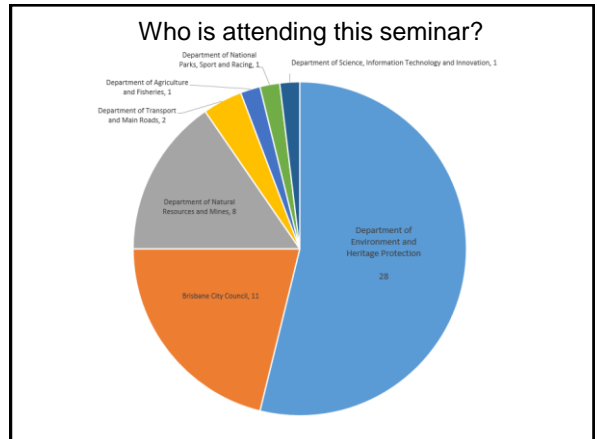


Slides for AELERT seminar on *R v Baden-Clay* 3 November 2016, held in Brisbane at EHP



Not everyone attending is a lawyer

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This seminar is being recorded for regional staff and AELERT members outside of Queensland.

- ### Seminar outline
1. Take home points
 2. Summary of the decision in *The Queen v Baden-Clay* [2016] HCA 35
 3. Implications of the decision for environmental prosecutions
 4. Case study: taking a natural resource in a National Park
 5. Policy implications: recent failure to reverse onus of proof for land clearing offences in Qld
 6. Questions

This seminar won't cover aspects of the judgment that are not especially pertinent to environmental prosecutions.

For an excellent & interesting analysis of the arguments before the QCA and HCA, see the Bar Association of Queensland seminar by Soraya Ryan QC chaired by Elizabeth Wilson QC "R v Baden-Clay [2016] HCA 35 - The HCA has spoken: What did we hear?" 20 October 2016 (recording available on BAQ website)

Screenshot of Soraya Ryan QC's seminar

- ### Take home points
1. The decision has important implications for environmental prosecutions particularly where **circumstantial evidence** such as **post-offence conduct** is relied upon to establish the identity of the offender.
 2. The decision is a short, clear and unanimous statement of the law by the High Court that will be very helpful for explaining to Magistrates relevant principles for the use of circumstantial evidence in summary prosecutions of environmental offences.
 3. Environmental compliance officers, investigators and lawyers should be aware of its implications for issues such as proving vegetation clearing and similar offences where satellite imagery is relied upon to establish elements of an offence but there is no direct evidence of the identity of the offender.

**Point of clarification:
direct vs circumstantial evidence**

“Circumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts. It is traditionally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the [primary] event sought to be proved.”

Shepherd v R (1990) 170 CLR 573 at 579 per Dawson J.

For example: a witness who testifies that she saw the defendant shoot the victim in cold blood gives direct evidence of the murder.

A witness who testifies that she saw the defendant fleeing the scene of the crime gives circumstantial evidence from which the defendant's guilt may be inferred.

Circumstantial evidence may be woven together like “**strands in a cable** rather than links in a chain” to infer an ultimate fact.

Shepherd v R (1990) 170 CLR 573 at 579 per Dawson J



“Lies and post-offence conduct are a species of circumstantial evidence. An inference of guilt may be drawn from the concatenation [i.e. a series of interconnected things] of circumstances including the post-offence conduct. The process of reasoning from “strands in a cable” of circumstantial evidence discussed in *Shepherd v R* [is an appropriate metaphor for it].”

R v Ciantar (2006) 16 VR 26 at [44] per Warren CJ, Chernov, Nettle, Neave and Redlich JJA.

Summary of the decision in *The Queen v Baden-Clay* [2016] HCA 35; (2016) 334 ALR 234



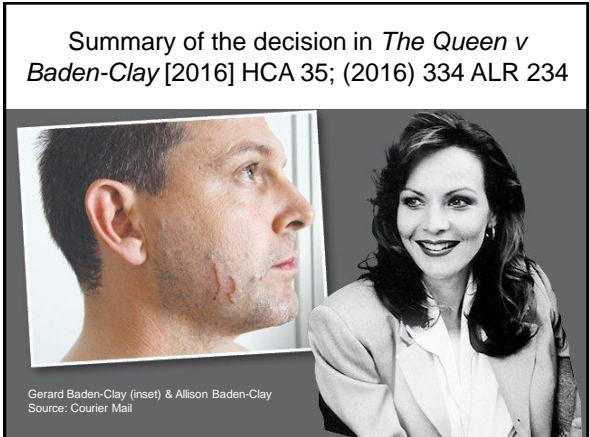
At 7:30 am on Friday, 20 April 2012, Gerard Baden-Clay reported his wife and mother of three children Allison missing from their house at Brookfield, west of Brisbane. He claimed she went for a walk at 10 pm the night before and had not returned home.

Photograph of the Baden-Clay home tendered by the Crown in the trial of Gerard Baden-Clay for the alleged murder of his wife. Source: Queensland Police



On 30 April 2012, 10 days after her disappearance and an extensive search by police and members of the community, Alison's body was found beneath a bridge 13 km from Baden-Clay's home.

Kholo Creek Bridge at Mt Crosby where the body was found. Picture: Jodie Richter. Source: The Courier-Mail



Background of past cases in relation to circumstantial evidence: *Plomp v The Queen* (1963) 110 CLR 234

- Accused (Plomp) and his wife went swimming at Southport (Qld) on dusk.
- Surf was not dangerous and wife was a good swimmer
- Wife drowned and accused claimed she had been caught in an undertow from which he had been unable to save her.
- There were no witnesses to the drowning other than the accused.
- Prior to his wife's drowning the accused had started an affair with another woman, whom he told his wife was dead and a few days before his wife's death he proposed marriage to and had introduced one of his children to as his "new mummy".
- Following the drowning the accused lied about his affair and his relationship with the other woman and sought to get her to lie about it to the police. He attempted to marry her and moved in with her.

Plomp v The Queen (1963) 110 CLR 234 at 243 per Dixon CJ:

In the present case it appears to me that if the jury weighed all the circumstances they might reasonably conclude that it would put an incredible strain on human experience if Plomp's evident desire to get rid of his wife at that particular juncture, presaged as it was by his talk and actions, were fulfilled by her completely fortuitous death although a good swimmer and in circumstances which ought not to have involved any danger to her.

Background of past cases in relation to circumstantial evidence: *Weissensteiner v R* (1993) 178 CLR 217

- Two people who were building a boat to sail around the Pacific were joined by the accused who agreed to work for no wages if they took him on their cruise.
- The three departed Cairns on 27 November 1989 and were seen a short distance north of Cairns. Only the accused was ever seen again and there was ample evidence (such as a total lack of communication with their families) that the two others were deceased.
- The boat returned to Cairns in December 1989 with only the accused.
- The accused departed Cairns in January 1990 and spent eight months sailing around the Pacific during which time he gave inconsistent stories about the owner of the vessel and the whereabouts of the deceased before being detained in the Marshall Islands due to an Interpol warrant issued regarding the vessel and the deceased.
- The accused attempted to escape custody but was recaptured.
- The accused did not give evidence at his trial for murder.

R v Baden-Clay [2016] HCA 35; (2016) 334 ALR 234

- The accused gave evidence that he had left his wife alone watching TV on the night she died, 19 April 2012, and he had nothing to do with his death.
- He said cuts on his face occurred while he was shaving. Expert evidence at the trial suggested deep cuts were consistent with scratch marks while later cuts were consistent with shaving.
- The cause of death was unable to be determined.
- The accused had been having an affair with another woman since 2008 whom he had told that he would be out of his marriage by 1 July. He confirmed this promise in writing less than three weeks before his wife's disappearance.
- After his wife's death the accused made elaborate attempts to conceal her death and lied to police & others about her being simply missing.
- After his wife disappeared the accused lied to police about his ongoing affair and told the woman he was having the affair with that they "need to not ... communicate and lay low."

There is a great, short summary of the main principles for using circumstantial evidence to establish guilt at [46]-[47]:

Hypothesis consistent with innocence

[46] The prosecution case against the respondent was circumstantial. The principles concerning cases that turn upon circumstantial evidence are well settled.¹⁵ In *Barca*,¹⁶ Gibbs, Stephen and Mason JJ said:

"When the case against an accused person rests substantially upon circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are 'such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused': *Peacock v R*.¹⁷ To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be 'the only rational inference that the circumstances would enable them to draw': *Plomp v R*.¹⁸ see also *Thomas v R*."¹⁹

[47] For an inference to be reasonable, it "must rest upon something more than mere conjecture. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence"²⁰ (emphasis added). Further, "in considering a circumstantial case, *all of the circumstances* established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence".²¹ (emphasis added). The evidence is not to be looked at in a piecemeal fashion, at trial or on appeal.²²

Post-offence conduct features at [72]-[77]

Post-offence concealment and lies

[72] The respondent's false denials to police about his ongoing affair, his suggestion to Ms McHugh that she should "lie low", and his enquiry of her as to whether she had revealed the affair to the police were all capable of being regarded by the jury as evidencing a strong anxiety to conceal from police the existence and true nature of his affair with Ms McHugh. This anxiety could reasonably be seen as indicative that, in his mind, the affair and the killing were inter-related, and that the killing was not an unintended, tragic death of his wife, but an intentional killing.

[76] It was open to the jury, in this case, to regard the lengths to which the respondent went to conceal his wife's body and to conceal his part in her demise as beyond what was likely, as a matter of human experience, to have been engendered by a consciousness of having unintentionally killed his wife.

Implications for environmental prosecutions (building upon take home points)



1. The decision has important implications for environmental prosecutions particularly where **circumstantial evidence** such as **post-offence conduct** is relied upon to establish the identity of the offender.

The labelling of "post-offence conduct" by the High Court places it squarely in the gaze of law enforcement officers and other courts in a way that it hasn't been in the past, although it was considered in detail in *R v Ciantar* (2006) 16 VR 26.

While post-offence conduct (or, more accurately, "post-offence conduct probative of guilt") was part of the circumstantial evidence in past High Court decisions such as *Plomp* and *Weissensteiner*, it wasn't labelled as such.

Labelling it adds emphasis to it. It is now a recognised sub-species of circumstantial evidence.

2. The decision is a short, clear and unanimous statement of the law by the High Court that will be very helpful for explaining to Magistrates relevant principles for the use of circumstantial evidence in summary prosecutions of environmental offences.

Summary trials are hard. There is a heavy onus placed on the prosecution, especially where there is complex or technical evidence and law involved.

Simplicity and clarity are normally vital ingredients for successful summary prosecutions in practice because Magistrates are typically unwilling to engage in complex legal arguments and where defendants attempt to throw mud in the court's eyes to confuse and create doubt.

Doubt and confusion major obstacles for successful prosecutions. The *Baden-Clay* decision doesn't solve this but it makes using circumstantial evidence and post-offence conduct easier.

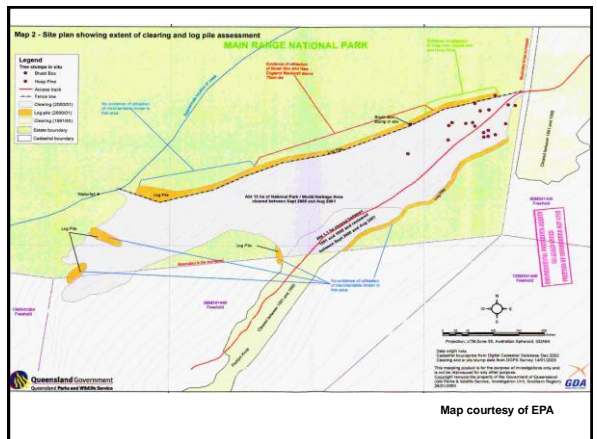
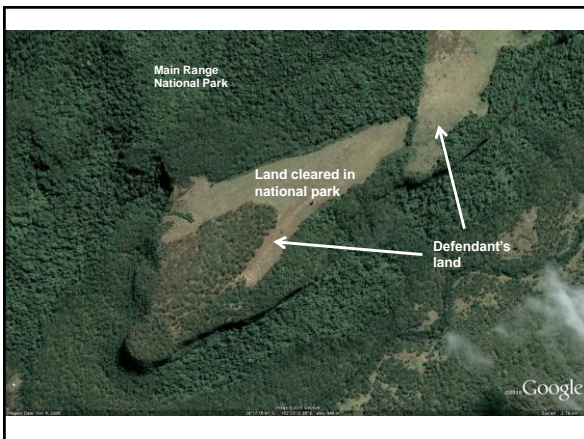
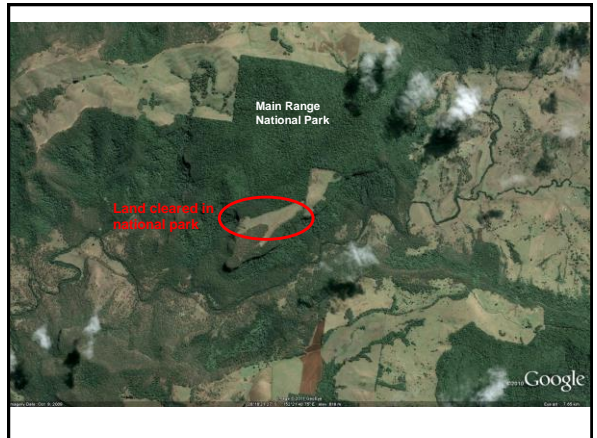
3. Environmental compliance officers, investigators and lawyers should be aware of the of the implications of the decision in relation to **post-offence conduct** for issues such as proving vegetation clearing and similar offences where satellite imagery is relied upon to establish elements of an offence but there is no direct evidence of the identity of the offender.

Applying the decision, for instance, where the identity of the person who unlawfully cleared land is uncertain, the fact that the landholder has not reported the clearing and has proceeded to farm the cleared land can be used as evidence of **post-offence conduct** to establish the landholder authorized or carried out the clearing.

4. The decision strengthens the well-known point that the lack of an eye witness or other direct evidence of the identity of person who committed the offence is not necessarily fatal for a prosecution.

The decision advances previously established principles that circumstantial evidence of the identify of the offender may be sufficient to establish guilt.

The label of "post-offence conduct" adds emphasis to this part of circumstantial evidence.



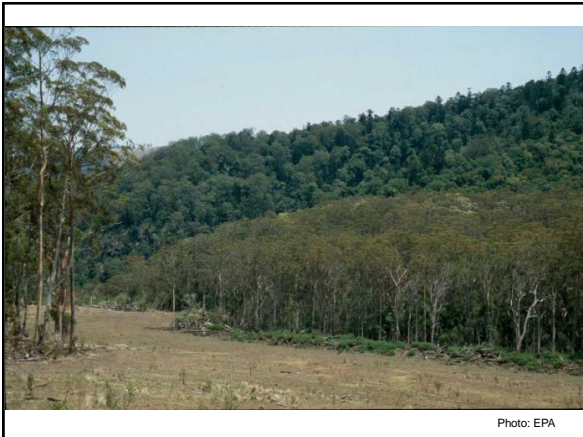


Photo: EPA

Section 62 of the *Nature Conservation Act 1992* (Qld) (Restriction on taking etc. of cultural and natural resources of protected areas)

“A person, ~~other than an authorised person~~, must not take, use, ~~keep or interfere with a cultural or natural resource of a protected area, other than under [a licence, permit or other exemption under the Act]~~”

“**natural resources**, in relation to ... a protected area ... means the natural and physical features of the area, including wildlife, soil, water, minerals and air

“**take** includes ... in relation to a plant: gather, pluck, cut, pull up, destroy, dig up, fell, remove or injure the plant or any part of the plant ...”

“**use**, in relation to a cultural or natural resource or wildlife, includes buy, sell, give away, process, move or gain any benefit from the resource or wildlife.”

Facts

- Large area cleared in National Park in remote area.
- Discovered by bushwalkers after clearing occurred.
- The cleared area joined & substantially expanded two existing cleared paddocks of a neighbouring farmer & due to the location no other person benefitted from the clearing.
- Neighbouring farmer was found to be actively farming the area when offence was investigated. He had:
 - erected barbed wire fences around cleared area
 - sown the cleared area with pasture seed
 - allowed his cattle to graze in the cleared area
- Farmer admitted guilt & pleaded guilty.

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- Farmer ~~admitted guilt & pleaded guilty~~ refuses to admit guilt, claims right to silence & pleads not guilty.

Policy implications: recent defeat of Bill to reverse onus of proof for land clearing offences in Qld

Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016 (Qld) – defeated in Parliament 18 August 2016

Insertion of new s 67A and new pt 4, div 2A

After section 67—

insert—

67A Responsibility for unauthorised clearing of vegetation

- (1) The clearing of vegetation on land in contravention of a vegetation clearing provision is taken to have been done by an occupier of the land in the absence of evidence to the contrary.

Explanatory Notes to Bill

Clause 6 reinstates reverse onus of proof offence provision, which existed prior to the 2013 legislative amendment to the Vegetation Management Act. The provision placed the responsibility for unlawful clearing with the “occupier” of the land, such as the owner or lessee, in the absence of evidence to the contrary. While this provision potentially breaches FLPs, reinstating this provision is justified for the following reasons:

- Unlawful clearing often occurs in remote areas, meaning that in many cases there is a lack of evidence available to the government (e.g. direct witnesses, copies of contracts as they are commercial in confidence), to establish who undertook the clearing.
- Due to the expense of clearing, it is highly unlikely that an unknown third party would undertake clearing on someone else’s property without the occupier’s invitation or consent.
- The landholder may still provide evidence to prove their innocence, using evidence that would be readily accessible to the landholder but not the government (e.g. where a contract may be commercial in confidence the contract does not need to be disclosed to government during its investigation).
- The state is still responsible for establishing and proving that a vegetation clearing offence has occurred.

There is also precedent of the reverse onus of proof, such as under the *Forestry Act 1959* (Forestry Act), and for red light and speed camera traffic offences which assume the owner of the car is responsible for the offence unless evidence is provided otherwise.

The decision in *R v Baden-Clay* goes a long way to alleviating the need for provisions such as s 67A in relation to vegetation clearing offences, particularly where post-offence conduct in farming a cleared area can be used to establish guilt.

- Satellite imagery establishes a large area (13ha as in *Boyle*) cleared on a landholder's property at a certain date.
- Expert evidence establishes the clearing would have taken approximately 3 days to carry out, cost around \$50,000 & has increased the property value by around \$200,000.
- No permit or exemption makes the clearing lawful.
- Landholder has:
 - not reported the clearing to authorities
 - erected barbed wire fences around cleared area
 - sown the cleared area with pasture seed
 - allowed his cattle to graze in the cleared area
- Landholder claims right to silence & pleads not guilty.

Post-offence conduct

To adapt the language of Dixon CJ in *Plomp v The Queen* (1963) 110 CLR 234 at 243, weighing all of the circumstances "it would put an incredible strain on human experience" given the commercial context and later use of the land if the clearing was a "completely fortuitous" occurrence done by some unidentified third party without the knowledge and consent of the landholder and direction and payment by the landholder.

Questions?

Seminar outline

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