMENT OF AGREED FACTS

The Applicant, the Minister for Environment Heritage and the Arts ("the Minister") and the First Respondent, Rocky Lamattina & Sons Pty Ltd ACN 007 420 822 ("the Company") agree the following Statement of Agreed Facts within the meaning of section 191 of the Evidence Act 1995 (Cth):

Rocky Lamattina and Sons Pty Ltd (ACN 007 420 822)

1. At all material times the Company:
 - 1.1. was a body corporate duly incorporated pursuant to the provisions of the *Corporations Act 2001*;
 - 1.2. was liable to sue and be sued in its corporate name; and
 - 1.3. was until about 26 June 2006, the registered proprietor of the property known as "Acacia Downs" and more properly described as Certificate of Title Volume 5400 Folio 622 Sections 324, 325, 326, 327 and 328 in the Hundred of Hynam in the State of South Australia ("the Property");
 - 1.4. was engaged in the production and distribution of carrots throughout South Eastern Australia;
 - 1.5. was a family owned and operated company which employed between 75 to 80 people;
 - 1.6. had shareholdings as follows:
 - 1.6.1. Mr Rocco Lamattina - one ordinary fully paid ordinary share;

Filed on behalf of the Applicant by:

Contact: Nic Parkyn

Australian Government Solicitor
Level 18, 25 Grenfell Street
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- 1.6.2. Ms Agata Lamattina - one ordinary fully paid ordinary share; and
- 1.6.3. The R & A Lamattina Trust - 99,998 fully paid shares.
- 1.7. had five Directors, four of whom had duties and responsibilities as follows:
 - 1.7.1. Mr Lamattina - organises the purchase of and development of new projects relating to the Respondent and the financial management of the Respondent generally;
 - 1.7.2. Angelo Rosario Lamattina - coordination of washing of produce, packing, sales and distribution of carrots;
 - 1.7.3. Phillip Lamattina - coordination and organisation of growing and harvesting of crops grown by the Respondent and associated farm works; and
 - 1.7.4. John Paul Lamattina - coordination and organisation of growing and harvesting of crops grown by the Respondent and associated farm works.

Mr Rocco Lamattina

- 2. At all material times Mr Lamattina was:
 - 2.1. a director and executive officer of the Company;
 - 2.2. acting in his capacity as a director and executive officer of the Company;
 - 2.3. effectively the Managing Director of the Company; and
 - 2.4. in respect of each of the matters agreed herein, acting within the scope of his actual or apparent authority at the time.

The South Eastern Red-tailed Black Cockatoo (*Calyptorhynchus banksii graptogyne*)

- 3. The South Eastern Red-tailed Black Cockatoo (*Calyptorhynchus banksii graptogyne*) ("the Cockatoo") is one of five subspecies of Red-tailed Black Cockatoo. The Cockatoo is a large bird (with a length of between 55-60 cm and weight between 570 to 870 grams) with an erectile crest. Adult males are glossy black with bright red panels in their tails. Adult females are also black, but have yellow spots on their heads, yellow bars on their underparts and yellow-orange tail panels. Photographs depicting the male and female Cockatoo are included as Annexure "A" to this Statement of Agreed Facts.

The Cockatoo's range and population

- 4. The Cockatoo occurs as a single population in a small area of south-eastern Australia which is delimited by Keith to Lucindale to Mount Gambier in South Australia and Portland to Casterton, Toolondo, Natimuk, Dimboola, Nhill and Kaniva in Victoria. A map showing the range of the Cockatoo is included as Annexure "B" to this Statement of Agreed Facts
- 5. The population of the Cockatoo is currently estimated to be limited to 660 breeding pairs.

6. Male Cockatoos attain their breeding plumage at four years of age, with females obtaining their adult plumage at approximately two years of age. Cockatoo pairs with sub-adult males have not been recorded nesting. The Cockatoos nest in loose colonies, with several nests within 1 square kilometre, but with a minimum of forty metres between active nests. The same nesting hollow may be used by Cockatoos in successive years and may also be reused after being vacant for several years. The Cockatoos have high nest fidelity, and have a preference for the same types of nest sites that are commonly used by Yellow-tailed Black Cockatoos, Galahs, Corellas and Ring-tail Possums.
7. The Cockatoos lay only a single egg which is incubated for thirty days. The nesting period for young Cockatoos is approximately eighty-seven days. After a young Cockatoo has fledged (reached the stage in its life when it is ready to leave the nest), it may continue to be fed by its parents for up to six months.

The habitat of the Cockatoo

8. The Cockatoo is restricted to living near areas of Desert Stringybark (*Eucalyptus arenacea*) and Brown Stringybark (*E. baxteri*) woodlands, and the adjacent woodlands of River Red Gum (*E. camuldulensis*), Yellow or Blue Gum (*E. leucoxylon*), Pink Gum (*E. fasciculosa*) and Buloke (*Allocasuarina luehmannii*). These areas are set out in the map included at Annexure "B" to this Statement of Agreed Facts.
9. The Cockatoo has highly specialised feeding requirements as they feed primarily on the seeds of the two closely related stringybark species referred to in paragraph 8 above and depend upon these trees for their survival. The Cockatoos will also feed seasonally on the seeds of Buloke. The feeding habitat of the Cockatoo in South Australia is more fragmented than the feeding habitat located in Victoria.
10. In addition to the fragmented nature of the Cockatoo's highly specialised feeding habitat, Desert Stringybark fruits on a three year cycle and Brown Stringybark fruits on a two to four year cycle. The only other food source regularly used by the Cockatoo (Buloke seeds) is only available from January to March of any year, as the seeds are shed from the trees soon after ripening. Buloke trees also do not produce a substantial crop of seeds every year.
11. The Cockatoo also has very specific requirements for breeding. The Cockatoo primarily nests in eucalypts with trunks with a diameter greater than 60cm containing a hollow with an entrance between 15-50cm in diameter and at least 6 metres off the ground and being in either the main trunk of the tree or in a 'spout' with an angle of less than 45° from vertical. Trees containing suitable hollows are likely to be over 220 years old. The Cockatoos nest in both dead and live eucalyptus trees. Cockatoo nests are most often found in farmland with scattered live and dead eucalypt trees. Over 95% of known nests of the Cockatoo are located within two km of a block of stringybark trees. The types of nesting hollows required by Cockatoos are also popular with other native species of birds and mammals.
12. In South Australia, the remaining Red Gum communities in the lower South-East (which provide a preferred nesting habitat for the Cockatoo) are classified as vulnerable¹ with 9.7% of the estimated original area remaining and only 0.3% protected in reserves.

¹As per the Natural Heritage Trust "National Recovery Plan for the South-Eastern Red-Tailed Black-Cockatoo", David Baker-Gabb, First Draft 2005 at page 5.

13. The Cockatoo does not make regular annual movements, but moves throughout their range in response to changes in the availability of food. In some years, most birds are in the northern part of their range as they feed on Desert Stringybark and in other years most move to the south to feed on Brown Stringybark. Their seasonal movement into the far north of their range depends on the availability of Buloke seed, though even in a year with good Buloke seeding, a significant proportion of the Cockatoo population may remain in the south, provided that there is sufficient stringybark seed in that area to support them.

The Cockatoo - an endangered species

14. The Cockatoo is listed as an endangered species pursuant to sub-section 178(1) of the *Environment Protection and Biodiversity Conservation Act 1999* ("the Act").
15. Pursuant to sub-section 178(1) of the Act, the Minister must, by instrument published in the *Gazette*, establish a list of threatened species divided into a number of categories, including 'endangered'. In 1994 the Cockatoo was listed as endangered under the *Endangered Species Protection Act 1992* ("the ESP Act"). On 16 July 2000 all ESP Act listings were transferred to the Act by instrument published in the *Gazette* No. S407. A copy of the *Gazette* No. S407 is included as Annexure "C" to this Statement of Agreed Facts.

The Property

16. The Property is located within the known range of the Cockatoo. The Property is marked on Annexure B with an "X".
17. On 2 April 2004, the Company purchased the Property for \$2,001,900.00. A copy of the contract for sale is included as Annexure "D" to this Statement of Agreed Facts.
18. Included with the contract for sale at Annexure "D", was a notification of decision from the South Australian Native Vegetation Council ("the NVC") with respect to an application to clear trees on the Property which had been made by the previous owner. Relevantly, the decision refused permission to clear 17 scattered trees over an area of 0.34 hectares, and granted permission (subject to conditions) to clear 7 scattered trees.
19. Following the purchase of the Property by the Company, Mr Lamattina travelled to Adelaide to attend a meeting with a representative of the South Australian Department of Water, Land and Biodiversity Conservation. The purpose of the meeting was to discuss a potential application by the Company to remove scattered trees from the Property, in order that three centre-pivot irrigation systems could be installed to allow year round crop rotation.
20. Mr Lamattina was informed by a representative of the South Australian Department of Water, Land and Biodiversity Conservation during this meeting that a timeframe of several months would be required to assess and process any application made by the Company to clear trees from the Property.
21. Following the meeting referred to in paragraphs 19 and 20 above, the Company did not lodge an application with the Department of Water, Land and Biodiversity Conservation to remove trees from the Property. Mr Lamattina was frustrated by the timeframe that would be required to consider any application to lawfully clear trees from the Property.

22. The Company spent approximately \$800,000 on improvements for the Property including:
- 22.1. the construction of a storage shed; and
- 22.2. the purchase of three centre-pivot irrigation systems.
23. At the time the Company purchased the Property, the other properties owned by the Company and on which it grew its produce, had been experiencing drought conditions for a number of years. This had resulted in a reduction in revenue received by the Company from its carrot growing operations. The Property was purchased by the Company as it was located in an area with higher annual rainfall.
24. A statement setting out the Company's financial position for the period 2003 to 2007 is included as Annexure "E" to this Statement of Agreed Facts.

The removal of trees from the Property

25. During the period between April 2004 and July 2005, the Company caused not less than 170 trees to be removed from the Property ("the Action"). The trees which were removed from the Property included trees from the species *E. leucoxylon* (Yellow or Blue Gum), *E. camaldulensis* (River Red Gum) and *E. fasciculosa* (Pink Gum).
26. The 170 trees removed included those trees referred to in the South Australian NVC notification of decision (see Annexure "D") for which permission to remove had previously been denied.
27. The Company did not seek or obtain approval from the Minister to remove 170 trees from the Property. The intention of the Company in clearing the trees was to enable a greater area of the Property to be irrigated and to increase the financial return from the Company's cropping enterprises as a result.
28. The 170 trees were removed at the direction of Mr Lamattina. He identified and marked a number of trees on the Property for removal and directed an employee of the Company to remove the trees with an excavator and loader. Photographs which depict trees which were removed from the Property is included as Annexure "F" to this Statement of Agreed Facts.
29. Included as Annexure "G" to this Statement of Agreed Facts is an aerial photograph which identifies (using a yellow half circle) the 170 trees referred to in paragraph 25 above. Also included in Annexure "G" are two panoramic photographs which depict from ground level the areas of the Property which were cleared and the extent of the Action taken by the Company.
30. It is agreed between the parties that the Action took place over an area of 150 hectares of land on the Property. The parties have not had a valuation conducted to ascertain what the value of the newly cleared land is likely to be as a result of the Action.
31. It is estimated that of the 170 trees removed, a minimum of 24 trees were potential nest trees for the Cockatoo.

32. At the time the Company engaged in the Action, Mr Lamattina was not aware that the Cockatoo was an endangered species, or that the clearance would have or is likely to have a significant impact on an endangered species.
33. On or about 28 June 2006, the Company transferred the Property to Jason Tranter No 1 Pty Ltd for an amount of \$1,373, 600.00. A copy of the memorandum of transfer is included as Annexure "H" to this Statement of Agreed Facts.
34. The Company has been convicted for contraventions of the *Native Vegetation Act 1991 (SA)* as a result of the Action in proceedings instituted by the NVC in the South Australian Magistrates Court. Included as Annexure "I" to this Statement of Agreed Facts is a copy of the sentencing remarks of Mr WAG Morris, SM in those proceedings and a an outline of the submissions put on behalf of the Company at the sentencing hearing.
35. The Company is also the subject of civil proceedings instituted by the NVC as a result of the Action, in which an order for the remediation of the Property is sought. Included as Annexure "J" to this Statement of Agreed Facts is a copy of the Summons filed by the NVC against the Company.

Significant Impact caused by the Action

36. The Minister and the Company agree that the Action is likely to have a significant impact on the Cockatoo in contravention of section 18(3)(b) of the Act. The parties agree that the scientific evidence available does not suggest that the Action has had an immediate impact of significance on the Cockatoo, but that it is likely that the Action will have a significant impact in the future.

Adverse affect on habitat critical for the survival of the Cockatoo

37. The Cockatoo is considered endangered because of it's small population size and continuing habitat loss.
38. The Action is likely to adversely affect habitat which is critical for the survival of the Cockatoo, as the Property is part of an area mapped as nesting habitat that is critical for the survival of the species. While the location of all nesting sites is not known, the Property is within a region which is recognised as one of the remaining strongholds of nesting for Cockatoos in South Australia and the area on the Property which was cleared could have supported up to six (6) nesting pairs.
39. The Cockatoo has traditional nesting areas where it returns to breed. The removal of the potential nesting trees is likely to lead to reduced nesting success in this area and a reduced recruitment of new Cockatoos into the population. Most known nest trees of the Cockatoo are paddock trees (of the type removed), and there is little of this habitat type left in South Eastern South Australia.

40. In addition to a reduction in suitable nesting habitat for the Cockatoo, it is also likely that the Action will reduce the area of occupancy of the Cockatoo with respect to the stringybark feeding habitat which adjoins the Property. As the Property will support fewer nesting pairs of Cockatoos, fewer Cockatoos will occupy and utilise the adjoining stringybark feeding habitat.



Kate Sullivan

A solicitor employed by
Australian Government Solicitor
Solicitor for the Applicant



Chris Ryan

Solicitor for the First
and Second Respondent

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ACN 007 420 822
First Respondent

ROCCO LAMATTINA
Second Respondent

ANNEXURE "A"

The following pages are "Annexure A" referred to in the Statement of Agreed Facts dated 21 April 2009.

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Figure 1 - Male and Female South Eastern Red Tailed Black Cockatoo at nesting hollow.

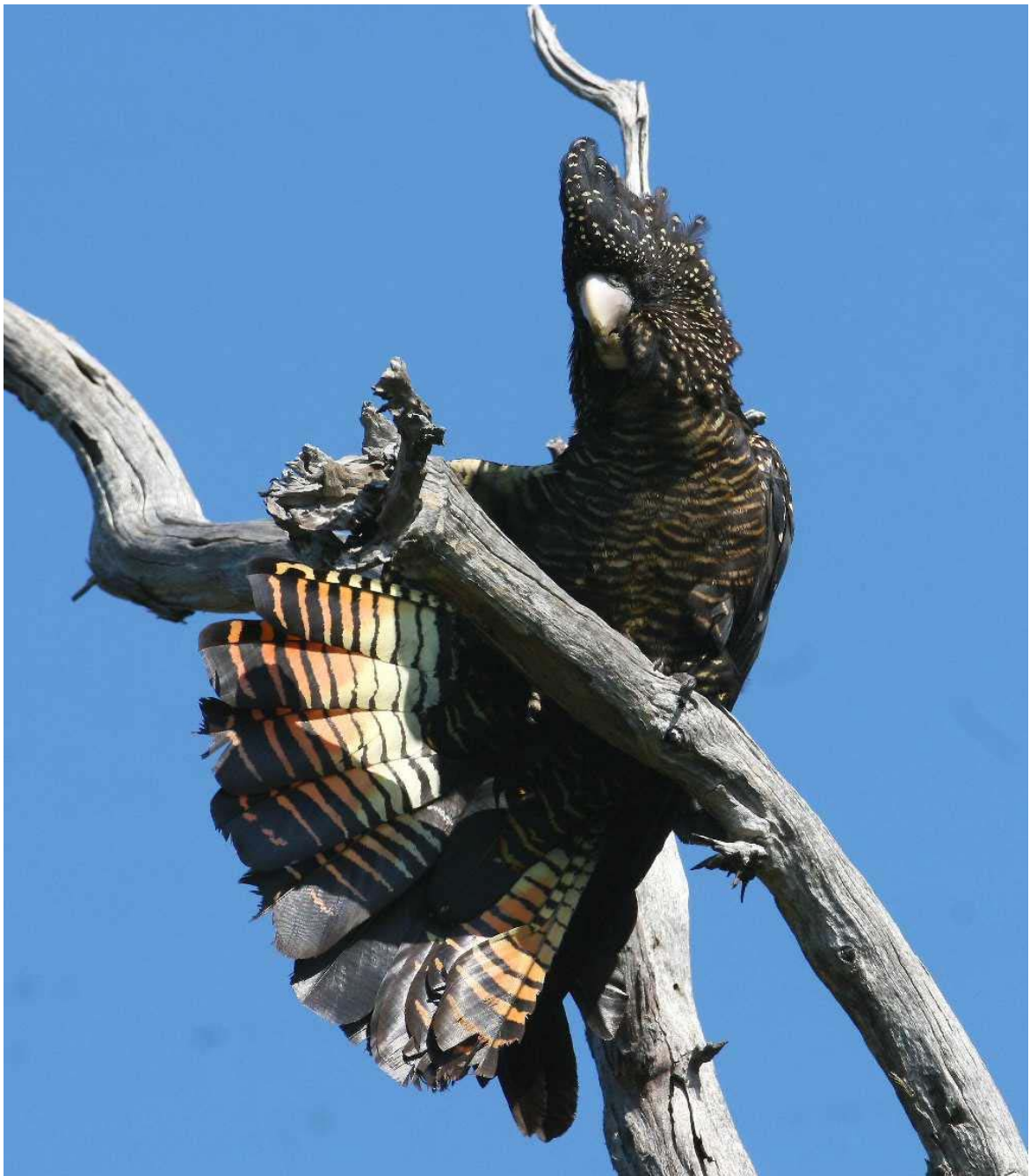


Figure 2 – Female South Eastern Red Tailed Black Cockatoo with splayed tail.



Figure 3 – Female South Eastern Red Tailed Black Cockatoo at nesting hollow.



Figure 4 – Male South Eastern Red Tailed Black Cockatoo.

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ANNEXURE "B"

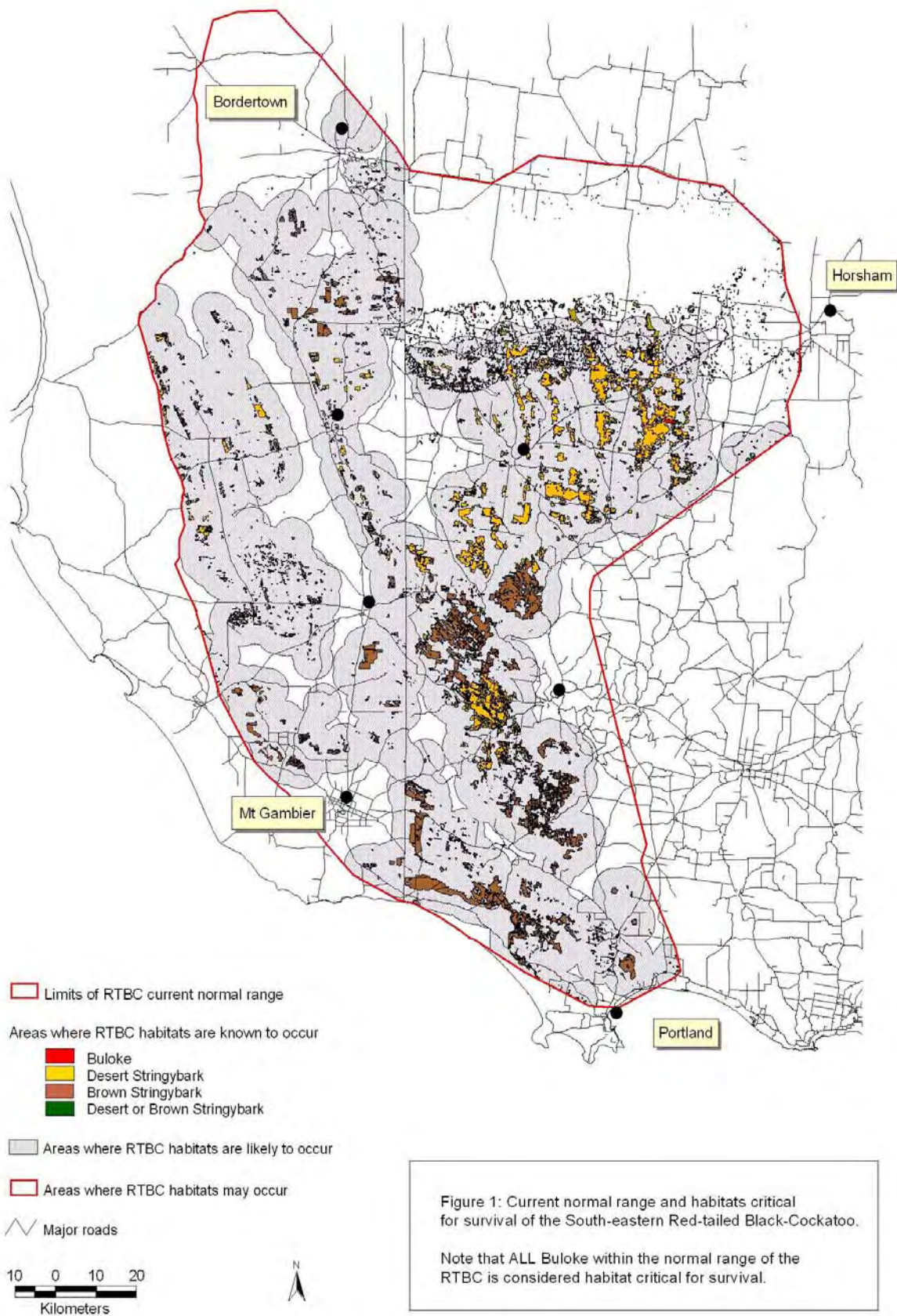
The following pages are "Annexure B" referred to in the Statement of Agreed Facts dated 21 April 2009.

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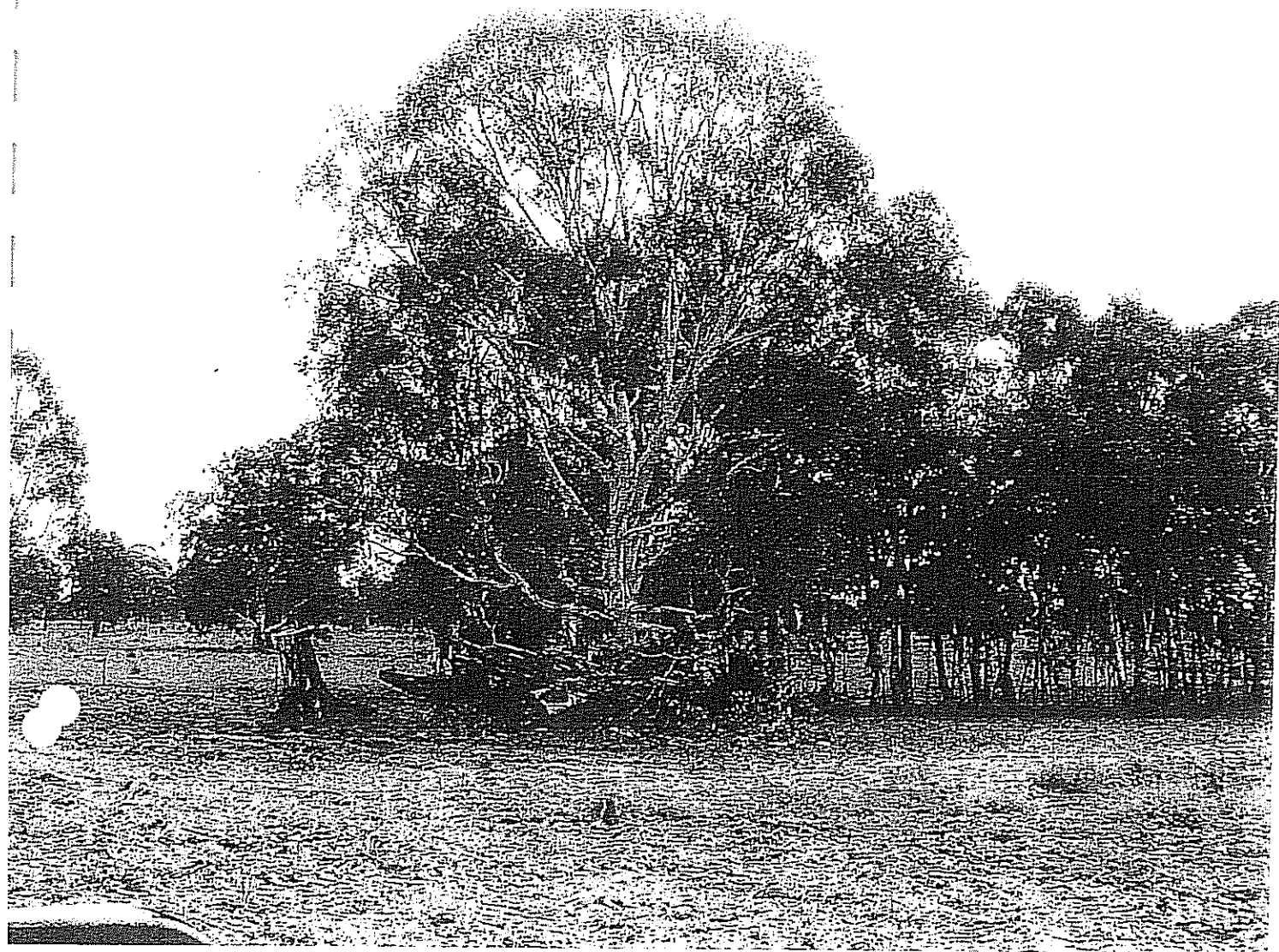
ROCCO LAMATTINA
Second Respondent

ANNEXURE "F"

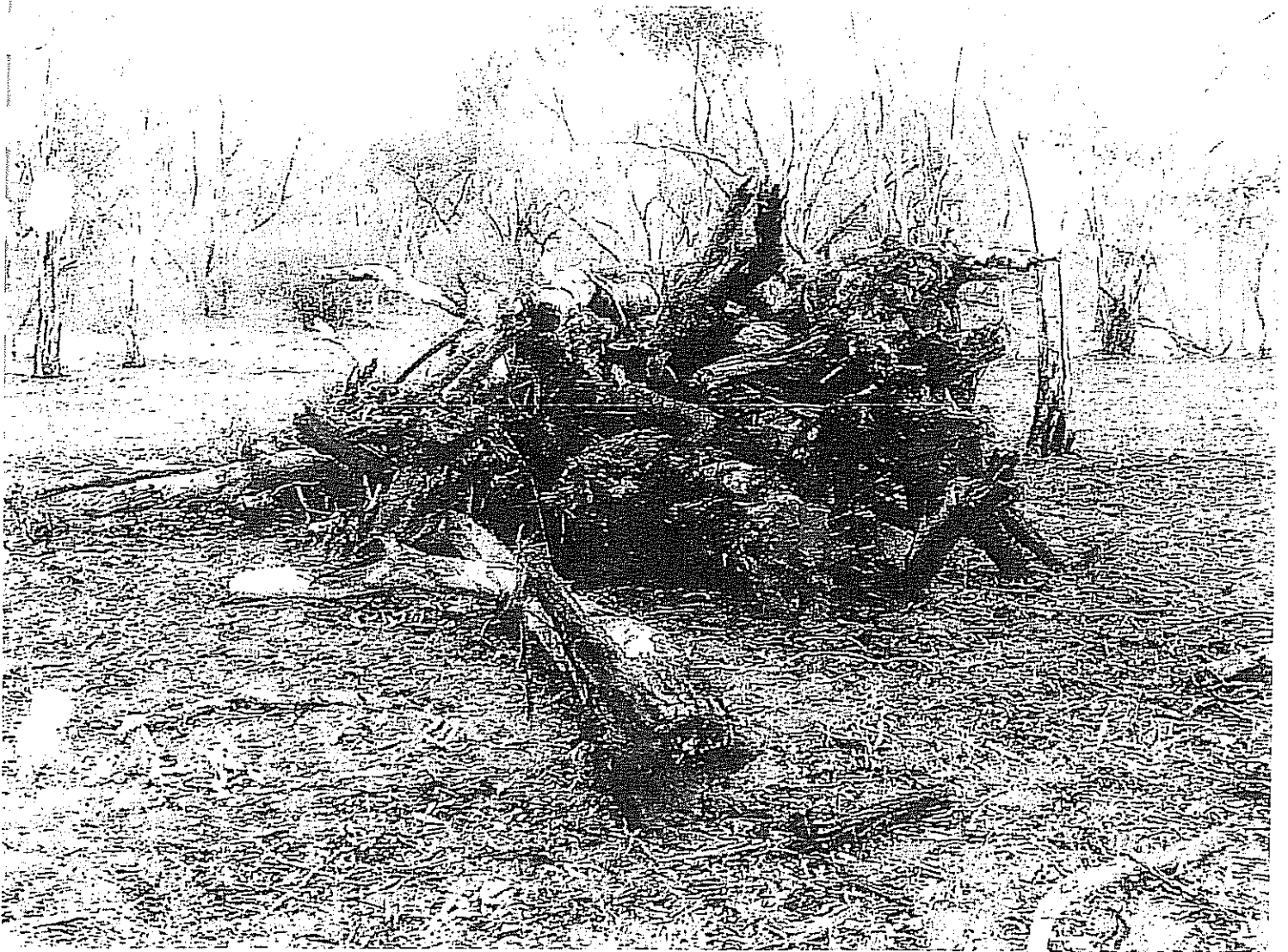
The following pages are "Annexure F" referred to in the Statement of Agreed Facts dated 21 April 2009.

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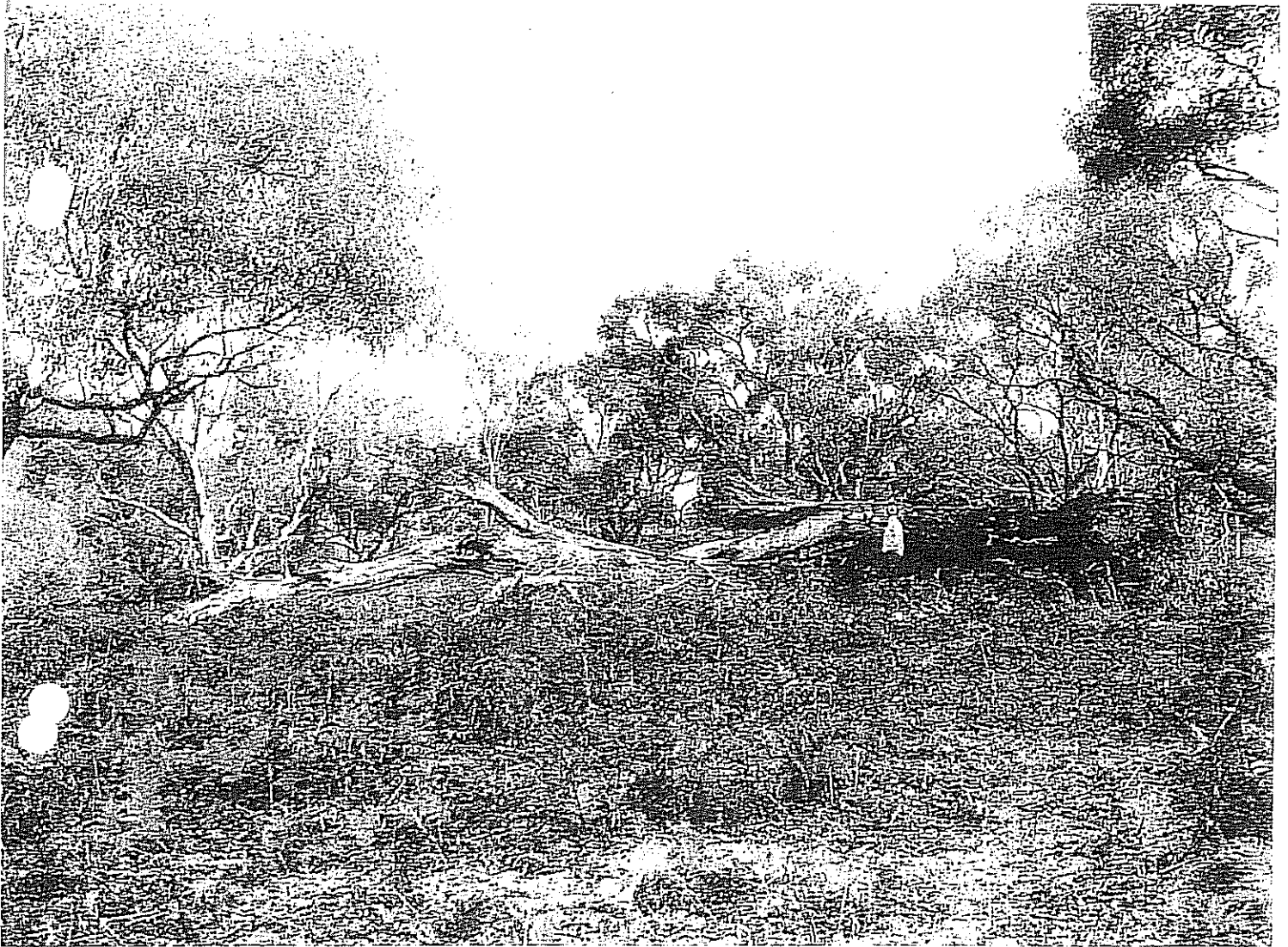
Date: 26 July 2005 Photo No.: 55
Location: Sec 324-25-26-27 & 328 Hd of Hyman
Taken By: Craig Baulderstone
Description: Tree stumps piled around the base
of a living eucalypt tree at WP 19.
Signed: *Craig Baulderstone*



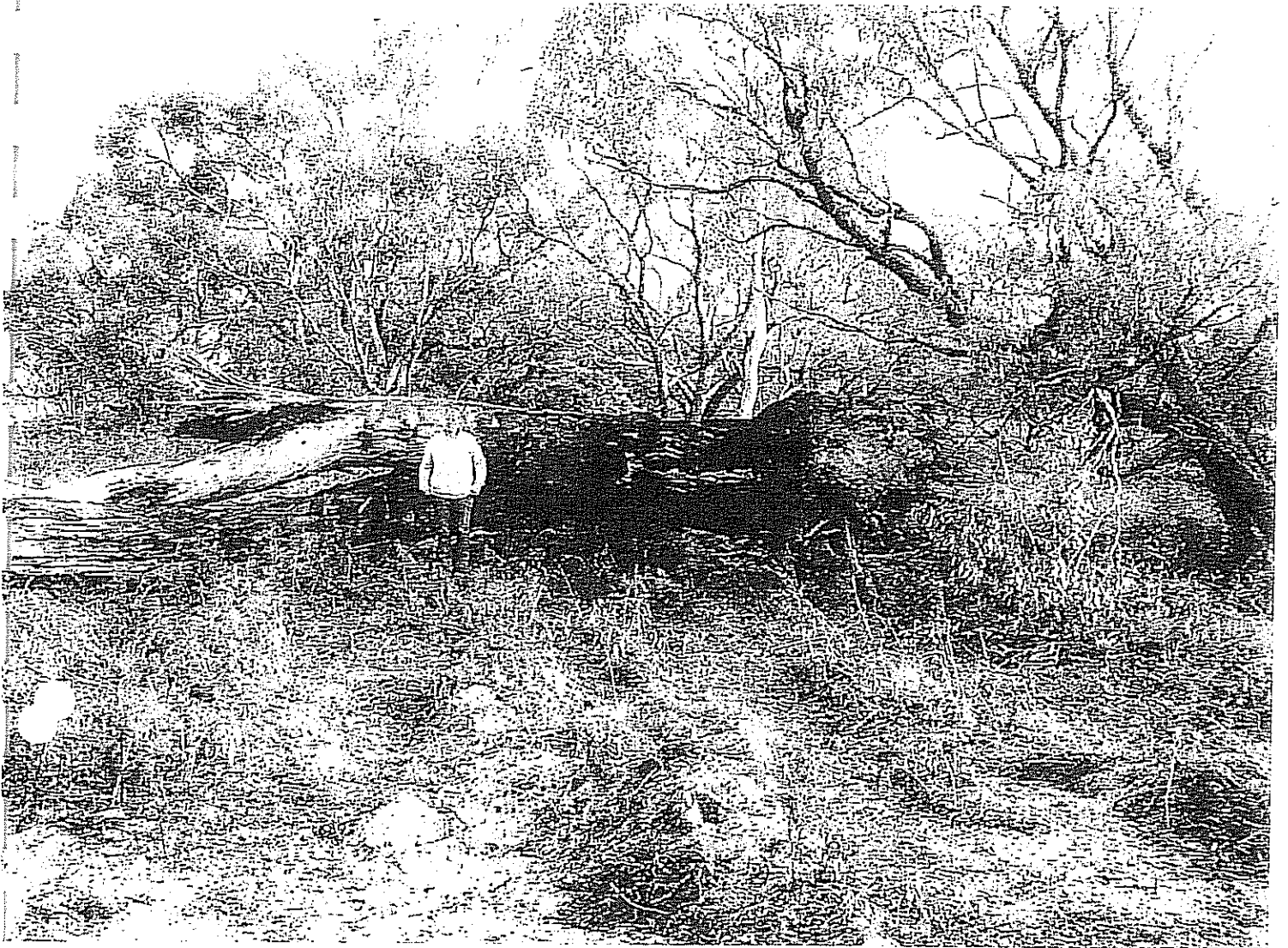
Date: 26 July 2005 Photo No.: 56
Location: Sec 324-25-26-27 & 328 Hd of Hyman
Taken By: Craig Boulderstone
Description: Pile of native trees at WP 20, approx
15 stumps/trunks in pile.
Signed *Craig Boulderstone*



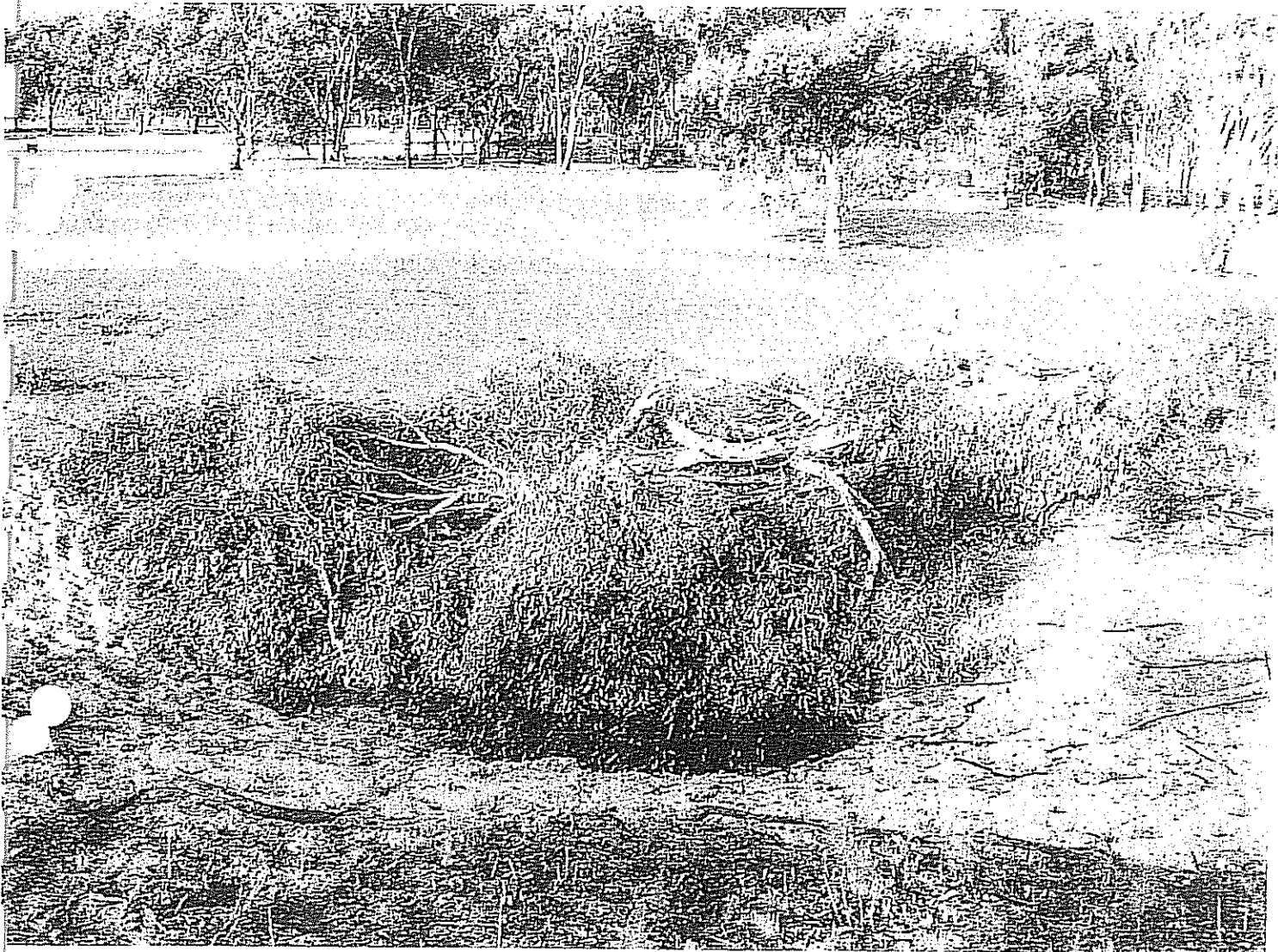
Date: 26 July 2005 Photo No.: 57
Location: Sec 324-25-26-27 & 328 Hd of Hyman
Taken By: Craig Baulderstone
Description: Another view of the pile of native
trees at WP 20, approx 15 stumps/trunks in pile.
Signed *Craig Baulderstone*



Date: 26 July 2005 Photo No.: 60
Location: Sec 324-25-26-27 & 328 Hd of Hyman
Taken By: Craig Boulderstone
Description: Felled large native tree, diameter
>2m, at WP 21.
Signed *Craig Boulderstone*



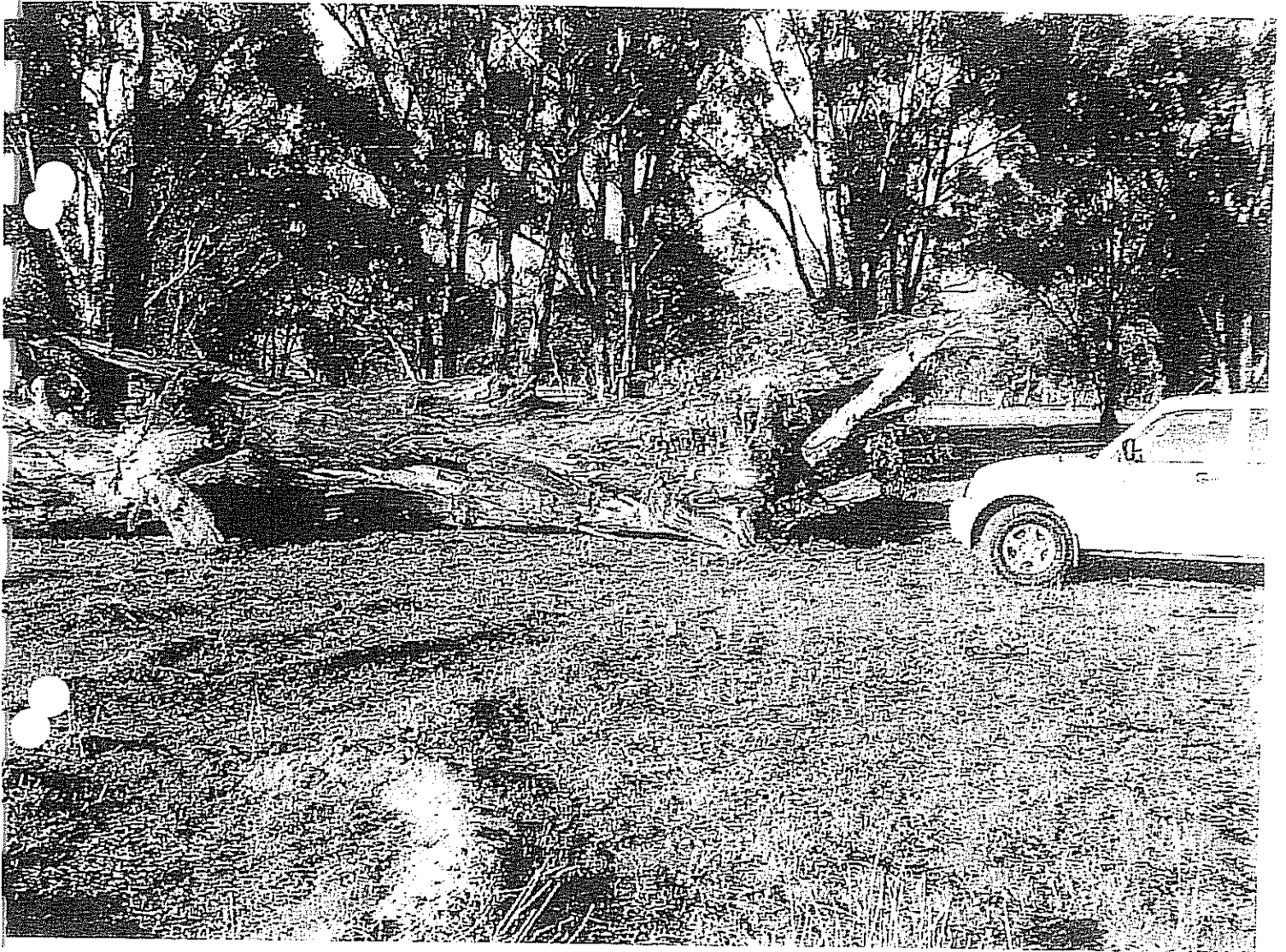
Date: 26 July 2005 Photo No.: 61
Location: Sec 324-25-26-27 & 328 Hd of Hyman
Taken By: Craig Baulderstone
Description: A closer view of felled large native
tree, diameter >2m, at WP 21.
Signed *Craig Baulderstone*



Date: 26 July 2005 Photo No.: 62
Location: Sec 324-25-26-27 & 328 Hd of Hyman
Taken By: Craig Baulderstone
Description: A pile of native trees at WP 22.
Signed *Craig Baulderstone*



Date: 26 July 2005 Photo No.: 63
Location: Sec 324-25-26-27 & 328 Hd of Hyman
Taken By: Craig Boulderstone
Description: A pile of approx 6 large native trees
at WP 23.
Signed *Craig Boulderstone*



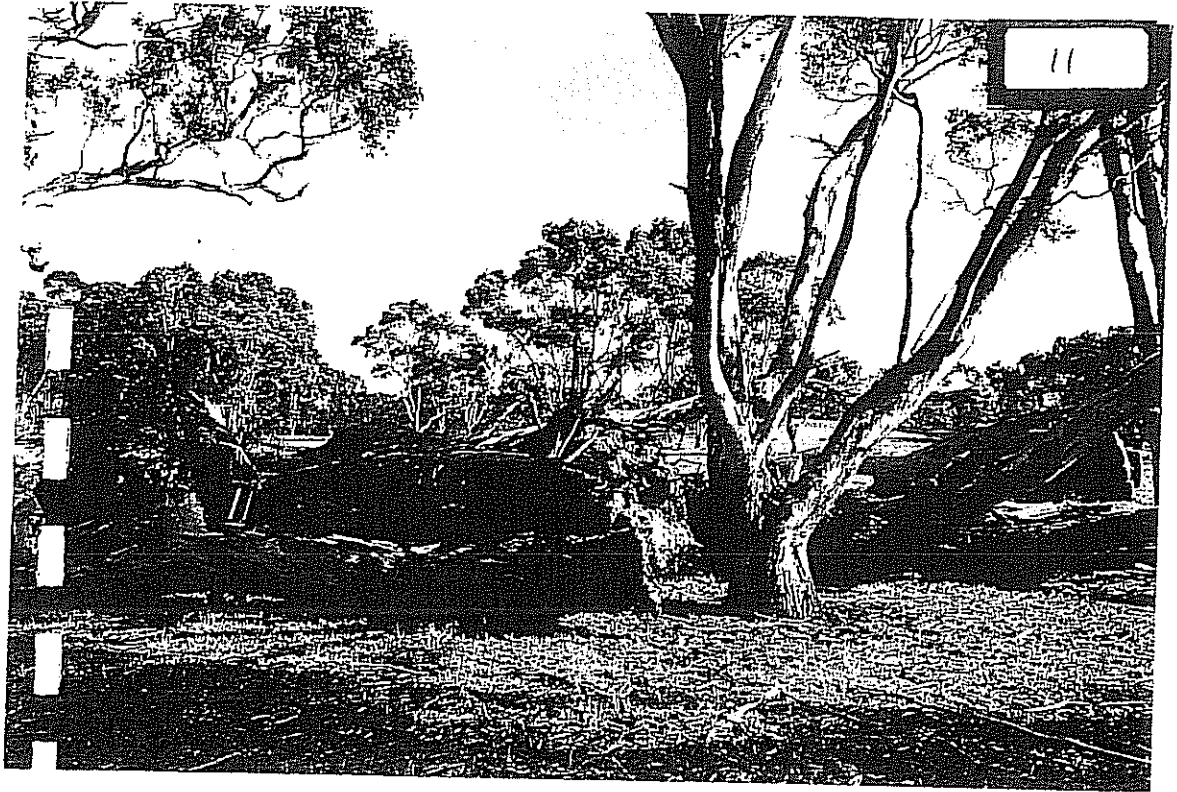
Date: 26 July 2005 Photo No.: 64
Location: Sec 324-25-26-27 & 328 Hd of Hyman
Taken By: Craig Baulderstone
Description: A closer view showing the size of the
native trees piled at WP 23.
Signed *Craig Baulderstone*

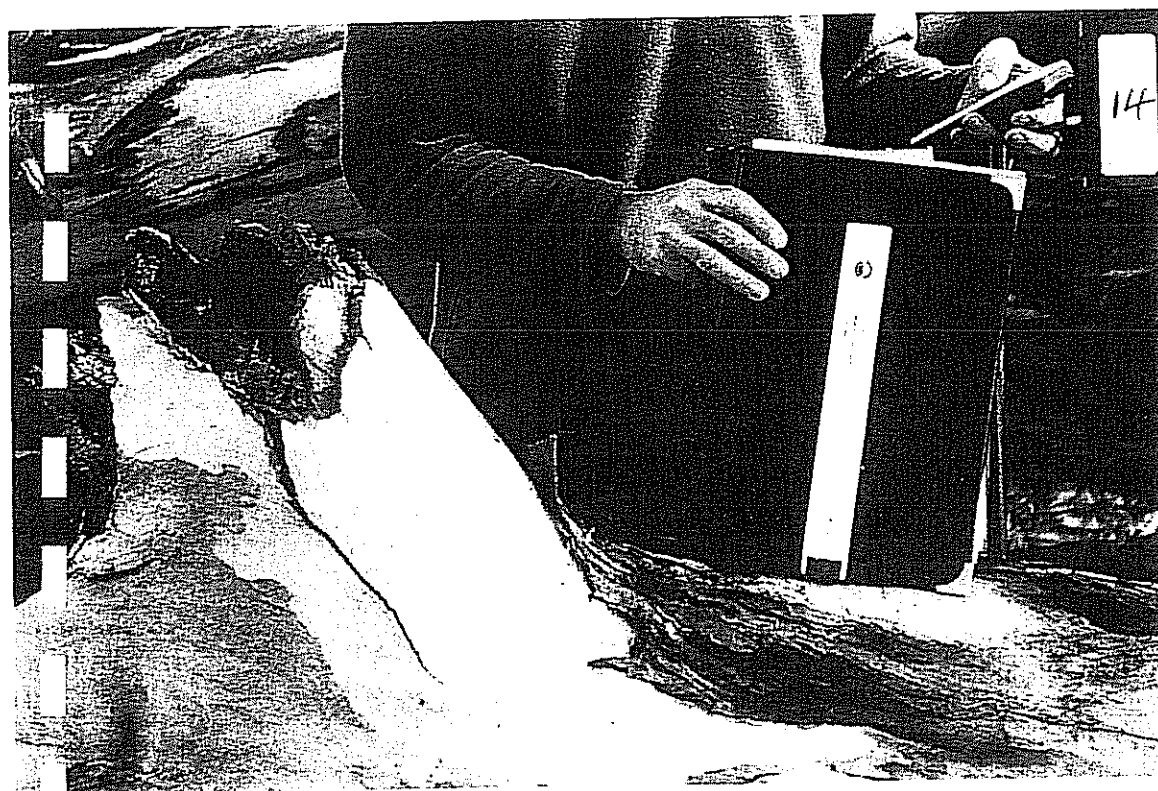


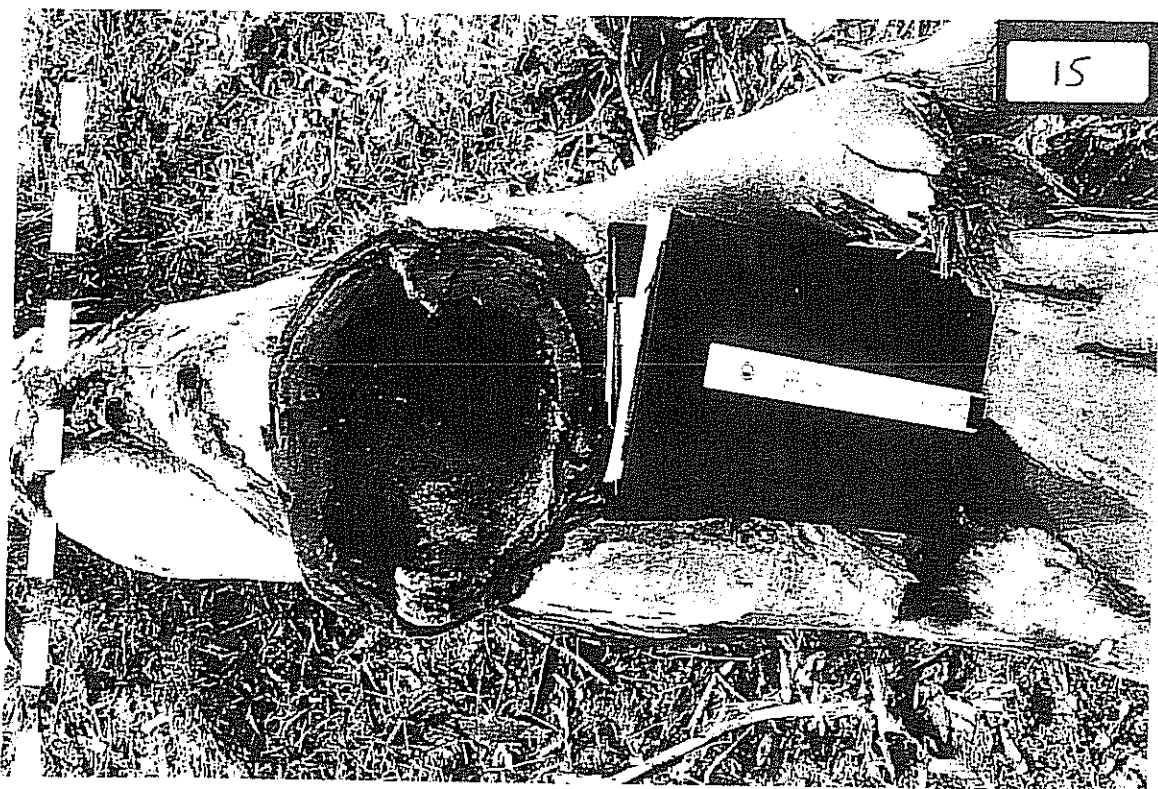
Date: 26 July 2005 Photo No.: 65
Location: Sec 324-25-26-27 & 328 Hd of Hyman
Taken By: Craig Boulderstone
Description: Pile of native trees at WP 24.
Signed *Craig Boulderstone*

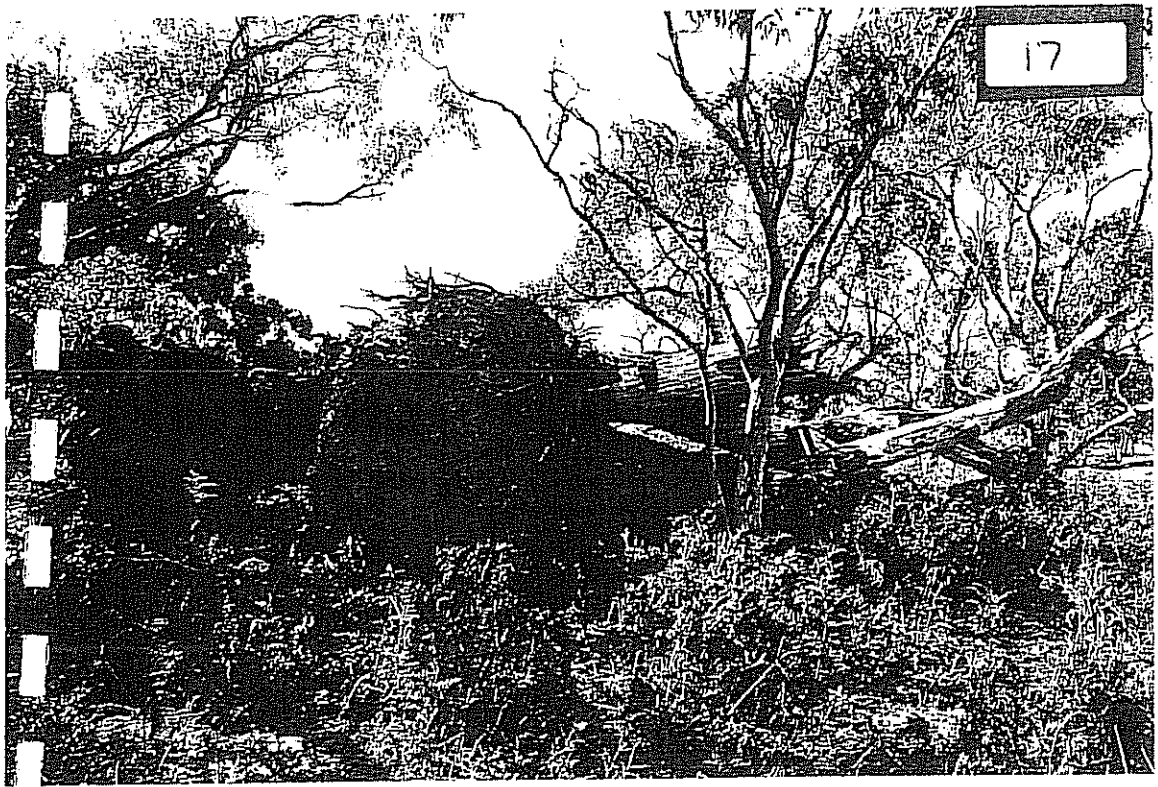


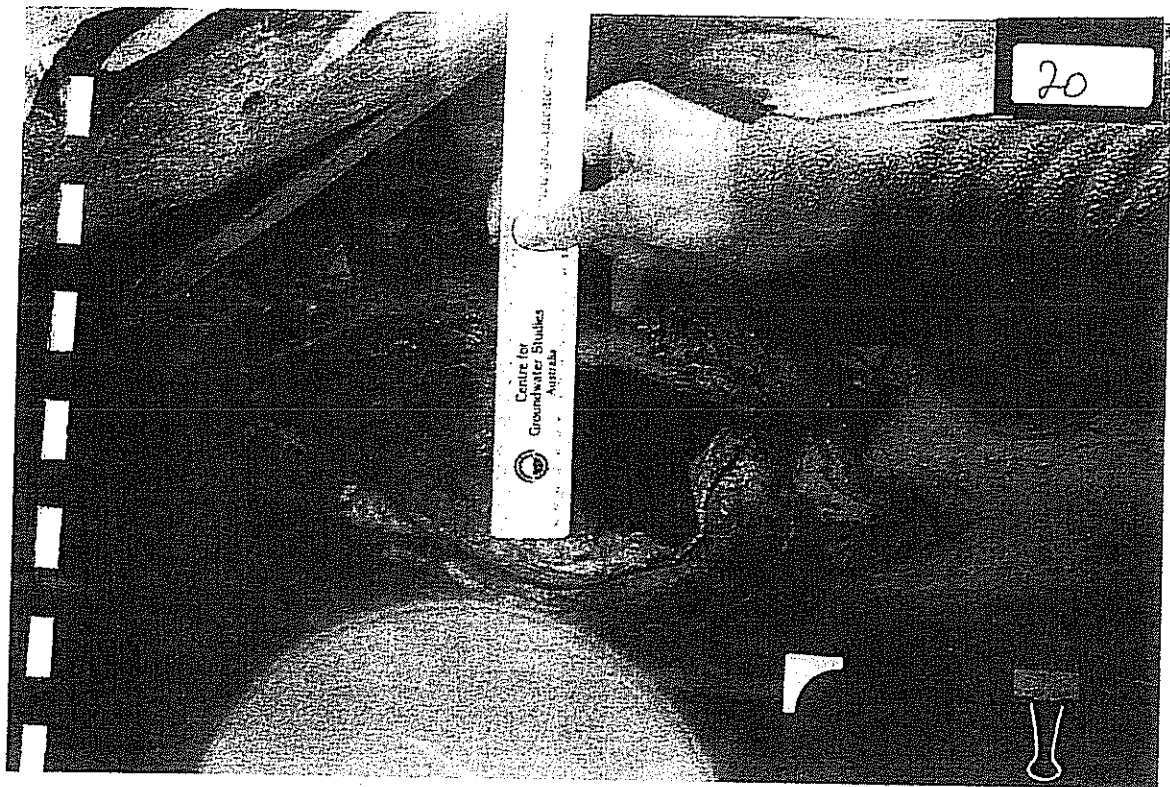
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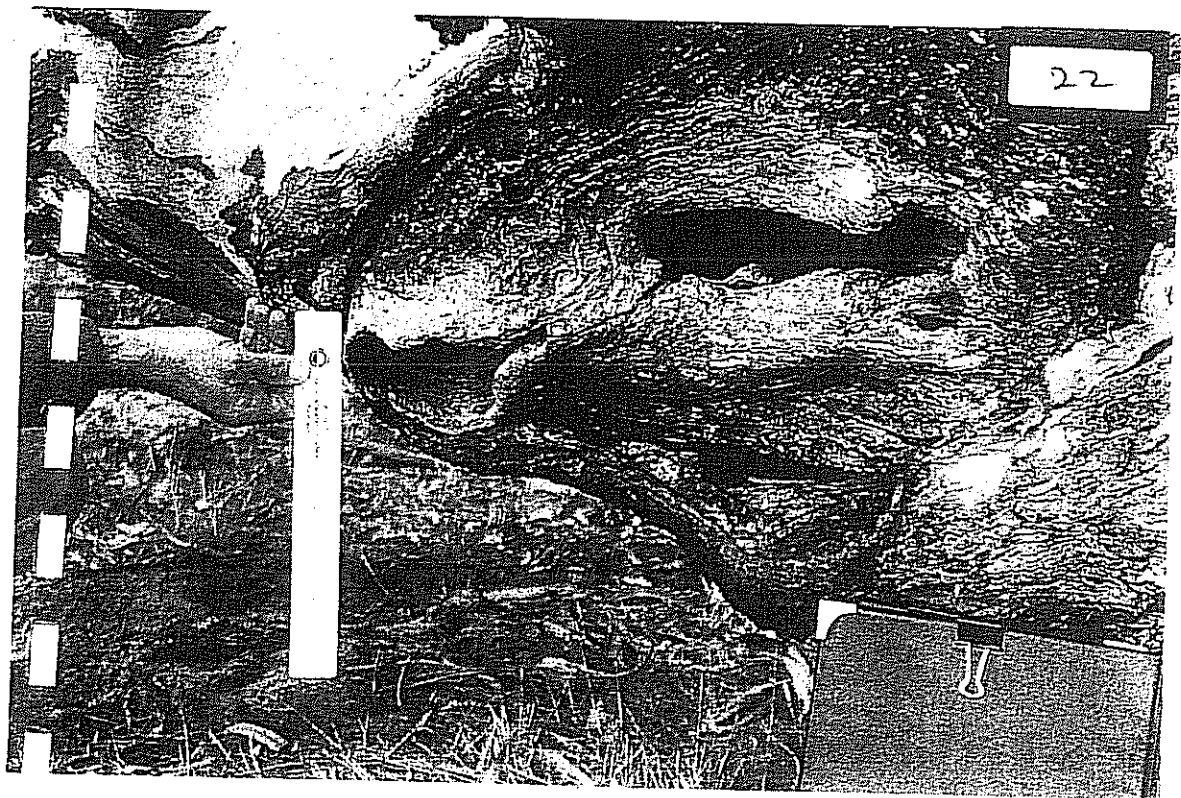


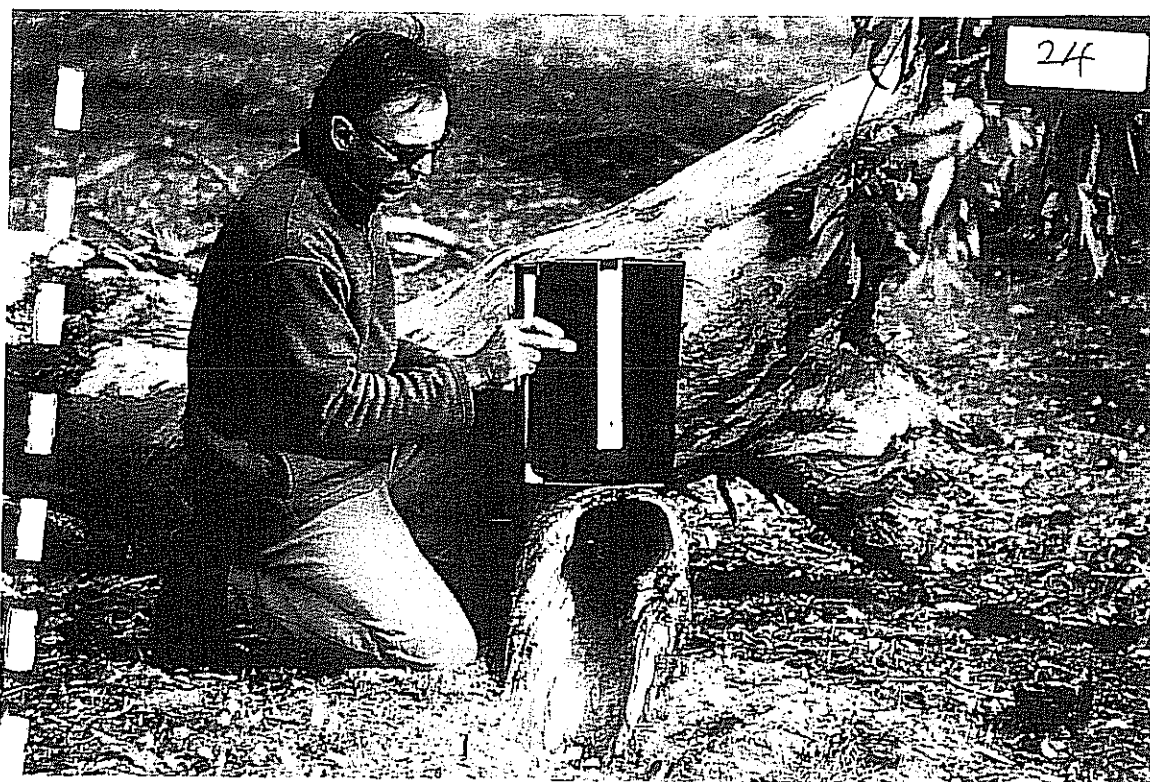
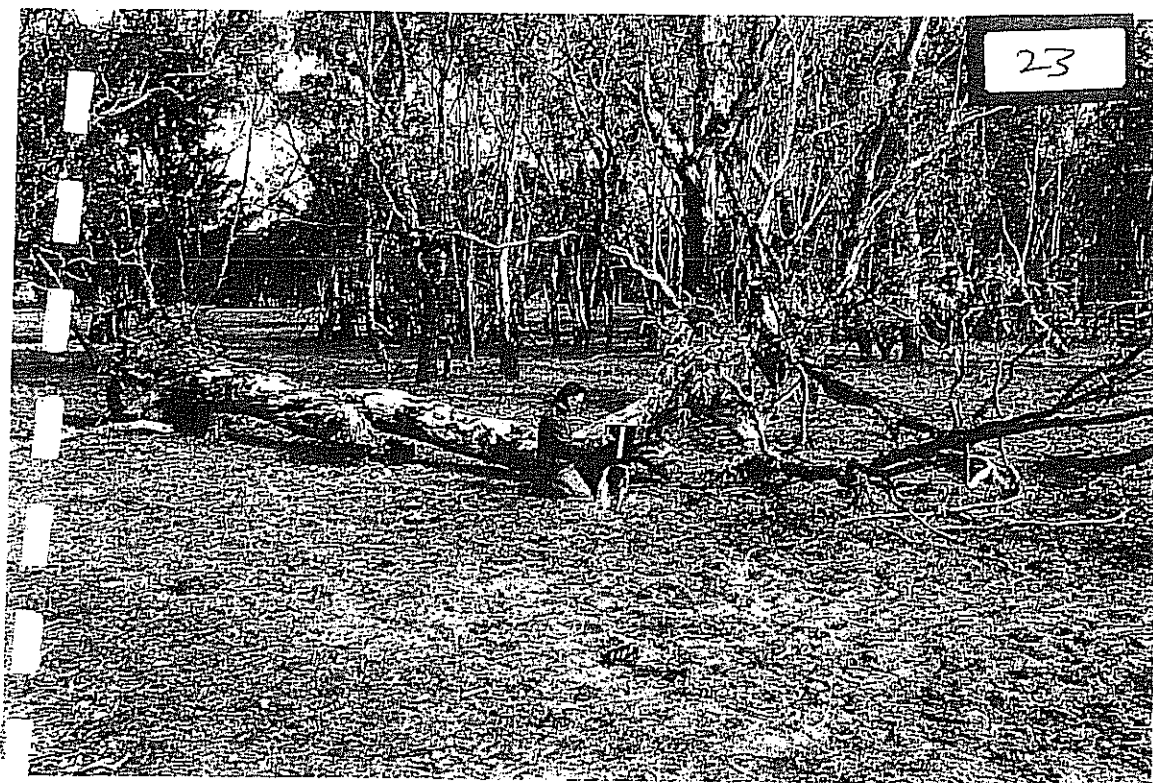














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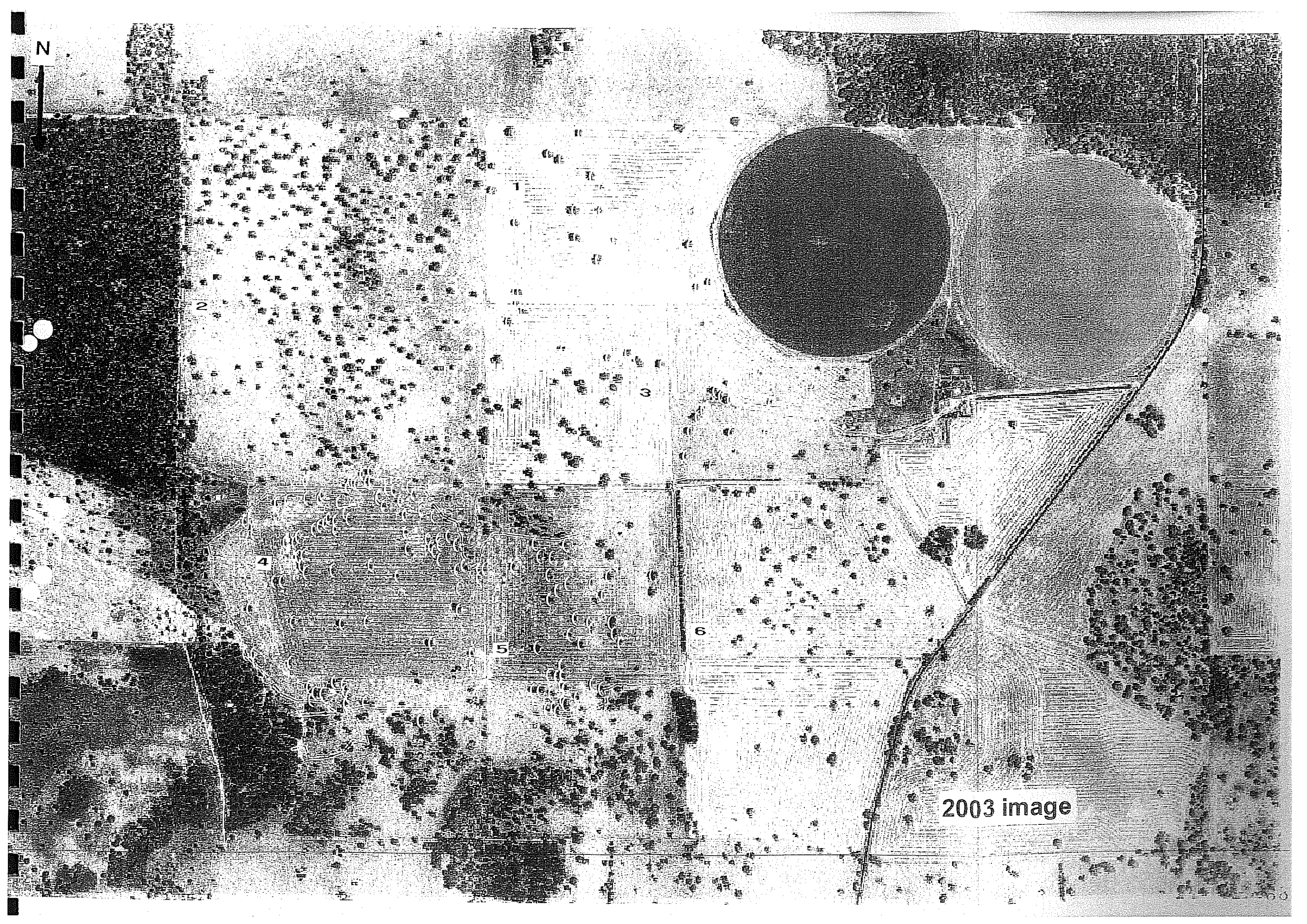
ROCCO LAMATTINA
Second Respondent

ANNEXURE "G"

The following pages are part of "Annexure G" referred to in the Statement of Agreed Facts dated 21 April 2009.

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2003 image

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ANNEXURE "I"

The following pages are "Annexure I" referred to in the Statement of Agreed Facts dated 21 April 2009.

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MAGISTRATES COURT OF SOUTH AUSTRALIA
(Criminal)

GOULD V ROCKY LAMATTINA & SONS P/L & ANOR

Remarks on Penalty of Mr WAG Morris, SM

27 November 2008

Complainant: PAUL LESLIE GOULD
Prosecution: MS K SHANKS, DIRECTOR OF PUBLIC PROSECUTIONS (CTH)
First Defendant: ROCKY LAMATTINA & SONS P/L
Counsel: MR C RYAN
Second Defendant: ROCCO LAMATTINA
Counsel: MR C RYAN

Hearing Date/s: 27/11/2008

File No/s: MCMTG-07-1677

GOULD V ROCKY LAMATTINA & SONS P/L & ANOR

Mr WAG Morris, SM
Criminal

1 For these remarks I will be using in part written notes and also in part the
reasons will be ex tempore as I go along. There may be pauses in my remarks while I
gather my thoughts. If I am called upon to produce written reasons then I reserve the
right to make necessary changes to syntax and grammar without changing any
essential element of my reasoning. I also propose to omit references to citations and
matters of that kind in giving of these ex tempore reasons.

2 I will use headings and try to announce the headings as I go along.

The Complaint

3 The complainant is a representative of The Department of Water Land and
Biodiversity Conservation (hereinafter referred to as the "department").

The Defendants

4 Rocky Lamattina and Sons Pty Ltd (whom I shall refer to as the corporate
defendant) and Mr Rocco Lamattina in person each defendant has respectively
pleaded to two counts of unlawfully clearing of Native Vegetation.

5 Mr Rocco Lamattina is a shareholder (with others) and director (with others) of
the corporate defendant.

6 Mr Rocco Lamattina is charged in person with the two counts in his capacity as a
member of the governing body of the corporate defendant. Proceedings against the
balance directors, that is to say members of the governing body of the corporate
defendant have been withdrawn.

7 It has been put to me that Mr Rocco Lamattina performed as it were all the
physical acts of the corporate entity. He made himself responsible for all the land
management decisions that gave rise to the unlawful clearing on the subject
properties.

The Charges

8 The unlawful clearing of native vegetation is admitted to have taken place and
commenced on about 18 January 2005 and ceased on 18 July 2005. The clearing was
in two separate and quite distinct locations, both in the South East of South Australia.

9 One count relates to land in the South East of South Australia, an area of land
that has been described in the complaint with more particularities but has been
referred to in the plea as "Accacia Downs". This land had been purchased by the
defendants from R M and CL Hinton (whom I will refer to as the "Hinton's").

- 10 The second property relates to as I say, other land in the South East of South Australia which is more accurately particularised in the complaint but referred to in these proceedings as the "Gap". That land, as I understood it had been leased long term from the Hinton's by the defendant company.

The defendants have pleaded guilty to the charges

- 11 These proceedings have been protracted but I am invited by the prosecution to accept the guilty pleas now entered on the agreed facts to be guilty pleas at an early opportunity. I propose to give the defendants the benefit of a reduction in penalty by reason of that guilty plea. The extent of the appropriate reduction I will announce in due course.

The Agreed Facts

- 12 The agreed facts upon which the pleas were entered are comprised of the particulars set out under the respective counts in the complaint and also by written submission.
- 13 The outline of complainants submission dated 23 June 2008 (subject to one amendment that I will mention later) was considered by the parties as the agreed facts. The complainant's submission was tendered by consent. The complainant tendered other documents and statements (separately marked as exhibits) by consent also as agreed facts that supplement the essential agreed facts coupled with as I have said the particulars set out in the complaint.
- 14 Large portions of the relevant land were cleared by the defendant for the purpose of permitting the land to be used to cultivate carrots using a centre pivot irrigation system. The defendants were engaged in the business of production of carrots on a very large scale formerly in Victoria. Centre pivot irrigation as its name suggests is a method of irrigation that uses a long irrigation arm (seemingly known as "the pivot"). The water is sourced at the centre of the pivot arm and the long arm rotates around the centre water source irrigating a large circular area of land. The pivot system requires, by reason of its operation, 360-degree circular area of cleared land to operate at all.
- 15 The agreed facts included an assertion that this conduct is not to be regarded as broad acre clearing for the purpose of formally calculating an appropriate penalty. But it was agreed that the removal of scattered trees in these circumstances achieved the same effect as broad acre clearance. Namely, broad acre clearance to give complete access to the required circular area of land. Of course there were many areas of this circular areas of land cleared in this way by the defendants.
- 16 The complainant says that I should impose a monetary penalty but not on the per hectare calculation basis. It seems to me one would have to have regard to the extent of the area cleared in any event but I understand the position to be I have been formally invited to calculate the penalty other than by reference strictly to the per hectares and there are good reasons for this. The prosecution also says the penalty should be towards the upper end of the scale by reason of increased productivity and the total loss of habitat and native fauna in the clearance of both the upper and lower storeys of all the vegetation in the cleared area.

Accacia Downs

- 17 Count one as to the corporate defendant and count two as to Mr Rocco Lamattina both relate to the land at Accacia Downs.
- 18 The land already had pivot irrigation areas on it in use by seemingly the Hinton's. The unlawful clearance gave access to the defendant to a further three pivot irrigation areas.
- 19 P1 is a photograph of Accacia Downs that shows with a red circle 141 trees that were removed by the defendants to create the area to create the three centre pivot areas. The photograph was taken at a time prior to the removal of the trees by the defendant.
- 20 P3 is an addendum statement of Mr Craig Balderstone dated 21 August 2008, an employee of the department. The statement details the method of removal of the trees and the calculation of the loss of tree canopy and the use that was put to the cleared land by the defendants at Accacia Downs.
- 21 Appendix 1 of P3 shows the circular cleared areas being marked F (17.5 hectares), G (17.5 hectares) and H (38.4 hectares). Clearances A, B, C, D and E on appendix 1 were not the subject of the charges before me. It ought to also be noted that the area I, which was a subject of these charges, had been used for commercial purposes irrigated and cropped for carrots.
- 22 The basic statistics of the clearance is the defendant cleared not less than 141 native trees being plants indigenous to South Australia to create the areas. The total tree canopy destroyed in the process was estimated to have been 2.9 hectares of canopy. The total area cleared by the three circular areas was 73 hectares.
- 23 The complainant says that whilst these clearance statistics themselves are serious, a mere looking at the statistics does not convey the importance and value of the particular native vegetation that was destroyed. Those statistics do not accurately communicate the damage caused by the unlawful conduct.
- 24 Firstly it has been put to me that as to the nature of the trees themselves all of the trees would have been not less than 50 years old and that a considerable number of the trees would have been more than 100 years old. Lastly some of the trees were likely to be in excess of 200 years old.
- 25 Secondly it was agreed that the trees and their canopy were accessed by significant wildlife and were an important habitat for that wildlife. The trees provided habitat for native birds, being Yellow Tailed Black Cockatoo (rated as a vulnerable species), Blue Faced Honeyeater (rated as rare species), the Crested Shrike Tit (rated as vulnerable species) and the White Bellied Cockatoo (rated as rare species). These trees were important for the provision of food, shelter and nesting for these rare and vulnerable birds.
- 26 The agreed facts tendered to me included a reference to the Red-tailed Black Cockatoo, a species of bird rated as endangered. The complainant withdrew the

allegation as to the existence of this bird in this habitat. The defendants' counsel told me that the defendant is the subject of intended civil proceedings under the *Endangered Species Act 1992* (Cth) and the defendant apparently intends to deny liability to the claim of the Commonwealth Government in relation to the existence of that bird on the land and or its endangerment. I was invited to disregard this aspect of the formal agreed facts and I do so.

- 27 Thirdly that Accacia Downs, and I will refer to the property described as the Gap shortly, that the described scattered trees were collectively remnant woodlands. They are considered grassy woodlands and are considered endangered. That the blue gum, pink gum grassy woodlands "are rated as vulnerable" and the trees were to be considered to comprise, not only individual trees but as I say a part of a whole threatened community.

- 28 Lastly the Native Vegetation Council commented that the pre-European vegetation mapping included that area cleared was grassy woodlands and although the grass was degraded with the introduction of non-native grasses, the native tree canopy was still considered to be intact when compared with the pre-European vegetation mapping.

The Gap

- 29 The basic statistics with respect of the Gap are that the defendant cleared no less than 130 native trees, being plants indigenous to South Australia. The removal created a commercial opportunity to have 12 pivot areas. Ten of the circular areas were 20 hectares each and the other two 35 hectares, creating a total land area cleared of 274.8 hectares. The total tree canopy was calculated to being 1.9 hectares. P4 is a photograph of the Gap property and shows the red circles with the 130 native trees that were removed by the defendants.

- 30 P5 is an addendum statement of Mr Craig Balderstone, an employee of the department and provides details as to the method of removal of the trees. His calculation of the loss of the tree canopy and the use put to the cleared land by the defendants at the Gap. Appendix 1 shows the 12 pivot areas unlawfully created, areas A to J and that they had been irrigated and commercially cropped for carrots by the defendant.

- 31 Again the complainant says that whilst these statistics are serious enough in themselves I am asked to take into account that those statistics do not convey the full importance and value of this particular native vegetation area that was destroyed and repeat the same further considerations that I have just set out above in relation to Accacia Downs. It is agreed that as set out in the report of the department attached to letter P7 (which I will refer to shortly in a bit more detail), it is agreed that that the condition of the land and fauna at Acacia Downes is representative of the condition land and fauna that would have been at The Gap prior to it's unlawful clearance. So that is an agreed fact as the condition of the land and fauna at The Gap.

Commercial Purpose

- 32 It is agreed that the defendant made a significant financial commitment in purchasing these two properties and also putting significant infrastructure on the property. The purpose of the clearance was to provide for land to grow carrots. Some of the cleared land as I have said was in fact used for production. However the properties are now sold and no ongoing commercial advantage accrues to the defendant by reason of his continued use of the land but the unfortunate fact remains that by reason of the defendants' clearance, ongoing use of the land accrues to the subsequent purchaser from the defendant. Seemingly the subsequent purchaser purchased in good faith and for value bearing in mind increased ability to conduct pivot irrigation.

The Defendants Knowledge

- 33 P7 is a letter from the Department attaching notification of the refusal of a prior application to clear the Accacia Downs. The notification and refusal included a full report dated 25 February justifying the refusal. This letter and attachments, P7, it is agreed was sent by the department to the real estate agent who was negotiating, it seems, for both the Hinton's and the defendants in relation to the Accacia Downs and the leasing of The Gap.

- 34 It seems from the attachments P7 that the original application of the Hinton's was to remove 258 native trees to establish 8 centre pivot irrigation areas on Accacia Downs. By the time the report was created, the number of trees sought to be cleared had been reduced to only 24. And even though it was reduced the application was only successful in part that only 7 trees could be removed out of the original application to remove 258. Even so this approval was subject to onerous re-vegetation and maintenance of re-vegetation of other portions of the land and its permanent reservation as native vegetation land. All of this information was provided by the department to the defendants' agent.

- 35 Even a cursory reading of that attached report and photographs representative of the trees on it all reveal the very obvious high environmental values of that land. The attachments to the report contained photographs of representative trees which can be seen simply by observing that they are significant, or were significant I should say as they are now gone.

- 36 The defendants asserts and the complainant agrees that Mr Rocco Lamattina himself (in person) did not look at the details set out in the Form 1 attached to the contract of sale. That whilst the defendant's son (fellow director of the corporate defendant) did acknowledge receiving the Form 1 encumbrance details, he did not communicate the notification of the prior refusal to his father Mr Rocco Lamattina. Consequently it is agreed that Mr Rocco Lamattina did not himself know of the prior refusal in 2005 of the clearance of the same land at Accacia Downs nor know of the special significance of the area that he unlawfully directed to be cleared.

- 37 However the complainant says that Mr Rocco Lamattina went to the office in Adelaide of Mr Peter Farmer, an employee of the department. It has been further agreed today in open court that at the date Mr Rocco Lamattina went to the office in

Adelaide of the department, the clearing had already been underway for some four months.

38 P8 is a statement of Mr Peter Farmer, the aforesaid employee of the department. He sets out an occasion when he met in his Adelaide Office Mr Lamattina. Mr Lamattina attended his office to advance his proposal to clear native vegetation and install the centre pivot irrigators, which as I have said, that nonetheless were already underway.

39 Mr Farmer sets out in part that Mr Lamattina contacted him:

"to enquire about a proposal to develop a property by installing centre pivot irrigators that were likely to remove native vegetation. He indicated that he was a vegetable grower from Victoria and was in the process or had recently purchased a property in the Frances-Naracoorte region. He was unsure of vegetation clearance requirements in South Australia."

40 Mr Farmer in his statement further says that he informed Mr Lamattina of the need to apply for a permit to clear native vegetation and that he could supply him with an application and that the application would take three to four months normally to process. At that particular time it was more likely to take six months to process because staffing issues personal to matters of the staff at the department that conducted the assessments. Mr Farmer told Mr Lamattina that his application could be "fast tracked" if he employed an accredited environmental consultant to do the report privately. Mr Lamattina, Mr Farmer says, indicated that he would consider the information that he had been given and left the office.

41 On the other hand Mr Lamattina admitted that he went to the office of Mr Farmer in Adelaide certainly to enquire about the requirements, if any, to clear native vegetation. He had a different recollection of the same conversation. Mr Lamattina, in his own record of interview (not tendered) but quoted in part to me, said that he went to the Adelaide office and he went there to find out:

"what needs to be done, or anything, as far as tree removal or clearing or whatever, but I never got that far".

42 Mr Lamattina described a disinterested Mr Farmer who merely described themselves as short staffed and too busy. Mr Lamattina, in further extracts of his interview that were revealed to me in the course of the agreed facts, sets out the following passages:

"... I just, that he was too busy and I just, and he said you gotta come back and see him in about two or three months time to talk about whatever I wanted to talk about and we didn't discuss anything".

43 Further on he said:

"Yes I spoke with Peter Farmer ... I think that he told me that they were all flat out and that the girls that work there were pregnant and they couldn't get out into the field for months".

44 Further he said:

"And I just took it from there. They really didn't care about what I was facing. We couldn't afford to have this sort of money lying around not producing".

45 That when asked by the interviewer what the clearance was for, Mr Lamattina said:

"Would you believe it, it is just out of necessity. You see last year we had a major fire at our packing shed that caused millions of dollars of damage and even though we were insured we spent nearly six months without any carrots to supply our customers. My insurance agent told me that businesses that sustain this sort of loss even though they are insured normally fail within two years."

46 So it emerged before me there to be two quite different recollections of the same meeting and I was not invited to resolve them.

47 The complainant says that the offence created by section 26 is a strict liability offence and that mens rea or knowledge of wrongfulness is not required in order to establish an offence. Further the complainant says that in the context of a regulatory offence for there to be any mitigating effect the Supreme Court has held that it is necessary for a defendant to demonstrate real and reasonable steps to attempt to comply with the Act notwithstanding the breach. *Dal Piva v Maynard* [2000] SASC 349 was cited as reference.

48 The prosecution assert that the defendant's conduct, on his own version which I was invited to proceed upon, was such that his modest attempt to find out what his legal obligations were vastly short of that what was required to be deserving has been regarded as mitigatory. The defendant does not disagree with these principles or observations. It is the defendant's case that I should sentence him on the basis that he was unsure of the vegetative clearance requirements in South Australia at the time of his conduct, with the additional remarks that I have mentioned. As to the prosecutions point of view, I am invited to proceed on that basis.

MS SHANKS INTERRUPTS PREVIOUSLY AGREED FACT WAS INCORRECT AND SEEKS TO SUPPLY HIS HONOUR WITH CORRECT YEAR OF CONVERSION WITH MR FARMER, BEING 2004

49 I have just now been informed that what was put to me earlier was not correct as to the date of the meeting and consequently the state clearance of the land at the date of the meeting of Mr Rocco Lamattina and Mr Farmer excuse me as I need to review my thoughts somewhat about this.

50 I will proceed on the basis that the enquiry by Mr Lamattina was seemingly in company with his agent at the office of the department was in May 04 as now agreed and that this meeting was at about the same time as the actual date purchasing (leasing) of the land at Accacia Downs and The Gap.

51 I am invited subject to the additional submissions made by the complainant to deal with this matter on the basis that the defendant (Mr Rocco Lamattina) was at best

unsure of the vegetation clearance required in South Australia, that Mr Rocco Lamattina had not read the Form 1 documents that I earlier referred to, that they had not been drawn to his attention by the other directors of the defendant company. That Mr Rocco Lamattina (with his agent) left the office of the department and the meeting with Mr Farmer unaware of his obligations with respect to clearing of native trees. It is agreed that following that meeting Mr Rocco Lamattina did not enquire further about his obligations because pressing commercial consideration overcame his willingness to become aware of his obligation. It has also been put to me that he failed to make further enquiry by reason of his dissatisfaction about what he perceived to be an unreasonable delay in achieving the outcome he desired. This of course was a matter of his perception and not a fact, but I accept and proceed upon the basis that it was his actually held perception. As I say, he was motivated to make no further enquiry by personal, financial and commercial considerations that were pressing on him. He then went about clearing the native land, it seems to me, indifferent as to the seriousness of the consequences. He was unaware of the seriousness of the consequences simply by reason of his own lack of proper enquiry.

- 52 I make my own observation that when one looks at what was presented to the defendant, this vegetation on this land over these many hundreds of hectares, that he would have personally went about marking individually 271 subject trees for bulldozing and burning. When one looks at the biomass created by the post destruction appearance set out in photographs in exhibit P2, it is clear that his indifference to his obligations and his indifference to consequences of his conduct was considerable and sustained over a period of six months of personal activity marking out the trees for removal and supervising between January and July of that year. But that is my own personal observation of the agreed facts that I take into account myself.

Defence Submission Generally

- 53 I have also had tendered an outline of submissions of the defendant and I have taken them into account. In addition to the written submission there was an extensive oral submission made on behalf of the defendant by Mr Cuthbertson, QC.
- 54 Mr Cuthbertson went directly to the important issue of the defendant's state of mind at the time of tree clearance. He acknowledged that there were significant financial pressures upon Mr Lamattina and it was these pressures that overcame his normally sensible and proper conduct, which he demonstrated over many years growing of carrots in Victoria.
- 55 I was told of the desperate need for production of carrots to meet costs already incurred. I suppose the defendant said as much in his interview but in other ways. I was told of very significant capital outlays, the engagement of about 50 employees already working full time and drawing wages. I was told of Mr Lamattina's disappointment, as he believed it to be, that he had to wait some two or three months even to talk about his application. Of course that perception was entirely incorrect and it was incorrect by reason of his own failure to make proper enquiries it seems to me, but a perception he had nonetheless. Mr Lamattina didn't consider he could wait, having millions of dollars invested with high recurrent costs continuing and to have no

return so he went right ahead and did the clearing work. These were frank and unvarnished submissions and I think indicative of a sense of wrongfulness.

Further Matters Taken into Account for the Defendant

56 I do take into account the defendant pleaded guilty and my attention was directed with his co-operation with the authorities in that he frankly answered questions notwithstanding it seems being urged by others present at the time to remain silent. I think it was his son or another director of the company. I do take into account as I have been asked that the defendants placed no obstacle in the way of the investigation facilitated entering onto their land and now regrets his offending.

57 I have been reminded at the time of his interview he was anxious to meet his obligations and as it were, to use his own words, "fix up" what he had done that was wrong.

58 I take into account on behalf of the defendant of the previous good character that the defendant enjoyed, I take into account particularly the evidence of Mr Ian Muir a horticultural supplier. He had known Mr Lamattina in the context of his business in Victoria. He had known him for 30 years. He attested in general terms that he was a very significant commercial producer of carrots. He gave evidence in general terms that the defendant did not normally run his business in such a careless or haphazard manner as he has demonstrated in South Australia. He gave evidence in particular of the reputation Mr Lamattina held amongst others that knew him in the industry in Victoria and that Mr Lamattina was regarded as probably the most professional horticultural farming enterprise in Australia. That was a very big statement but nonetheless I see Mr Muir has very wide contacts in the industry in Australia and so I should accept it and do. Mr Muir attested to the reputation Mr Lamattina had amongst people that knew him on a local level and his reputation amongst other things for honesty and integrity in his business dealings. I take those matters into account.

59 Counsel for the defendant, Mr Cuthbertson, pointed out which something that I myself thought did stand out quite starkly that this reputation was grossly at odds with his manner of dealing with this land in South Australia. I am satisfied then as counsel suggests that in his outline of submission that but for the financial pressures, the defendant would not have acted in this way ordinarily and that his was out of character and his good character is relied upon to demonstrate that. And I think it is clearly demonstrated. It was submitted by the defendant that there was a great deal of pressure to supply customers with carrots by reason of the disruption to his business base in Victoria. The fire to the packing shed gave rise to a \$15 million collar loss or at least it had to be replaced at a cost of \$15 million to the defendants. Further the properties in Victoria had been subjected to drought for several years and the company had been forced by financial circumstances to sell its Murray water entitlements, which it did for \$3.3 million dollars. And the move to South Australia was to secure land with rainfall and secure ground water. I suspect commercial phenomena that we are going to be increasingly familiar with. Mr Lamattina had customers he said that had to be supplied with carrots.

60 I was asked again to take into account by the defendant that his conduct was also in part motivated by his frustration, although it seems ill conceived. I have been asked to take into account by the complainant that if Mr Lamattina had properly informed himself, he would have known what Mr Farmer claims to have told him that he could have fast tracked the application and it could have been dealt with in less than the 3 months if he engaged at his own expense an accredited consultant

61 Still dealing with matters relevant to the defendant's plea and counsel for the defendant put to me that there is no ongoing financial gain by this misconduct. It seems rather tragically I suppose you could say that after the destruction of the tress and this environment, purely for commercial cultivation of carrots, it turned out that the land was no good for growing carrots. It seemed rather a tragic outcome.

62 Following the detection of the offending, Accacia Downs was sold by the defendants and the long lease at the Gap disposed of in some way financially. I was asked to take into account that whilst there was commercial motive there was no ultimate financial gain, just a very significant endeavour but no financial gain and certainly no ongoing financial gain as there are in some cases of this kind, some that I have been referred to. However, I appreciate there was no financial gain but what can not be overlooked is the defendants went into this venture and cleared the land indifferent to the consequences with the full intention of making a financial gain and possibly a significant one. I do not think I can give any weight to the unintended actual outcome, namely a loss.

63 I appreciate that when imposing a penalty on a corporate entity as defence have put to me, I can take into account the fact that Mr Lamattina is a shareholder and director in that company and in that capacity would also bear a portion of the financial burden of that penalty.

64 I have also been asked to take into account by the defendant that as a matter of statutory imperative he will be proceeded against or at least the corporate entity will, by State authorities under the *Native Vegetation Act* in terms of remediation of the land. Counsel admits that it is somewhat problematical to those that might determine those proceedings given that the defendant no longer owns the land, it is owned by a third party. It seems unlikely that the subsequent purchaser or third party who purchased in good faith is going to be prejudiced by his now use of the land or purchase of the land. It is suggested by counsel that some more creative solutions might be applied, namely the compulsory purchase of other land or other place to remediate. It seems to me I can only give very little weight to this. I do accept that there will be some proceedings, the outcomes it seems to me are entirely uncertain

65 I have also been asked to take into account by the defendant that they are defending proceedings brought in the Federal Court by the Commonwealth Government pursuant to section 18 of the *Environment Protection Act 1999* (Cth) in relation to impact of the clearing an endangered species, the Red-Tailed Black Cockatoo. It has been put to me by way of example that the Commonwealth regard an appropriate resolution to be a monetary contribution I think it is described, of \$250,000 which would be allocated for remediation somewhere and a further \$300,000 for a pecuniary penalty and \$19,000 for costs of the prosecution. However

it seems to me that I can have really no regard to these proceedings or the outcome or take them into account in terms of allocating an appropriate penalty here.

66 The Red-Tailed Black Cockatoo was removed from these allegations and I have not taken them into account in terms of aggravation. I do not see how I can take this into account in terms of mitigation. In any event as I understand it, the defendant is defending these proceedings in the Federal Court on the bases that the clearance could not have a "significant impact" on the species in question. So I give no weight to the submission I should take those factors or that other potential penalty into account.

67 I will take into account generally that in terms of compensation the defendants have indicated:

" that they are prepared to reasonably effect remediation for the damages to the vegetation that occurred "

68 I accept this but it seems to me I can only give modest weight to this as it was couched in the terms of "an indication" and also that it is conditional in that it counts in terms of what the defendants considers "reasonable". I accept that it demonstrates a willingness to make some compensation by way of remediation but to the extent the defendant considers or agrees is reasonable. I do not know what that is. I have taken into account but I do not give it a very significant weight. It certainly has to be given some weight and is consistent with the defendant's remorse and guilty plea.

69 I was also asked to take into account by defence counsel that despite the very significant capital sums employed by the defendant in this project, Mr Lamattina himself has incomes that are only surprisingly modest. He says that as a director of the company, they are very modest indeed. In paragraph four of the defendants outline of submission an income between 2003 and 2007 reflected an annual range of incomes as nil to a maximum of \$1,280.00. Further it is put that cash drawings as a partner by Mr Lamattina in the year 2007 was no more than \$58,000 for his wife a similar amount.

70 I was also asked as I think I have said before that in imposing penalty to take into account the double impact as I say upon Mr Lamattina. I asked about the corporate shareholdings by the defendant and I was told that Mr and Mrs Lamattina hold a share each and the balance of the shares are held by a corporate trust. I did not enquire further of counsel as to who were the beneficiaries in the trust and what was the nature of the trust, who made up management of the corporate trust or how and on what basis the trust is distributed to the beneficiaries. It just seemed to me impossible for me to make any accurate assessment of the double impact, as it was put to me, upon Mr Lamattina of a personal penalty and a penalty that he incurs having an interest in the corporate entity. I will make allowance but it does not admit of any precise calculation.

71 I was referred post submissions that this Act depends largely upon deterrence to achieve its primary purpose. I am referring to this in the context of the claim impecuniosity of the defendant.

72 In *Piva v Brinkworth* 59 SASR 92 and 96 His Honour Justice Duggan said that:

"In order for legislation such as this under discussion to succeed, there must be an effective means of enforcement. The harshment of the statutory penalties must be viewed in this light".

73 He went on to say in another passage that:

"...mitigating factors can be allowed for, but the emphasis on general and individual deterrence remains a vital consideration".

74 Whilst the economic benefit derived to the defendant by reason of his all this industry and scale of business conduct is surprising to me. I none the less propose to act upon that basis of fact. However it does seem to me that the element of the necessity of the need for individual and general deterrence will give rise to a penalty that can be perhaps considered as harsh by objective standards without looking at the facts of the individual case. That is simply a factor of the statutory penalties that are mandated.

75 Just some concluding remarks about an appropriate penalty.

76 The complainant points out the importance to the community of preservation of biodiversity and that this importance is reflected in the steady increases in the maximum now up to \$100,000 for each count since the Act was first enacted. Whilst the financial circumstances of both defendants are relevant to personal deterrence, prosecution it seems to me say that the financial circumstances are outweighed by the need for a strong personal and public deterrent element of the penalty.

77 I noted in this regard that the corporate defendant at least deals in substantial financial amounts far in excess of the monetary penalty I am able to impose even as a maximum and certainly more than I am willing to impose in accordance with the justice of the circumstances. It seems to me the corporate defendant has the financial capacity, even if I put the personal financial circumstances of the defendant, Mr Lamattina, to one side.

78 I also remind myself of the submission that Counsel for the defendants put to me that this is not the total removal of virgin scrub and this seemed to be an important submission, and so I am considering it in concluding remarks now and not before.

79 It was argued that the removal of sparsely positioned trees to create a clear area within land that was already substantially cleared and by reason of that, not a total denuding of a large area that admittedly was cleared. Counsel points by way of an interesting analogy that one could not be said to have created an airport runway by reason of the removal of one tree that stood in the way of land that could otherwise be put to that use. It is suggested by this kind of reasoning that I should be careful not to be influenced by the very significant number of hectares that were cleared and put commercial use.

80 It is plain that this is not the removal of virgin scrub and further that this did not seem to me to be a useful analogy. This was not the removal of "virgin scrub" it was in fact the removal of individual scattered trees on one description. This submission overlooks that the so-called scattered trees were in fact grassy woodlands and whilst

the grassland was degraded by introduced species, the canopy was virtually intact with its pre-European occupation condition. It overlooks the fact that the trees were important for food and shelter, for nesting of rare and vulnerable birds and it had very high environmental values in terms of the age of the trees in particular and the maturity of the area as a whole. This conduct of the defendant it seems to me was the total destruction of all of those environmental values and not merely the removal of some scattered individual trees. Furthermore, by removing that entire environment, commercial advantage was gained to all of the then created vacant space, not merely the portions that were previously occupied by trees. This is not broad acre clearing for the purposes of formally calculating the penalty but in my view it was the removal of scattered trees to achieve the same effect as broad acre clearance and of land not otherwise available at all to the purpose the defendant had in mind.

Penalties in Other Cases

- 81 I have been referred to a plethora of cases, quite an extensive list. They have been of some assistance to me in terms of the principles certainly and I think I have applied the principles in those cases and I have discussed the appropriate issues so far, the principles in those cases. But as to penalty, it seems to me each of those cases turns on its own facts. The penalties imposed in some of those cases were based on lower maximums prior to 2002. In some cases the maximum was only \$4,000 and not the \$100,000 now. In other cases \$40,000. Some of those cases were dealt with in superior Courts to the Magistrates Court but dealing with Magistrates Court matters on appeal.
- 82 Now whilst they were all of value, none of them are directly comparable at all in my view. I have also had a schedule of other proffered by the defence, they are also very helpful but somewhat scant on detail and there were no references to the cases so I simply accept them on face value as being an accurate, certainly as an accurate account of the outcomes. But as I say, the detail is a bit scant.
- 83 I have collated the cases that I have considered important according to the penalty imposed. Time today does not permit me to set them all out. I will take the opportunity to set them out if called upon to produce my reasons in writing. As I say, I will set out more precisely my summaries of those cases and penalty outcomes if called upon to do so.

Summary of cases reviewed

National Parks and Wildlife v Bolderoff

Adelaide Magistrates Court 2nd of May 01

The maximum penalty was \$40,000.

The removal of trees was from an approved waste disposal or landfill area.

Blue Gums of a moderate height were removed from border area's.

42 trees were removed. The gums had only a life of 40 years in any event.

The trees and grass beneath them provided habitat for kangaroos. Removal of some trees was approved.

The offending was considered to be at the bottom end of the scale of offending.

Fine \$7,500 after reduction for a guilty plea percentage that was unannounced.

Native Vegetation Authority v Feast Magistrates

Mount Gambier 15th February 2005

The maximum penalty was \$10,000.

The offence involved the removal of only re growth that was only 15 years matured some of the re growth involved some specie that was of significance and uncommon.

There were two parcels of land. The clearance was for economic gain to subdivide the land into 30 allotments for residential purposes.

The clearance was not deliberate defiance.

The work was done without appreciating the significance of the re growth.

Both the developers and the contractor were being prosecuted for the offending. The defendants did not make a financial gain from the development in all the circumstances.

The developer took advice from the clearing contractor as to the clearing of the regrowth.

This was not regarded as a major land clearance.

The personal circumstances of the defendant were said to give rise to particular sympathy. There were two parcels of land. Count 1 imposed \$5,400 after reduction of 10% for guilty plea. Count 2 \$4,500 after reduction of 10% for a guilty plea.

Crown v Finniss River Australia Pty Ltd and Hickinbotham

Adelaide Magistrates Court 00-6563 12th March 2001

The maximum penalty was \$40,000

The cleared land was 1.4 hectares remnant native vegetation that was being grazed the number of trees were 70.

There was possibility that had the defendant applied for removal it might have been granted.

Extensive evidence of positive good character was advanced.

The subject land had already been re vegetated the expense to the defendant was expect to be over \$80,000.

A fine of \$11,000 was imposed after a reduction in penalty for a guilty plea of 10%.

Dendy v Mittgen

Adelaide Magistrates Court 4th June 2007 AMC-06-9423

The number of trees was 1,109. This was broad acre clearance of regrowth.

The area of land cleared was not determined.

The land was previously grazed extensively.

The land had been completely cleared in 1981 removing all vegetation with exception of some of the large trees.

The clearance alleged was re growth of less than 5 years old.

The purpose of the clearance was to create more of the existing grazing land.

The defendants were subject to an application to reinstate portions of the land but the extent of the compensation was unknown.

The defendant was the co owner of the land and was a person of only moderate means with very low taxable incomes declared over a number of years.

A monetary penalty even at the lowest end of the scale would have a significant impact upon the defendant and his partner.

He was a person of good character and an environmentalist and of good standing in his community.

A fine of \$13,600 after a discount of 15% for a guilty plea was considered appropriate indicative penalty.

There was a second count of clearance.

23.4 hectares of vulnerable native vegetation involving 50 to 90 trees.

The vegetation was all re growth of some 16 years of age.

The clearance was not total and some trees left standing.

It was not broad acre clearing.

The defendant in this matter was a contractor and not the owner of the land. Portion of the re growth clearing did not require authorization but the defendant went beyond the clearance exempt from approval.

The defendant contractor thought that the re growth was exempt but re growth is only exempt if 5 years of age or under. The vegetation now had significance for some bird and wildlife.

A fine of \$1,500 was imposed after a discount of 15% was considered appropriate indicative penalty

Section 18A was then used to impose a final penalties under one penalty of \$14,875.00

Department of Nation Parks and Wildlife v M and B Farmers Nominees Pty Ltd and Vuskan

Para Districts Magistrates Court 4th of November 2000

The maximum penalty was \$40,000.

Both defendants pleaded guilty to one count of clearing native vegetation.

What were cleared were some parts of stands of remnant trees.

Financial circumstances arose that required the company to make an immediate return on the property.

The vegetation was removed to permit pivot irrigation to grow potatoes.

Only parts of the remnant vegetation were removed.

The defendant was completely aware of the need for authority to remove. Arrangements were already in place prior to the guilty plea to re vegetated areas of land to make good the loss of vegetation at the defendant's expense.

The re vegetation would restore the land to a better condition than prior to the clearing.

As to the owner of the property the penalty imposed was \$15,000 the discount for a guilty plea was applied but the rate of discount was not disclosed.

As to the contractor a penalty of \$1,500.00 after discount for a guilty plea.

Department of Water Land and Biodiversity Conservation v Pratt

Christies Beach Magistrates Court 27th November 2007

The maximum penalty at the time of this offending was \$225,000.

The magistrate had only the power to impose a maximum penalty of \$150,000.

The offending was 200 widely scattered trees over 200 hectares of farmland which had already been substantially cleared and grazed.

The penalty was imposed upon the basis that the defendant believed that 50% of the trees were in a very poor condition. 25% of the trees were only in fair condition. The balance were in poor condition were likely to die in 5 years some were dead.

Expert reports confirmed that there were no further environmental values to the trees as a whole.

In all likelihood a permission to clear the land would have been approved.

Make good orders were likely to be made.

The defendant cleared for economic purposes to install pivot irrigation to grow potatoes.

The defendant was of good character his farming activities were extensive and employed many people.

The prosecution and defence both submitted that the offending and therefore the penalty should be at the lower end of the range and penalty was imposed on that basis.

A penalty was imposed of \$22,500 after a reduction of 15% by reason of the guilty plea.

Piva v Brinkworth 59 SASR 92

Supreme Court of South Australia Duggan J. 1st October 1992.

The maximum penalty was \$10,000 or \$1000 per hectare whichever was the greater.

There were two complaints of misconduct.

The first offence 189 hectares of cleared land.

The clearance was limited to acts of ploughing and re sowing no large trees were removed.

The defendant was of positive good character and a significant contributor to conservation to the environment financially and personally.

The penalty upheld on appeal was \$28,350.00 the rate of discount for a guilty plea was not disclosed.

The penalty was calculated by reference to the hectares involved.

The second offence 21 hectares of cleared land.

This involved the removal of virgin scrub.

The penalty upheld on appeal was \$12,670 the rate of discount for a guilty plea was not disclosed.

The penalty was calculated by reference to the hectares involved.

Dridan v Brinkworth District Criminal Court 18th December 2003 Kelly J

The maximum penalty was \$40,000.

The matter was referred to the District Criminal Court by the Magistrate.

The defendant was the owner of the property.

The nature of the clearance broad acre but was such so as to permit re growth and it was not virgin scrub.

The purpose was to make mustering of cattle in the area easier.

The defendant was aware of the need for consent.

Some of the trees were up to 100 years old.

The defendant has prior history of offending of a like kind.

That the defendant knew of environmental monitoring sites on the property.

Penalty was imposed on a broad acre basis.

A fine of \$230,000 was imposed with an allowance of 12% discount for a guilty plea.

Penalty remarks (continued)

84 The maximum penalty for each of these counts is \$2,500 per hectare - \$100,000 maximum. Both complainant and defendant submit I should not use the per hectare calculation in any direct arithmetic way. Both the complainant submit that this is not a case for use of the per hectare calculation.

85 I turn now to my own individual considerations of the proper penalty to impose.

86 There were two different locations in two separate and distinct areas. I do not consider this, as one offence although I can see it is continuous conduct that has simply continued on from one property to another, or perhaps both properties at the same time. I am not to know. In essence these changes created the lasting destruction of loss to the particular environmental value. I think these offences should be regarded as two separate and quite distinct offences.

87 In summary I have taken into account the nature and extent of the clearance at each location. The significance of the vegetation both as individual trees and collectively as a whole as intact pre-European settlement grassy woodlands. I take into account the use of the woodland as a habitat. I have taken into account the state of knowledge of the defendants obligations I do not proceed on the basis that he knew his obligations, but I do take into account and it seems to me the defendant was wilfully indifferent to coming to knowing or meeting his legal obligations and went ahead indifferent to the consequences of his conduct. I take into account his indifference was motivated in part by frustration but in the main by commercial need occasioned by difficulties in his own business. It seems to me that the defendant subjugated the value to the community of the subject land to meet his own personal short-term financial needs.

88 I will take into account that he did not know of the high environmental value of the subject area, particularly with respect to Accacia Downs and of course those same values are attributed to the property known as the Gap. I take into account Mr

Lamattina's lack of knowledge of his obligations and the consequences was of a result of his own annoyance of what he considered inadequate public official response.

89 The corporate defendant is grossly negligent in this regard. It seems to me an astonishing level of negligence to invest such significant sums invested with a view to clear the land to grow carrots and would not look at and have regard the Form 1 which set out the encumbrances over the land. It clearly sets out the prior refusal and clearly set out the very high environmental values of the land and that this level of culpability for the company must be regarded as high for that reason as well.

90 In each of the subject cases that I have referred to, there were reductions in penalty of between 12% and 20%. The most common reduction for a guilty plea being 15%.

91 I am mindful the defendants were co-operative with the investigation. I am mindful of Mr Lamattina's previous good character which was well established. I am mindful of the likelihood that some ill-defined level of expense will be incurred by the defendants in relation to making good for the damage. I note the willingness to participate to a "reasonable extent". I decline to take into account the issues associated with the Federal Court proceedings.

92 I do give some weight to the modest financial circumstances claimed by Mr Lamattina personally and to a lesser extent that claimed by the corporate defendant. In my view these matters must give way to the need to impose deterrent penalties that are a personal deterrent and certainly must give way to provide a public deterrent. The penalties albeit harsh are a product of the penalty range imposed by Parliament and for good social and community reasons. I will make a significant adjustment as to the penalty that falls upon Mr Lamattina by reason of the fact that he will also bear some ill-defined penalty by reason of his shareholding within the corporate defendant.

93 Lastly I take into account that these offences are rightly considered to be at the upper end of the scale of offending, even for a first offender. There are many reasons that I have mentioned - the area of the land, the nature of the environment totally destroyed. I consider that whilst the maximum \$100,000 I must in that penalty range make room for second offenders. But the circumstances of this offence being it seems to me should approach 50% of the maximum penalty as a starting point before reduction for a guilty plea.

94 I can use section 18A of the *Sentencing Act*. I have been addressed on that but it seems to me unnecessary in these circumstances to impose one penalty. If I was using section 18A, I would have to go through and announce the individual penalties anyway. Given that they are two separate properties, it seems to me appropriate to impose a separate penalty. If any adjustment is necessary I can do so by reason of totality principle once I aggregate the penalties for each defendant, or I look at the aggregated affect I should say, the penalties for each defendant.

95 I have taken into account the sustained period of time over which this destruction took place without regard to obligations. I have taken into account the penalties imposed in many of the other cases to which I have been referred but it seems to me

the maximum in those cases was typically much less than the penalties before me, not in every case though.

96 Fixing the reduction for the guilty plea I take into account that a plea is indicative of remorse and also a pragmatic level, saves expense to the community of a hearing. However, the amount that I will allow in relation to this second element, that is to say the saving to the community, is dependant upon the facts of the case and it seems to me the destruction occasioned by the defendant was well demonstrated. An admission of responsibility in some form for the outcome of the defendant's conduct is very likely in any event.

97 Even having made those observations I intend to impose a reduction of a like kind as is the case I have been referred to, namely 15%.

98 I now turn to the actual penalties.

99 With respect to count 1, just by reference to just the basic facts, that is Accacia Downs, 141 trees, 73 hectares and three pivots. I will impose a penalty of \$35,000, I will reduce it by 15% by reason of a guilty plea to \$29,750.

100 As to count 3, that is the 247 hectares of cleared land for 12 pivots, the removal of 130 trees, there will be a fine of \$45,000 which I will reduce by 15% to \$38,250.

101 Now that gives rise to an aggregated penalty of \$68,000 and I do not think it is appropriate to reduce that by reason of a totality principle.

102 As to Mr Lamattina, count 2 a fine of \$25,000 that is Accacia Downs, 141 trees, 73 hectares and three pivots. I will reduce it by the 15% to give rise to a penalty of \$21,250.

103 As to count 4, a fine of \$35,000 that is in relation to the property known as the Gap. I won't repeat the basic statistics. After a reduction for a guilty plea, that would give rise to a fine of \$29,750.

104 I look at the aggregated amount. That gives rise to an aggregated amount of \$51,000. I have considered Mr Lamattina's personal income levels and I still do not think I should reduce that by way of the totality principle, the principles of which I do not propose to outline for the reasons that I have already mentioned.

105 I will allow costs for the prosecution for each defendant at \$750, there will also be Court costs.

Background

1. Rocco Lamattina is the Director of Rocky Lamattina and Sons Pty Ltd, a company engaged in the production and distribution of carrots throughout South-eastern Australia.
2. The company is based in Wemen in the State of Victoria and has properties at Kaniva and Wemen. It employs approximately 75 to 80 people in the cultivation, harvesting, packaging and distribution of carrots.
3. The other Directors of the company are the wife and sons of Rocco Lamattina.
4. The income received as Directors in the years 30 June 2003 to 30 June 2007 are as follows:

Director	For the year ending	Amount (\$)
Rocco Lamattina	30 June 2003	nil
	30 June 2004	387
	30 June 2005	1265
	30 June 2006	1276
	30 June 2007	1280
Agata Lamattina	30 June 2003	nil
	30 June 2004	387
	30 June 2005	1265
	30 June 2006	1276
	30 June 2007	1280
Angelo Rosario Lamattina	30 June 2003	26784
	30 June 2004	387
	30 June 2005	1264
	30 June 2006	1276

	30 June 2007	1276
Phillip Lamattina	30 June 2003	26784
	30 June 2004	387
	30 June 2005	1264
	30 June 2006	1276
	30 June 2007	1279
John Paul Lamattina	30 June 2003	26784
	30 June 2004	387
	30 June 2005	1355
	30 June 2006	1276
	30 June 2007	1276

5. The cash drawings of each partner from the trust in the financial year ending 30 June 2007 are as follows:

5.1.	Rocco Lamattina	\$58,044.00
5.2.	Agata Lamattina	\$58,044.00
5.3.	Angelo Lamattina and Tina Marie Lamattina	\$65,500.00
5.4.	John Lamattina	\$56,000.00
5.5.	Phillip and Sarah Lamattina	\$65,500.00

6. On 11 September 2001, the company's packing sheds and equipment were totally destroyed by fire. The cost of the replacement of sheds and equipment was in the order of \$15 million.
7. The growing areas in which the company's properties were located had been in drought for several years and a decision was made to obtain a property further to the south and in a different climatic area so that the company could produce carrots throughout the year.

Relocation

8. The financial ramifications of the fire and the drought and the rebuilding of a new facility led to the decision of the company to sell its Victorian entitlements to Murray River water for \$3.3 million to pay for ongoing operating costs.
9. Without the water allocation, it was necessary for the company to relocate its operations from the River Murray irrigation area to other areas with more reliable rainfall for production of carrots.
10. On 2 April 2004, the company entered into a contract for the purchase of a rural farming property known as Acacia Downs situated northwest of Naracoorte.
11. The property had provision for four centre pivots for irrigation and the company proposed a further three.
12. In order to install the additional three centre pivots, there was a need to clear some scattered paddock trees from the Acacia Downs' property.

Dealings with Department

13. After acquiring Acacia Downs, Rocco Lamattina arranged through his conveyancer Rachel Mahney to meet with Sybille Winter, an officer of the Department of Water, Land, Biodiversity and Conservation in Adelaide on 28 July 2004.
14. The appointment had to be rescheduled at the last minute and the next available date on which an officer of the Department could consult with Rocco Lamattina was 30 August 2004.
15. Rocco attending in Adelaide on 30 August 2004 with Rachel Mahney, Sybille Winter, however, was unable to attend and Peter Farmer of the Department attended in her stead.
16. The defendant took to the appointment an application for a set aside area and proposals for regeneration. The defendant says that Mr Farmer did not appear to have time to discuss matters in depth with him and his advice was very general. He advised that the process would take as least three months and because of staff shortages, possibly longer, as much as six months.
17. The defendant had had a number of dealings with the Victorian Department of Sustainability and Environment in respect of the development of rural properties within that State. He had found officers of that Department to be helpful and proactive in seeking to achieve the best result for the environment and the farmers utilising the land within that State.
18. Officers of that Department had on occasions visited his property in order to facilitate applications to clear and resolve a mutually appropriate clearance regime.

Decision to remove trees

19. On this occasion, the defendant felt disgruntled and somewhat helpless.
20. After the meeting, Mr Lamattina instructed his employees to remove certain trees which would be within the area of the pivot. He made the decision to remove the trees without consulting with the other Directors.
21. When he attended the property after the trees had been cleared, he was surprised to see in fact how many trees had been removed.
22. At the relevant time, the defendant had no knowledge of the rarity of the Red-Tailed Black Cockatoo. He now finds himself charged with civil offences under the relevant Commonwealth legislation.

Losses occasioned by Relocation

23. Following the packing shed fire in 2001, a key part of the company's operation was destroyed. This involved the preparation for packing and distribution of the company's principal product, carrots.
24. It was necessary for the company to lease a temporary packing shed to try and maintain the day to day running of the business and to provide ongoing employment for permanent staff of approximately 55 workers and to service existing customers.
25. The cost of developing the temporary premises was approximately \$650,000.00 and in addition, the site was leased at a cost of approximately \$300,000.00 for the term of 17 months.
26. As the temporary facility was not as sufficient as the purpose-built site, additional labour was required to process and pack at additional cost.
27. The temporary facility could not produce the same volume of product and the quality of product was compromised, and accordingly prices achieved were less than for carrots processed in the purpose-built facility.
28. Sales decreased by approximately 30% to 40%.
29. The downturn also occurred during a period of severe and extended drought which further adversely affected production and led to the strategic decision being made to acquire the Acacia Downs property.
30. It would have been commercially more sensible to close down until the new facility was built and to claim loss of income insurance, but this would have resulted in staff retrenchment involving approximately 65 employees.

31. The company received part payment of loss of income insurance but it is estimated there was a shortfall of approximately \$4.5 million from what would otherwise have been paid.
32. The defendant considered the development was being frustrated by the response of the South Australian Department of Water, Land and Biodiversity Conservation and frustration associated with that led to the rash decision to remove the trees.
33. The Acacia Downs episode caused the company significant losses:
 - 33.1. The property was purchased in April 2004 for \$2.55 million;
 - 33.2. It was sold on 24 June 2006 for \$2.12 million;
 - 33.3. Between those dates, the company expended approximately \$800,000.00 improving the company with the construction of storage sheds and centre pivots;
 - 33.4. The company has lost about \$1.1 million on the venture.