

**CAROL JEANETTE BOOTH**

Applicant

**ROHAN BRIEN BOSWORTH**

First Respondent

**FRANCES BRIEN BOSWORTH**

Second Respondent

**APPLICANT'S OUTLINE OF SUBMISSIONS**

**INTRODUCTION**

1. This is an application under s475 of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* ("EPBC Act") for:
  - (a) A prohibitory injunction restraining the Respondents from causing, procuring or allowing the death or injury, whether by electrocution, shooting or otherwise, of flying foxes on or about the Respondents' property at Lots 107 and 108, Crown Plan CLW652, Parish of Meunga, County of Cardwell, in the State of Queensland; and
  - (b) An order that the Respondents and/or their agents dismantle any construction or device on the Respondents' property at Lots 107 and 108, Crown Plan CWL652, Parish of Meunga, County of Cardwell, in the State of Queensland used for killing flying foxes by electrocution.

**ISSUES TO BE DECIDED**

2. There are two principal issues to be decided in this application:
  - (a) Whether the action by the Respondents in operating a system of electric grids on their lychee fruit farm to electrocute flying foxes has, will have, or is likely to have a significant impact on the world heritage values of the Wet Tropics World Heritage Area; and
  - (b) Whether the Court should exercise its discretion to grant the injunction and consequential order sought.

3. The Applicant's standing is not at issue. Section 475(5) of the EPBC Act widens standing to seek an injunction to remedy or restrain an offence or other contravention of the Act. The Respondents admit the Applicant's standing consistent with His Honour Justice Spender's finding of fact for the interim injunction application.<sup>1</sup>

## FACTS

4. The facts of the case are set out in the pleadings and affidavits of Dr Carol Booth, Mr Allan McIlwee, Mr Jeremy Tager, Mr Vern Veitch, Mr Mathew Patterson, Mr Greg Richards, Dr Len Martin, Ms Olivia Wybird and Mr Peter Valentine. These are incorporated into the submissions that follow.

## RELEVANT LAW

5. This application is brought under s475 (Injunctions for contravention of the EPBC Act) for an alleged breach of s12 (World heritage - civil penalty provision) of the EPBC Act.<sup>2</sup> As relevant here, s475 provides:<sup>3</sup>

### **“475 Injunctions for contravention of the Act**

#### *Applications for injunctions*

- (1) If a person has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of this Act or the regulations:
- (a) the Minister; or
  - (b) an interested person (other than an unincorporated organisation); or
  - (c) a person acting on behalf of an unincorporated organisation that is an interested person;
- may apply to the Federal Court for an injunction.

#### *Prohibitory injunctions*

- (2) If a person has engaged, is engaging or is proposing to engage in conduct constituting an offence or other contravention of this Act or the regulations, the Court may grant an injunction restraining the person from engaging in the conduct.

#### *Additional orders with prohibitory injunctions*

- (3) If the court grants an injunction restraining a person from engaging in conduct and in the Court's opinion it is desirable to do so, the Court may make an order requiring the person to do something (including repair or mitigate damage to the environment).”

6. Section 12 and the associated provision of s13 provide:

### **“12 Requirement for approval of activities with a significant impact on a declared World Heritage property**

- (1) A person must not take an action that:
- (a) has or will have a significant impact on the world heritage values of a declared World Heritage property; or

<sup>1</sup> *Booth v Bosworth* (2000) FCA 1878 (Spender J) at para 5.

<sup>2</sup> Note that the Spectacled Flying Fox (*Pteropus conspicillatus*) is not listed as a threatened species under the EPBC Act and therefore the civil penalty provision provided in s18 (Listed threatened species or endangered community) and criminal offence provided in s18A (Offences relating to threatened species, etc.) of the Act are not relevant.

<sup>3</sup> Note that the powers conferred by s475 are in addition to and do not limit any other powers of the Court :s480.

- (b) is likely to have a significant impact on the world heritage values of a declared World Heritage property.

Civil Penalty:

- (a) for an individual – 5,000 penalty units;
  - (b) for a body corporate- 50,000 penalty units.
- (2) Subsection (1) does not apply to an action if:
- (a) an approval of the taking of the action by the person is in operation under Part 9 for the purposes of this section; or
  - (b) Part 4 lets the person take the action without approval under Part 9 for the purposes of this section; or
  - (c) there is in force a decision of the Minister under Division 2 of Part 7 that this section is not a controlling provision for the action and, if the decision was made because the Minister believed the action would be taken in a manner specified in the notice of the decision under section 77, the action is taken in that manner; or
  - (d) the action is an action described in subsection 160(2) (which describes actions whose authorisation is subject to a special environmental assessment process).
- (3) A property has **world heritage values** only if it contains natural heritage or cultural heritage. The **world heritage values** of the property are the natural heritage and cultural heritage contained in the property.
- (4) In this Act:
- cultural heritage** has the meaning given by the World Heritage Convention.
  - natural heritage** has the meaning given by the World Heritage Convention.

### 13 What is a declared World Heritage property?

*Properties on the World Heritage List*

- (1) A property included in the World Heritage List is a **declared World Heritage property** as long as the property is included in the List.

*Properties not yet included on World Heritage List*

- (2) A property specified in a declaration made under section 14 (with any amendments made under section 15) is a **declared World Heritage property** for the period for which the declaration is in force.”

7. There are six elements to the cause of action contained in s12:
- (a) a person;
  - (b) takes an “action”;
  - (c) that has, will have or is likely to have;
  - (d) a “significant impact”;
  - (e) on the world heritage values;
  - (f) of a declared World Heritage property.
8. Prior to analysing each of these elements, it is useful to set out the relevant principles of statutory interpretation upon which the interpretation of them must be based.
9. The primary rule of statutory interpretation is that words must be given their plain and ordinary meaning having regard to their context and the purpose or object underlying the Act. The Court’s fundamental task is to determine the meaning that the legislature intended the words to have, which normally is found in the

ordinary and natural meaning of the words.<sup>4</sup> However, a technical meaning may be preferred where it is clear from the context and subject matter that this was the meaning the legislature intended the words to have.<sup>5</sup> In addition, s15AA of the *Acts Interpretation Act 1901 (Cth)* requires that in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object. In *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384, in a joint judgement, McHugh, Gummow, Kirby and Hayne JJ summarised the primary principles as follows:

“However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction<sup>6</sup> may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.”

10. In this regard, s3 of the EPBC Act provides (*inter alia*):

**“3 Objects of Act**

(1) The objects of this Act are:

- (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance [NB: this includes the world heritage values of a declared World Heritage property]; and
- (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
- (c) to promote the conservation of biodiversity ...”

11. In interpreting s12 of the EPBC Act the Court will also be conscious of the use of terms such as “action” and “significant impact” in numerous other provisions of the Act. In particular these terms are used in provisions imposing civil and criminal liability, in addition to World Heritage properties, in relation to Ramsar Wetlands, threatened species, threatened ecological communities, migratory species, nuclear actions and Commonwealth Marine areas.<sup>7</sup> Collectively, these matters are termed, “matters of national environmental significance”.<sup>8</sup> The Court

<sup>4</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161-2 per Higgins J; *Cooper Brookes (Wollongong) Proprietary Limited v Commissioner of Taxation* (1981) 147 CLR 297 at 304-306 per Gibbs CJ, at 310-311 per Stephen J and at 320-321 per Mason and Wilson JJ; *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 372-375 per Brennan CJ and at 381-384 per McHugh, Gummow, Kirby and Hayne JJ.

<sup>5</sup> *David and Jones v State of Western Australia* (1905) 2 CLR 29 at 42-3 per Griffith CJ, at 46 per Barton J and at 51 per O’Connor J; *Marine Power Australia Pty Ltd & Anor v Comptroller-General of Customs & Ors* (1989) 89 ALR 561 (FCA) at 572 per Lockhart J; *Herbert Adams Pty Ltd v Federal Commissioner for Taxation* (1932) 47 CLR 222 at 227.

<sup>6</sup> For example, the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities: *Coco v The Queen* (1994) 179 CLR 427 at 437.

<sup>7</sup> See ss15A, 16, 17B, 18, 18A, 20, 20A, 21, 22A, 23 and 24A. Note also the use of these terms in ss26, 27A and 28, which deal with Commonwealth land and Commonwealth actions.

<sup>8</sup> See generally, C McGrath, ‘An introduction to the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, its implications for State environmental legislation and public interest

will no doubt wish to adopt, if possible and appropriate, an interpretation of s12 that is consistent with, and applicable to, these other provisions of the Act.<sup>9</sup>

12. It will also be necessary to consider whether the interpretation accorded by any relevant international treaty to the terms used in s12 of the EPBC Act can or should be adopted by the Court. There are three reasons for doing so. Firstly, there are express references to terms defined in the World Heritage Convention<sup>10</sup> in s12. Secondly, s15AB(2)(d) of the *Acts Interpretation Act 1901 (Cth)* includes “any treaty or other international agreement that is referred to in the Act” as extrinsic material that may be referred to in ascertainment of the meaning of a provision.<sup>11</sup> Thirdly, as a principle of statutory interpretation of the common law as stated by Mason CJ and Deane J in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287:

“Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia’s obligations under a treaty or international convention to which Australia is a party,<sup>12</sup> at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia’s obligations under international law.”<sup>13</sup>

13. On the basis of these principles of statutory interpretation, the six elements of s12 of the EPBC Act may be interpreted and applied to the facts of this case.

**(a) a person**

14. In relation to the first element of s12, each Respondent is a natural person in addition to owning and operating the lychee farm the subject of these proceedings as a partnership.<sup>14</sup>

**(b) takes an “action”**

15. In relation to the second element of s12, the EPBC Act does not define “action” although ss523-524A qualify its meaning.<sup>15</sup> In the context of the EPBC Act, the

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litigation’ (2000) 6 (28) QEPR 102; C McGrath, *Major Pieces of the Queensland Environmental Legal System*, Environmental Law Publishing, Brisbane, 2001, pp5-6 and 26.

<sup>9</sup> As far as possible, words of a statute are to be read so as to give harmony to the statute as a whole: *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 per McHugh, Gummow, Kirby and Hayne JJ.

<sup>10</sup> *Convention for the Protection of the World Cultural and Natural Heritage* ATS 1975 No. 47. Entry into force generally: 17 December 1975.

<sup>11</sup> See *D & R Henderson (Mfg) Pty Ltd v Collector of Customs* (1974) 48 ALJR 132 at 135 per Mason J; *Swan Portland Cement Ltd v Minister for Small Business and Customs* (1991) 22 ALD 446 at 452 per Lockhart J; *Barry R Liggins Pty Ltd v Comptroller-General of Customs* (1991) 32 FCR 112 at 118-120 per Beaumont J (Lockhart and Gummow J agreeing).

<sup>12</sup> *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38.

<sup>13</sup> In this context, note that treaty provisions are interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of the treaty’s object and purpose: Art 31 *Vienna Convention on the Law of Treaties* ATS 1974 No 2.

<sup>14</sup> Section 22 *Acts Interpretation Act 1901 (Cth)*.

<sup>15</sup> These submissions were prepared on the basis that the *Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001 (Cth)*, which was passed on 29 June 2001 but had not received Royal Assent at the time of writing, would enter into force in the immediate future. Schedule 1, Part 3 of the amending Act, which (inter alia) inserted ss25A, 43A and 43B and repealed

plain meaning of “action” is the process or state of acting or of being active; something done; an act; or deed.<sup>16</sup> The plain meaning of “act” is anything done or performed; a doing; deed; the process of doing.<sup>17</sup>

16. Sections 523-524A of the EPBC Act, qualify the plain meaning of “action”. These sections provide:<sup>18</sup>

**523 Actions**

- (1) Subject to this Subdivision, *action* includes:
- (a) a project; and
  - (b) a development; and
  - (c) an undertaking; and
  - (d) an activity or series of activities; and
  - (e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d).

**524 Things that are not actions**

- (1) This section applies to a decision by each of the following kinds of person (*government body*):
- (a) the Commonwealth;
  - (b) a Commonwealth agency;
  - (c) a State;
  - (d) a self-governing Territory;
  - (e) an agency of a State or self-governing Territory;
  - (f) an authority established by a law applying in a Territory that is not a self-governing Territory.
- (2) A decision by a government body to grant a governmental authorisation (however described) for another person to take an action is not an *action*. ...

**524A Provision of grant funding is not an action**

Provision of funding by way of a grant by one of the following is not an action:

- (a) the Commonwealth;
- (b) a Commonwealth agency;
- (c) a State;
- (d) a self-governing Territory;
- (e) an agency of a State or self-governing Territory;
- (f) an authority established by a law applying in a Territory that is not a self-governing Territory.

17. Based on the plain meaning of “action” and the qualifications given to it in ss523-524A, the meaning that can be attributed to it in the EPBC Act is, a physical activity or series of activities not being a government decision or grant of funding.<sup>19</sup>

18. This interpretation of “action” within the EPBC Act is also consistent with the reference to “*activities* that are likely to have significant impacts on the environment” in s3(2)(d), the objects clause, of the EPBC Act (emphasis added).

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ss522B, 523(2), 524B and the definition of “significant” in s528 of the EPBC Act, commences on the day the amending Act receives Royal Assent.

<sup>16</sup> *The Macquarie Dictionary*, 3<sup>rd</sup> ed, 1997, p20.

<sup>17</sup> *Ibid*, p19.

<sup>18</sup> Note also that although s523 expressly uses the conjunctive term “and”, this would appear to be simply poor drafting and the items should be read as if the disjunctive “or” were used (ie one item, or combination of them, is sufficient to come within the definition of an “action”). The non-exclusive, “includes”, definition allows this interpretation.

<sup>19</sup> A similar interpretation, although in a different legislative scheme, was given to “proposed action” by Sackville J in *Tasmanian Conservation Trust Inc v Minister for Resources and Anor* (1995) 55 FCR 516 at 532-536. In that case His Honour found (at 536) that the term “proposed action ... more naturally refers ... to the physical undertaking, rather than any licence authorising the undertaking.”

While the exclusion of government decisions from the definition of “action” may somewhat compromise the ability of the Act to achieve the objects of both the EPBC Act referred to above and the World Heritage Convention, it is submitted that, to this extent, the plain meaning of the word when interpreted in light of the qualifications expressed in ss523-524A, must prevail.

19. Applying this interpretation to the facts of the present case, the physical activity or series of activities of the Respondents on their farm in operating annually a series of electric grids for the purpose of killing flying foxes comes within this definition and therefore is an action for the purpose of the EPBC Act. The fact of the operation of the grids, their size and purpose is not in dispute. The Respondents have not contended that they will cease to operate the grids at any point in the future. In the context of these proceedings it may be inferred from this fact that the Respondents intend and, unless restrained, will continue to operate their electric grids for the purpose of killing flying foxes for the foreseeable future.
20. Finally, before turning from the meaning of the term “action” and its application to the facts of this case, the issue of whether a prior Commonwealth or State approval existed to exempt the Respondents’ action from the operation of the EPBC Act under ss43A and 43B must be addressed.<sup>20</sup> Sections 43A and 43B, which replace the now repealed ss522B and 523(2), are transitional provisions of the EPBC Act that provide a final qualification to the application of the Act to actions. These sections provide:

**43A Actions with prior authorisation**

- (1) A person may take an action described in a provision of Part 3 without an approval under Part 9 for the purposes of the provision if:
- (a) the action consists of a use of land, sea or seabed; and
  - (b) the action was specifically authorised under a law of the Commonwealth, a State or a self-governing Territory before the commencement of this Act; and
  - (c) immediately before the commencement of this Act, no further environmental authorisation was necessary to allow the action to be taken lawfully.

- (2) In this section:

*environmental authorisation* means an authorisation under a law of the Commonwealth, a State or a self-governing Territory that has either or both of the following objects (whether express or implied):

- (a) to protect the environment;
- (b) to promote the conservation and ecologically sustainable use of natural resources.

**43B Actions which are lawful continuations of use of land etc.**

- (1) A person may take an action described in a provision of Part 3 without an approval under Part 9 for the purposes of the provision if the action is a lawful continuation of a use of land, sea or seabed that was occurring immediately before the commencement of this Act. For this purpose, an enlargement, expansion or intensification of use is not a *continuation* of a use.

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<sup>20</sup> See footnote 15 in relation to the imminent (at the time of the preparation of these submissions) commencement of the *Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001 (Cth)*, which (inter alia) will repeal the original s522B and insert ss43A and 43B.

- (2) However, subsection (1) does not apply to an action that was specifically authorised under a law of the Commonwealth, a State or a self-governing Territory before the commencement of this Act.

Note: Section 43A applies to actions that were specifically authorised under a law before the commencement of this Act.

21. There is no evidence of any Commonwealth approval of the action. In relation to relevant State approvals, Spectacled Flying Foxes are protected animals under the *Nature Conservation Act 1992 (Qld)*,<sup>21</sup> which, as material here, require a Damage Mitigation Permit under s112 of the *Nature Conservation Regulation 1994 (Qld)* to kill, injure or harm during the course of protecting a fruit orchard such as the Respondents' farm.
22. The affidavits of Dr Carol Booth and Mr Jeremy Tager, together with the attached "Damage Mitigation Permit" dated 28 November 2000 issued by the Queensland Parks and Wildlife Service, evidence that it was not until 28 November 2000 that the First Respondent had obtained a Damage Mitigation Permit under s112 of the *Nature Conservation Regulation 1994 (Qld)*. In addition it is arguable, but unnecessary to analyse here, that the Damage Mitigation Permit purportedly issued on 28 November 2000 was invalid as an improper exercise of power.
23. The transitional provisions contained in ss43A and 43B therefore do not apply as the action was not specifically authorised by a law of the Commonwealth or Queensland before, or an existing lawful use of land at, the commencement of the EPBC Act on 16 July 2001. The Respondents' action in operating a system of electric grids to electrocute flying foxes is therefore subject to the provisions of the EPBC Act. This is consistent with the Court's finding at the hearing of the interim injunction application in relation to the now repealed s522B and s523(2), which had a similar purpose and effect as ss43A and 43B.<sup>22</sup>

**(c) that has, will have or is likely to have**

24. In relation to the third element of s12, "has, will have or is likely to have" involves the question of whether the action of the Respondent has caused any significant impact on the world heritage values of a declared World Heritage property. As this application is a civil action, causation, as all of the elements of the cause of action, must be proven on the balance of probabilities.<sup>23</sup>

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<sup>21</sup> The legislative scheme through which this occurs is as follows: s88 of the *Nature Conservation Act 1992 (Qld)* makes it an offence to take a protected animal other than under (as relevant here) a permit issued under a regulation (note that none of the other excuses or defences in s88 apply to this case). "Take" is defined in s7, in relation to an animal, to include to kill, injure or harm the animal. "Protected animal" are defined in s7 to include threatened, rare or common wildlife prescribed under the Act. Spectacled Flying Foxes (*Pteropus conspicillatus*) are included in the "common wildlife" category as a "common mammal" :Schedule 5 *Nature Conservation (Wildlife) Regulation 1994 (Qld)*, and therefore protected under s88 of the NCA. In relation to the relevant permit, the *Nature Conservation Regulation 1994 (Qld)* contains many different forms of licences and permits; however, for the Respondents' activity of culling a protected animal to protect agricultural crops, the relevant permit is found in s112 (Damage Mitigation Permit) of those regulations.

<sup>22</sup> *Booth v Bosworth* (2000) FCA 1878 (Spender J) at paras 8-9.

<sup>23</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336.

**(d) a “significant impact”**

25. In relation to the fourth element of s12, the term “significant impact” is not defined in the EPBC Act. Section 524B allowed the Commonwealth to make regulations prescribing the matters to be taken into account in determining whether an impact that an action has, will have or is likely to have is significant; however, the Commonwealth never did so and that section has now been repealed and a new s25A inserted.<sup>24</sup> Section 25A allows for regulations to provide that a specified action is taken to be an action to which a specified regulatory provision applies. No such regulations have been made.
26. Environment Australia, which is the Commonwealth agency administering the EPBC Act, has published *Administrative Guidelines*<sup>25</sup> to provide guidance to the public in determining whether a significant impact has, will have or is likely to occur. These guidelines purport to provide criteria by which a significant impact may be determined. It is submitted that the Court should disregard the *Administrative Guidelines*, principally because they are not created under any statutory power and can be no more than a statement of government policy of factors it will consider in determining whether an action will have a significant impact on a matter of national environmental significance.<sup>26</sup>
27. In relation to international law, while the terms “significant reduction” and “significant adverse effect” are used in the Biodiversity Convention,<sup>27</sup> no definition of these terms is provided. Consequently these terms are interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>28</sup> This principle is synonymous with the plain meaning and purposive rules of statutory interpretation normally applied to municipal statutes. As such, the consequence of referring to international law is not that it provides a definition of “significant impact” but that the interpretation of this term for the purposes of the EPBC Act should be in accordance with the purposes and objects of the Biodiversity Convention and the World Heritage Convention. In summary, these may be stated as the conservation of biodiversity; and the identification, protection, conservation and presentation of world heritage properties respectively.
28. It is submitted that the term “significant impact” in s12 should be given its plain meaning read in context and together with the purpose and objects of the EPBC Act and relevant international treaties. There has been considerable case law on the term “significant” in other legislation.

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<sup>24</sup> See footnote 15, which deals with the amendments to the EPBC Act under the *Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001 (Cth)*.

<sup>25</sup> Environment Australia, *Administrative guidelines for determining whether an action has, will have, or is likely to have a significant impact on a matter of national environmental significance under the Environmental Protection and Biodiversity Conservation Act 1999*, Environment Australia, Canberra, 2000.

<sup>26</sup> The Court is in a fundamentally different position to the Administrative Appeals Tribunal (“AAT”), in which government policy is a legitimate consideration: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419-421 per Bowen CJ and Deane J; *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 643 per Brennan J (President).

<sup>27</sup> *Convention on Biological Diversity* ATS 1993 No. 32. Signed for Australia, subject to ratification, on 5 June 1992 at Rio de Janeiro. Entry into force for Australia 29 December 1993. See references to “significant reduction” in the Preamble and “significant adverse effect” in Articles 7, 8 and 14.

<sup>28</sup> Article 31 (Interpretation of Treaties) *Vienna Convention on the Law of Treaties* ATS 1974 No.2.

29. The plain meaning of the term “significant” read in context is “important; of consequence.”<sup>29</sup> The plain meaning of “impact” read in context is “to have an affect on.”<sup>30</sup> The plain meaning of significant was applied in *McVeigh & Anor v Willarra Pty Ltd & Ors* (1984) 54 ALR 65 at 108 (McGregor J); (1984) 6 FCR 587 at 596 (Toohey, Wilcox and Spender JJ), which involved judicial review of a Minister’s decision that a film contained “significant Australian content.” In that case it was held (as obiter in the Full Court) that the ordinary meaning of “significant” was “important; notable; of consequence”.

30. In *Jarasius v Forestry Commission (NSW)* (1988) 71 LGRA 79 (NSW(LEC)) at 93-94, Hemmings J held (as obiter) that for the purposes of s112 of the *Environmental Planning and Assessment Act 1979 (NSW)* the phrase “likely to significantly affect the environment” should be interpreted as follows:<sup>31</sup>

“The respondent submits that because ‘significantly’ is not defined in the E P & A Act, the meaning in the *Macquarie Dictionary* should be applied, that is, ‘important’, and that word means ‘more than ordinary’. Without deciding it, I am prepared in this case to assume that that is the appropriate test.”

31. In *Drummoyne Municipal Council v Roads and Traffic Authority of New South Wales* (1989) 67 LGRA 155 (NSW(LEC)), a case involving a rather adventurous claim that new traffic signs represented a significant effect to the environment, Stein J stated (at 163):

“I am prepared to suggest that a significant effect must be an important or notable effect on the environment, as compared with an effect which is something less than that, that is, non-significant or non-notable. But I must stress that the assessment of the significance must depend upon an assessment of the facts constituting the environment and the activity and its likely effect on that environment.”

32. The reasoning of Stein J in *Drummoyne* was adopted in the current leading case for the definition of “significant”, *Tasmanian Conservation Trust Inc v Minister for Resources & Gunns Ltd* (1995) 55 FCR 516 (“*Gunns No.1*”).<sup>32</sup> That case involved judicial review of a decision to grant a woodchip export licence. In finding that the relevant Commonwealth Minister had failed to consider whether the proposed action “affected or was likely to affect the environment to a significant extent” and nullifying the purported decision, Sackville J held (at 541):

“In considering whether the proposed action would have a significant effect on the environment, it is appropriate, in my view, in the words of Cripps J in *Kivi v Forestry Commission of New South Wales* (1982) 47 LGRA 38 at 47 to:

‘... look to the whole undertaking of which the relevant activity forms a part to understand the cumulative and continuing effect of the activity on the environment’.

<sup>29</sup> *The Macquarie Dictionary*, 3<sup>rd</sup> Ed, The Macquarie Library Pty Ltd, Sydney, 1997, p1974. A useful analysis of the term “significantly affect” and the manner in which it had been interpreted by the courts was given by Preston (Preston BJ, ‘The Environmental Impact Statement Threshold Test: When is an Activity Likely to Significantly Affect the Environment?’ (1990) EPLJ 147).

<sup>30</sup> *The Macquarie Dictionary*, 3<sup>rd</sup> Ed, The Macquarie Library Pty Ltd, Sydney, 1997, p1070.

<sup>31</sup> This test was followed by Hemmings J in *Bailey v Forestry Commission of New South Wales* (1989) 67 LGRA 200 (LEC(NSW)) at 211-212 and by Bignold J in *Rundle v Tweed Shire Council & Anor* (1989) 68 LGRA 308 (LEC(NSW)) at 331. Hemmings J’s reasoning in *Jarasius* (at 94) also provides a useful and clear example of a factual situation of a “significant effect” in the context of logging.

<sup>32</sup> Followed (on the point of “significant”) in *Re Truswell and Minister for Communication and the Arts* (1996) 42 ALD 275 (AAT decision) which (at 294-5) analyses cases which have considered the term “significant”.

However, this does not mean that the significance of a particular activity can only be assessed by reference to its impact upon the whole area in which some aspect of the activity is to take place ... site specific impacts can be significant, depending on the circumstances. ...

Despite the deficiencies of the evidence, I think it sufficiently established that Gunns' proposed action ... would have had a significant effect on the environment. If the word 'significant' needs elaboration in this context, I use it in the sense of 'an important or notable effect on the environment': *Drummoyne Municipal Council v Roads and Traffic Authority of New South Wales* (1989) 67 LGRA (LEC(NSW), Stein J) at 163. In my view this is so whether one considers the proposed action as an entire undertaking or in terms of its effects on particular sites."

33. While Stein J and Sackville J used a definition of "important or notable", it is submitted that the preferable interpretation of the term "significant impact" for the purposes of the EPBC Act, is "an impact that is important or of consequence having regard to its context and intensity". The reason for this is that analysis of Stein J's judgement indicates it was based on a definition of "significant" drawn from the case law in the early 1980s and the Oxford Dictionary. Since that time the *Macquarie Dictionary* has become established as the official Australian dictionary. As definitions and meanings can change over time, the *Macquarie Dictionary* definition should be used for the EPBC Act rather than a slavish limitation to case law. Applying this test, each case will be a question of fact.
34. The interpretation of the term "significant impact" as meaning "an impact that is important or of consequence having regard to its context and intensity", is supported by extrinsic material. In 1991 the Australian and New Zealand Environment and Conservation Council ("ANZECC") provided a definition of "environmental significance" in a report to the Prime Minister and First Ministers, entitled, *A National Approach to Environmental Impact Assessment in Australia*.<sup>33</sup> The ANZECC comprises the Environment Ministers of the Commonwealth, the States and the Territories of Australia and New Zealand and it is submitted that this document may be referred to as an extrinsic aid in interpreting the meaning of "significant impact" in the EPBC Act.<sup>34</sup> This document provides (at page 2):

**"Environmental Significance**

The [Environmental Impact Assessment (EIA)] process is normally initiated if a proposal appears likely to have a significant effect on the environment. The concept of environmental significance is applied at a number of points in the process including referral proposals, level of assessment applied and evaluation of potential impacts.

In the EIA context, the concept of environmental significance is a judgement on the degree of importance and consequence of anticipated change imposed on the environment by a proposal.

This judgement is based upon the following factors:

- character of the receiving environment and the use and value which society has assigned to it
- magnitude, spatial extent and duration of anticipated change
- resilience of the environment to cope with change
- confidence of the prediction of change

<sup>33</sup> ANZECC, *A National Approach to Environmental Impact Assessment in Australia*, ANZECC Secretariat, Canberra, October 1991.

<sup>34</sup> Section 15AB *Acts Interpretation Act 1901 (Cth)*.

- existence of policies, programmes, plans and procedures against which the need for applying the EIA process to a proposal can be determined
- existence of environmental standards against which a proposal can be assessed
- degree of controversy on environmental issues likely to be associated with a proposal.”

35. The test contemplated in the ANZECC report of significance being “the degree of importance and consequence” having regard to a number of factors concerning the context and intensity of the impact, is consistent with the plain meaning of “significant impact” and case law. In this sense, the extrinsic material confirms the plain meaning.<sup>35</sup>
36. It remains to be considered whether the plain meaning of significant impact is consistent with the object of the EPBC Act, the Biodiversity Convention and the World Heritage Convention. It is submitted that an interpretation of “significant impact” as “an impact that is important or of consequence having regard to its context and intensity” is consistent with the objects of the EPBC Act, the Biodiversity Convention and the World Heritage Convention. While the broadest possible interpretation of “significant impact” such as “any impact, however small” might be said to promote the objects of the EPBC Act, Biodiversity Convention and World Heritage Convention to an even greater degree by giving the EPBC Act a wider ambit of operation, such an interpretation would both strain the plain meaning of the Act and lead to the Act being applied in increasingly tenuous situations.<sup>36</sup> Allowing even the most tenuous link to trigger the EPBC Act would possibly produce a result that was both unworkable and unconstitutional having regard to the federal context within which the EPBC Act operates and the nexus with the Australia’s international legal obligations required for the validity of Commonwealth laws enacted pursuant to s51(xxix) of the Constitution.<sup>37</sup> Equally, a more narrow definition than its plain meaning allows (if any is available) would tend to defeat the purposes of the EPBC Act, World Heritage Convention and Biodiversity Convention. On this basis it is submitted that the Court should adopt the interpretation of “significant impact” suggested, i.e. an impact that is important or of consequence having regard to its context and intensity.
37. Applying this interpretation of significant impact to the facts of the case, it is necessary, firstly, to determine what are the facts concerning the impact of the Respondents’ action in operating their electric grids to kill flying foxes and, secondly, to determine whether that impact represents a significant impact on the world heritage values of the Wet Tropics World Heritage Area. The second part of

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<sup>35</sup> Section 15AB(1)(a) *Acts Interpretation Act 1901 (Cth)*.

<sup>36</sup> Note that the Explanatory Memorandum to the EPBC Bill 1999 (Cth) provide (at p23) in relation to s12 that, “not all actions impacting on a world heritage property will have, or are likely to have, a *significant impact* on the *world heritage values* of that property. This clause therefore does not regulate all actions affecting a world heritage property.” (emphasis in original text).

<sup>37</sup> Note s15A (Construction of Acts to be subject to Constitution) *Acts Interpretation Act 1901 (Cth)*. See generally: *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168; *Tasmania v Commonwealth* (1983) 158 CLR 1 (the Tasmanian Dam Case); *Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v Commonwealth* (1989) 167 CLR 232 (the Wet Tropics Case); *Victoria v Commonwealth* (1996) 187 CLR 416 (the Industrial Relations Act Case) at 487-488 per Brennan CJ, Toohey, Gaudron, McHugh, Gummow JJ.

this analysis will be set out below after discussing the world heritage values of the Wet Tropics World Heritage Area.

38. The relevant facts concerning the impacts of the Respondents' action in operating their electric grids to kill flying foxes, from the affidavits of Dr Carol Booth, Ms Olivia Whybird, Mr Greg Richards and Dr Len Martin, can be summarised as follows:

(a) the death of an estimated 409, 499, 305 and 297 Spectacled Flying Foxes (excluding juvenile Spectacled Flying Foxes which starved to death following the death of their mothers) on 21 November, 22 November, 29 November and 3 December respectively, from which an inference can be drawn of estimated death rates for the duration of the annual operation of the Respondents' electric grids;<sup>38</sup>

(b) the total species' population of the Spectacled Flying Fox in or associated with the Wet Tropics World Heritage Area was estimated over a 3 year period to be of the order of 113,390 in November 1998, 74,440 in November 1999 and 79,980 in November 2000;<sup>39</sup>

(c) the impacts on the biological features of the Spectacled Flying Fox species making it vulnerable to decline due to the scale and repetitious nature of the operation of the Respondents' electric grids, including that the Spectacled Flying Fox:

(i) is a seasonal breeder with peak births and lactation occurring at the same time as the Respondents operate their electric grids. Consequently, the effects of electrocution will be much greater than is evident from counts of dead bats on the electric grids due to foetal deaths, abortions of injured females and death of suckling young;

(ii) population modelling of the dynamics of changes in the Spectacled Flying Fox population over time associated with the continuing and cumulative impact of the operation of the Respondents' electric grids each year indicates that this action will cause rapid decline in the population, halving the population size within 5 years;

“It is predicted that any continuation of the seasonal culling of [Spectacled Flying Foxes] at the rates estimated to occur in the orchard of Mr Rohan Brien Bosworth will lead to rapid declines in populations of [Spectacled Flying Foxes] in the immediate vicinity ... Furthermore, because of the mobility of [Spectacled Flying Foxes], the impacts of persistent culling in the Bosworth orchard and resultant population decline will spread over broad areas of the Wet Tropics World Heritage Area.”<sup>40</sup>

(d) the Spectacled Flying Fox is a rainforest specialist species and is typically located in or adjacent to rainforest, now largely contained within the Wet Tropics World Heritage Area;

<sup>38</sup> Affidavit of Dr Carol Booth, 23 March 2001, p5 para26.

<sup>39</sup> Exhibit F (November 2000 Spectacled Flying-fox Survey) to affidavit of Ms Olivia Whybird.

<sup>40</sup> Affidavit of Dr Leonard Martin, 23 March 2001, p7.

- (e) the Spectacled Flying Fox fulfils an important role in the ecological and evolutionary processes of the rainforests with which it is associated. In particular its role in pollination and seed dispersal is important for maintaining species and community diversity in the Wet Tropics World Heritage Area. Richards summarises this role as follows:<sup>41</sup>

“[T]he Spectacled Flying Fox has a role in the seed dispersal of rainforest canopy plants through:

- The dispersal of fruit containing seed/s via the ‘raiders and residents’ model
- The dispersal of seeds themselves via excretion
- The knocking down of ripe fruit, making it available to ground dwelling seed dispersers.

...

Through the pollination and (especially) the seed dispersal capabilities of the Spectacled Flying Fox, this animal may be integral to the maintenance of the viability and regeneration of a suite of rainforest species.

...

Future culling of Spectacled Flying Foxes, through electrocution at the Bosworth Farm, at any level, will further erode the size of the vertebrate disperser pool, reducing the potential for rainforest canopy plants in the [Wet Tropics World Heritage Area] to reproduce. No other conclusion can be reached.”

39. Based on these impacts, the next issue to be considered is whether this is a significant impact on the world heritage values of the Wet Tropics World Heritage Area.

**(e) on the world heritage values**

40. The term “world heritage values” is defined in ss12 and 13 of the EPBC Act. These were set out above but may be repeated here for convenience:

**12 Requirements for approval of activities with a significant impact on a declared World Heritage property**

...

- (3) A property has *world heritage values* only if it contains natural heritage or cultural heritage. The *world heritage values* of the property are the natural heritage and cultural heritage contained in the property.

- (4) In this Act:

*cultural heritage* has the meaning given by the World Heritage Convention.  
*natural heritage* has the meaning given by the World Heritage Convention.

**13 What is a declared World Heritage property?**

*Properties on the World Heritage List*

- (1) A property included in the World Heritage List is a *declared World Heritage property* as long as the property is included in the List.

*Properties not yet included on World Heritage List*

- (2) A property specified in a declaration made under section 14 (with any amendments made under section 15) is a *declared World Heritage property* for the period for which the declaration is in force.

41. The terms “World Heritage Convention” and “World Heritage List” are themselves defined in s528 of the EPBC Act:

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<sup>41</sup> Affidavit of Gregory Richards, 23 March 2001, pp6-14.

**World Heritage Convention** means the Convention for the Protection of the World Cultural and Natural Heritage done at Paris on 23 November 1972, as in force for Australia immediately before the commencement of this Act.

Note: The English text of the Convention is set out in Australian Treaty Series 1975 No.47.

**World Heritage List** means the list kept under that title under Article 11 of the World Heritage Convention.

42. Cultural Heritage is not relevant to this case, in relation to Natural Heritage, Article 2 of the World Heritage Convention provides (emphasis added):

#### ARTICLE 2

For the purpose of this Convention, the following shall be considered as “natural heritage”;

natural features consisting of physical and **biological** formations or **groups of such formations**, which are **of outstanding universal value** from the **aesthetic or scientific** point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

43. A World Heritage Committee is established under Article 8 of the Convention and Article 11 provides:

#### ARTICLE 11

1. Every State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list provided for in paragraph 2 of this Article. This inventory, which shall not be considered exhaustive, shall include documentation about the location of the property in question and its significance.

2. On the basis of the inventories submitted by States in accordance with paragraph 1, the Committee shall establish, keep up to date and publish, under the title of “World Heritage List”, a list of properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of this Convention, which it considers as having outstanding universal values in terms of such criteria as it shall have established. An updated list shall be distributed at least every two years. ...

5. The Committee shall define the criteria on the basis of which a property belonging to the cultural or natural heritage may be included in either of the lists mentioned in paragraphs 2 and 4 of this article.

44. One view of s12 of the EPBC Act is that the world heritage values of a declared World Heritage property must be ascertained objectively and independently by the Court based on the definition given in Article 2 of the Convention and evidence tendered in a trial. Such a result would no doubt prove difficult for the Court to undertake and would be an expensive and time-consuming task. It is also a task for which the Court is ill-equipped.
45. It is suggested that the better view for the interpretation of s12 is that the Court should look to the nomination and listing of the Wet Tropics World Heritage Area as evidence of its world heritage values together with the *Operational Guidelines*

for the Implementation of the World Heritage Convention adopted by the World Heritage Committee under Article 11 of the World Heritage Convention (“the *Operational Guidelines*”).<sup>42</sup> While this departs from the plain or literal meaning of ss12 and 13 of the EPBC Act, it is suggested that such an approach is required because:

- (a) the term “world heritage values” has an established technical meaning shown in the *Operational Guidelines*;<sup>43</sup> and
- (b) reliance on the nomination and listing documents as evidence of the world heritage values together with reliance on the *Operational Guidelines* in defining the term “world heritage values” is consistent with and will promote the purpose and objects of the EPBC Act and the World Heritage Convention.

46. In addition, specific authority for such an approach is found in *Queensland v The Commonwealth* (1989) 167 CLR 232 (“the *Wet Tropics Case*”) at 240-1 where the joint judgement of Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ stated (emphasis added):

“In one sense, the status of a particular property as one of outstanding universal value forming part of the cultural heritage or natural heritage is an objective fact, ascertainable by reference to its qualities; but, as evaluation involves matters of judgment and degree, an evaluation of the property made by competent authorities under the Convention is the best evidence of its status available to the international community. The competent authorities to make an evaluation for the purposes of the Convention are, in the first place, the State Party on whose territory a property is situated and, if the State Party submits a property in an inventory under Art. 11 par. 1, the Committee under Art. 11, par. 2. ...

Although the status of a property as part of the cultural heritage or natural heritage follows from its qualities rather than from their evaluation either by the relevant State Party or by the World Heritage Committee (as Gaudron J recognized in *Richardson v Forestry Commission*),<sup>44</sup> a State Party which evaluates a property as part of the cultural heritage or natural heritage and submits it to the Committee for listing thereby furnishes the international community with evidence of that status ...

From the viewpoint of the international community, the submission by a State Party of a property for inclusion in the World Heritage List and inclusion of the property in the List by the Committee are the means by which the status of a property is ascertained and the duties attaching to that status are established. **The State Party’s submission of a property is some evidence of its status but the Committee’s listing of a property is conclusive.**”

47. The status of the Wet Tropics World Heritage Area as truly forming World Heritage under the Convention had been directly challenged by the State of Queensland and formed part of the decision in the *Wet Tropics Case*. It is therefore submitted that the case is binding authority for the proposition that the status and world heritage values of declared World Heritage property are to be determined from the nomination and listing of the property.

<sup>42</sup> The latest version of these guideline maintains these four criteria together with an assessment of integrity, as the basis for the assessment of World Heritage. See UNESCO (Secretariat for the World Heritage Committee), *Operational Guidelines for the Implementation of the World Heritage Convention*, UNESCO World Heritage Centre, Paris, March 1999.

<sup>43</sup> See *David and Jones v State of Western Australia* (1905) 2 CLR 29 at 42-3 per Griffith CJ, at 46 per Barton J and at 51 per O’Connor; *Marine Power Australia Pty Ltd & Anor v Comptroller-General of Customs & Ors* (1989) 89 ALR 561 (FCA) per Lockhart J at 572; *Herbert Adams Pty Ltd v Federal Commissioner for Taxation* (1932) 47 CLR 222 at 227.

<sup>44</sup> (1988) 164 CLR 261 at 341.

48. The nomination and listing process for the Wet Tropics World Heritage Area was summarised by Gaudron J in the case stated for consideration by the Full Court in the *Wet Tropics Case* as follows:<sup>45</sup>

“In December 1987 the [Commonwealth] submitted to the World Heritage Committee as suitable for inclusion in the World Heritage List provided for in par. 2 of Art. 11 of the Convention for the Protection of the World Cultural and Natural Heritage (‘the Convention’), a property consisting of a number of areas of land situated in the north-east of the State of Queensland, described as ‘Wet Tropical Rainforests of North-East Australia (‘the property’). In June 1988 the International Union for the Conservation of Nature and Natural Resources (‘the IUCN’) made a report and recommendation to the Bureau of the World Heritage Committee in respect of the property. This was followed by a recommendation by the Bureau to the World Heritage Committee and a request to the [Commonwealth] for clarification and further information. On 30 September 1988 the [Commonwealth] provided to the World Heritage Committee clarification and further information respecting the submission, including revisions to the boundary of the property and a change in the description of the property to ‘Wet Tropics of Queensland’. In October 1988 the IUCN provided to the World Heritage Committee a technical evaluation of the property. In December 1988, on the basis of the clarification and further information provided by the [Commonwealth] and the IUCN technical evaluation, the Bureau recommended to the World Heritage Committee that the property be inscribed on the World Heritage List. On 9 December 1988 the World Heritage Committee, in accordance with par. 2 of Art. 11 of the Convention, considered the property to have outstanding universal value in terms of certain Operational Guidelines promulgated by it pursuant to par. 5 of Art. 11 of the Convention by which it defined the criteria on the basis of which a property may be included in the World Heritage List.”

49. The “technical evaluation” of the IUCN referred to by Gaudron J, summarised the Commonwealth of Australia’s nomination and justification of inclusion of the Wet Tropics on the World Heritage List as follows (emphasis added):<sup>46</sup>

“The Wet Tropical Rainforest nomination, as presented by the Government of Australia, provides the following justification for designation as a World Heritage property:

- a) Cultural property
  - (iv) Extant Aboriginal rainforest culture. Aboriginal occupation dates back at least 40,000 years.
- b) Natural property
  - (i) Earth’s evolutionary history. Contains one of the most complete and diverse living records of the major states in the evolution of land plants, from the very first land plants to higher plants (Gymnosperms and Angiosperms), as well as one of the most important records of the history of marsupials and songbirds.
  - (ii) Ongoing geological processes. **Levels of species diversity and endemism are exceptionally high, reflecting long-isolated ancient biota of the Australian wet tropics.**
  - (iii) Exceptional natural beauty. One of the most significant regional ecosystems in the world, with outstanding features of natural beauty and magnificent sweeping landscapes. Exceptional is the coastal scenery, which combines tropical rainforest, white sandy beaches and fringing reefs just offshore.

<sup>45</sup> Reproduced at (1989) 167 CLR 233-4.

<sup>46</sup> IUCN, *Documentation on World Heritage Properties (Natural) – Wet Tropical Rainforests (486) Australia*, IUCN, Gland, October 1988, pp4-5.

- (iv) **Habitat of rare and threatened species. Provides the only habitat for numerous rare or threatened species of plants and animals.”**

50. The biodiversity of bat species (of which the Spectacled Flying Fox is a member) was cited directly:<sup>47</sup>

“Fauna diversity is the highest in Australia, with 30% of marsupial species, 60% of bat species, 18% of frog species, 23% of reptile species and 62% of butterfly species present. Some 54 species of vertebrates are unique to the area.”

51. The biodiversity of bat species in the Wet Tropics also drew particular comment in the IUCN evaluation report of the nomination.<sup>48</sup>

“... Within Australia, the [Wet Tropics] contains the majority of the continent’s bat and butterfly species as well as many other plant and animal species restricted to this one area. All there are indicators of the biological uniqueness of the area which sets it apart within the Australian biogeographic realm.”

52. The IUCN recommended (in terms that were adopted by the Bureau of the World Heritage Committee and accepted by the World Heritage Committee in listing the property) that the Wet Tropics be listed on World Heritage list in the following terms (emphasis added):

“The property in general terms therefore merits inscription on the World Heritage list on the basis of the following criteria:

- i) Earth’s evolutionary history. The site contains a diverse living record of the major stages of earth’ evolution, particularly within its Gondwana context.
- ii) **On-going biological evolution. As a centre for endemism for the region, the wet tropics provide fundamental insights into evolutionary patterns both in isolation from and in interaction with other rainforests.**
- iii) Exceptional natural beauty. Within the boundaries of the site are some superlative scenic features highlighted by extensive sweeping forest vistas, wild rivers, waterfalls, rugged gorges and coastal scenery. The site also provides a terrestrial continuum with the Great Barrier Reef.
- iv) **Habitat for threatened species. These wet tropical forests hold a largely intact flora and fauna with hundreds of species restricted within its boundaries.”**

53. The four aspects of the nomination by the Commonwealth of Australia and recommendation of the IUCN reflect the criteria for the inclusion of natural properties on the World Heritage List contained in the *Operational Guidelines*. These criteria are adopted in the actual inscription of a property on the World Heritage List. The Wet Tropics World Heritage Area is inscribed on the World Heritage List for all four criteria of natural heritage with corresponding criteria for integrity, ie:<sup>49</sup>

#### **44. Natural heritage property**

- (a) (i) be outstanding examples representing major stages of earth’s history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features; or
- (ii) be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh

<sup>47</sup> Ibid, p4.

<sup>48</sup> Ibid, p8.

<sup>49</sup> UNESCO (Secretariat for the World Heritage Committee), *Properties Inscribed on the World Heritage List*, UNESCO World Heritage Centre, Paris, 2000.

water, coastal and marine ecosystems and communities of plants and animals;  
or

- (iii) contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance; or
- (iv) contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation.

and

(b) also fulfil the following conditions of integrity:

- (i) The sites described in 44(a)(i) should contain all or most of the key interrelated and interdependent elements in their natural relationships; ...
- (ii) The sites described in 44(a)(ii) should have sufficient size and contain the necessary elements to demonstrate the key aspects of processes that are essential for the long-term conservation of the ecosystems and the biological diversity they contain; ...
- (iii) The sites described in 44(a)(iii) should be of outstanding aesthetic value and include areas that are essential for maintaining the beauty of the site;
- (iv) The sites described in paragraph 44(a)(iv) should contain habitats for maintaining the diverse fauna and flora characteristic of the biographic province and ecosystems under consideration

54. These criteria of natural heritage and integrity are the basis for the affidavit evidence of Mr Peter Valentine, an expert in World Heritage properties, that the death and injury of large numbers of Spectacled Flying Foxes due to the Respondent's electric grid system "poses a serious threat to the world heritage values of the Wet Tropics World Heritage Area". Mr Valentine emphasises criteria 2<sup>50</sup> and 4<sup>51</sup> together with the ecological role fulfilled by the Spectacled Flying Fox in seed dispersal of plants making them "keystone species – in other words, species which provide a critical role in holding communities together and whose loss precipitates serious collapse in the ecological processes and composition of the community." Mr Valentine also notes that the Spectacled Flying Fox species itself forms part of the biodiversity that is identified as of outstanding universal value.

55. The Respondents' action in operating an electric grid system on their property killed or injured an estimated 300-500 Spectacled Flying Foxes for the period sampled by Dr Booth. As this occurred during the breeding season for the Spectacled Flying Foxes and inference can be drawn that this also caused the death by starvation of juvenile Spectacled Flying Foxes left at their roost while the mothers went in search of food; however, the numbers of these deaths are unknown. It is the scale and Respondents' intention to continue the operation of their electric grids in future years that is the most outstanding evidentiary feature of this case.

56. It is submitted that the Respondents' action in operating their electric grids for the purpose of electrocuting flying foxes is clearly having or is likely to have a significant impact on the world heritage values of the Wet Tropics World Heritage Area because:

- (a) the Spectacled Flying Fox species itself, and each of its members, forms part of the world heritage values of the Wet Tropics World Heritage Area;

<sup>50</sup> That is, natural heritage criteria (a)(ii) and associated condition of integrity (b)(ii).

<sup>51</sup> That is, natural heritage criteria (a)(iv) and associated condition of integrity (b)(iv).

(b) the Spectacled Flying Fox species forms part of and contributes to the ecological and evolutionary processes (such as pollination and seed dispersal) within the Wet Tropics World Heritage Area, such processes also being part of the world heritage values of the Wet Tropics World Heritage Area and essential for the maintenance of other species which are part of the world heritage values and the integrity of the Wet Tropics World Heritage Area.

57. In relation to the impact of the action of the Respondents on the world heritage values of the Wet Tropics World Heritage Area, Dr Valentine concluded:<sup>52</sup>

“Flying foxes form part of the biodiversity values for which the Wet Tropics of Queensland was formally nominated and listed. ... Any threat to the existence of the species is a threat to the outstanding universal value of the property.”

“Any significant loss of flying foxes within the World Heritage Area (or sufficiently adjacent to it so that the population is part of the plant reproductive ecology) gives rise to serious concern for the possible destruction of world heritage attributes with form the outstanding universal value for which the site is listed and which Australia is committed to protect.

The World Heritage Convention also addresses the question of integrity associated with criteria for listing. Ecological integrity is the capacity of an ecosystem to recover from disturbance and to maintain the ecological processes which produce it. It is evident that a loss of significant numbers of flying foxes would give rise to concerns about potential loss of integrity of the Wet Tropics World Heritage Area.”

58. On this basis it is submitted that the Respondents’ action in operating an electric grid system for the purpose of electrocuting flying foxes is causing and will continue in the future to cause a significant impact on the world heritage values of the Wet Tropics World Heritage Area.

**(f) of a declared World Heritage property**

59. As referred to above, the Wet Tropics of Queensland World Heritage Area was inscribed on the World Heritage List in 1988. It remains on the list.<sup>53</sup> These facts are admitted by the Respondents.

**DISCRETION TO GRANT INJUNCTION**

60. It is submitted that the statutory power to grant a prohibitory injunction under s475(2) and make a consequential order under s475(3) of the EPBC is at the Court’s discretion in all of the relevant facts and circumstances of the case.<sup>54</sup> The following are suggested as the principal factors that the Court should take into account in determining whether or not to grant the injunction and make the order applied for in this case:

- (a) the general principles of injunctive relief;
- (b) the Respondents’ breach of s12 of the EPBC Act;

<sup>52</sup> Affidavits of Mr Peter Valentine, 21 March 2001, p9 and 7 December 2001 p2.

<sup>53</sup> Ibid.

<sup>54</sup> The reasoning of the Full Court in *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248, per Lockhart, Gummow and French JJ, in relation to s80 of the *Trade Practices Act 1974 (Cth)*, would appear directly applicable to the statutory injunction provided under s475.

- (c) the scope and purpose of the EPBC Act;
- (d) the public interest;
- (e) the inadequacy of damages;
- (f) the availability of non-lethal alternatives to protect the Respondents' crop;
- (g) the economic impacts of the grant of the injunction on the Respondents; and
- (h) whether the form of the injunction is appropriate.

### **General Principles of injunctive relief**

61. Guidance may be obtained from equitable principles in the exercise of the discretion to grant an injunction under s475, except in so far as they are expressly excluded or modified by the EPBC Act, but equitable principles are not the sole determinant and their relevance may vary according to the nature of the proceedings.<sup>55</sup> In particular their relevance may vary according to whether the proceedings are brought to enforce the public interest or to vindicate a private entitlement.<sup>56</sup> Statutory injunctions such as s475 may be granted to restrain criminal acts, unlike the usual position in equity.<sup>57</sup>

### **The Respondents' breach of s12 of the EPBC Act**

62. If the Court determines on the balance of probabilities that the Respondents have contravened and/or will contravene s12 of the EPBC Act, this will be a principal factor weighing in favour of the grant of the injunction and the making of the order sought. The scale and intended annual repetition of the Respondents' action together with the vulnerability of the Spectacled Flying Foxes to decline together with the importance of this species for the ecological and evolutionary processes of the Wet Tropics World Heritage Area are the key evidentiary features of this case. These facts indicate a serious contravention and intended future contravention of s12, which weigh in favour of the grant of the injunction and making of the order.

63. In addition, the actions of the Respondents by destroying fauna protected under Queensland law<sup>58</sup> without obtaining a permit required by law is a factor that the Court may consider in deciding whether to grant the injunction. Their further disregard for the law by exceeding the Damage Mitigation Permit issued by the Queensland Parks and Wildlife Service on 28 November 2000 to take 500 Spectacled Flying Foxes over a two month period (the remaining lychee season) is an additional factor relevant to the Court's discretion.

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<sup>55</sup> *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 (Lockhart, Gummow and French JJ).

<sup>56</sup> *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181 (Full Ct FCA) at 187 per Bowen CJ.

<sup>57</sup> *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 266 per Gummow J.

<sup>58</sup> Section 88 *Nature Conservation Act 1992 (Qld)* makes it an offence to take a protected animal (including wildlife listed as common) without a licence, permit or other authority issued or given under a regulation. It is common ground that the First Respondent did not hold a "Damage Mitigation Permit" under s112 of the *Nature Conservation Regulation 1994 (Qld)* until 28 November 2000.

## Scope and purpose of the EPBC Act

64. An injunction sought under a statutory cause of action must come within the scope and purpose of the Act.<sup>59</sup> The substantive scope and purpose of the EPBC Act is stated in s3(1)(a)-(c). This application falls clearly within each of these three limbs of the scope and purpose of the Act. The Applicant seeks to protect the environment, in particular the world heritage values of the Wet Tropics World Heritage Area, which are of national environmental significance. The application also promotes ecologically sustainable development through the conservation and ecologically sustainable use of natural resources being the Spectacled Flying Fox species, which, additionally, promotes the conservation of biodiversity.

## The public interest

65. The present case is brought in the public interest to protect natural heritage recognised as World Heritage and s475 may be regarded as essentially a public interest provision.<sup>60</sup> It is undoubtedly a matter of great public interest that the world heritage values of the Wet Tropics World Heritage Area, and biodiversity generally, are protected. In *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 155, in refusing to grant an application for an interlocutory injunction on the balance of convenience, Mason ACJ stated the principal as follows:

“It is a different matter where it is suggested that the proposed restraint on enforcement of the statute would occasion a significant detriment to the public interest by preventing the defendant from enforcing a legislative scheme which is designed to protect the environment from pollution by litter. Then the need to protect the private interests of the plaintiff must be weighed against the public interest in avoiding injury to the environment.”

66. In granting an interlocutory injunction in *Richardson v Forestry Commissioner* (1988) 164 CLR 261 at 275-6 Mason CJ stated:

“Despite statements that the plaintiff must show that it is probable that the plaintiff will suffer irreparable injury if no injunction is granted (*Clements and Marshall Pty Ltd v Field Peas Marketing Board (Tas)*),<sup>61</sup> in a case such as the present it is enough for the plaintiff to show that irreparable injury is a possibility in the sense stated. The object of the Act being to preserve intact that which may be a unique heritage, the possibility of injury is enough to sustain an interlocutory injunction by way of protecting the area in question, thereby preserving the subject-matter of the inquiry pending its completion at least. ... Notwithstanding evidence that the defendants and the interveners will suffer substantial loss by reason of the grant of the relief sought and that the injunctions will cause substantial consequential loss to persons engaged in the forestry industry, the timber industry and related activities in Tasmania, the possible loss of, or injury to, what may be a unique heritage must be regarded as the paramount factor.”

67. Compliance with Australia’s international legal obligations is another factor that may be considered within the public interest. The World Heritage Convention and the Biodiversity Convention place clear obligations on Australia to protect,

<sup>59</sup> *Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd* (1997) 148 ALR 339 (FCA) per Merkel J.

<sup>60</sup> See the discussion of public interest provisions in *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 in relation to s80 of the *Trade Practices Act 1974 (Cth)*.

<sup>61</sup> (1947) 76 CLR 401 at 407.

conserve, present and to transmit to future generations the world heritage values<sup>62</sup> and to conserve the biodiversity of the Wet Tropics World Heritage Area.<sup>63</sup>

### **Inadequacy of damages**

68. An equitable injunction will not be granted where common law damages are adequate.<sup>64</sup> It is submitted that the issue of damages is irrelevant for statutory injunctions or public interest provisions such as s475 of the EPBC Act.<sup>65</sup> However, if this is incorrect, the question of the adequacy of damages can simply be answered by concluding that the applicant has no claim for damages at law.<sup>66</sup>

### **The availability of non-lethal alternatives to protect the lychee crop**

69. Lychee farms located close to the Respondents farm and in the wider region, currently use netting to protect their lychee crops from moths, birds and flying foxes. Netting is a practical, non-lethal solution to flying fox predation of the Respondents' lychee crop. It can also prevent or minimise storm damage to orchards and other benefits for crop production. The availability of such non-lethal alternatives is a factor weighing in favour of the Court determining to grant the injunction and make the order sought.

### **Economic impact on the Respondents**

70. Against the grant of the injunction and the making of the order the Respondents will incur economic impact either should they choose to net their lychee crop (due to the cost of installing and maintaining the netting) or should they choose not to net their orchard (through added crop losses). A number of animals including species of moths, birds and flying foxes cause losses of the Respondents lychee fruit even with the operation of the Respondents' electric grids. Therefore, the Respondents will also suffer economic losses even if the injunction sought is not granted. In purely economic terms, it may be a sound decision if the Respondents chose to cease the operation of their electric grids and to net their orchard.

71. Weighed against the economic impact on the Respondents should the injunction be granted and consequential order be made, are the issues given above such as the contravention of s12 of the EPBC Act, the public interest that world heritage values are protected and the availability of non-lethal alternatives to protect the lychee crop.

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<sup>62</sup> Schedule 5 (Australian World Heritage management principles) *Environment Protection and Biodiversity Conservation Regulations 2000 (Cth)*. See generally *Friends of Hinchinbrook Society Inc v Minister for Environment (No 2)* (1997) 69 FCR 28 per Sackville J.

<sup>63</sup> See generally *Commonwealth v Tasmania* (1983) 158 CLR 1 (the Tasmanian Dam case); *Queensland v The Commonwealth* (1989) 167 CLR 232 (the Wet Tropics case).

<sup>64</sup> *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 All ER 992 at 1005 per Sachs LJ.

<sup>65</sup> See generally *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248, per Lockhart (with whom French J agreed) and Gummow JJ.

<sup>66</sup> *R v Secretary of State for Transport; Ex parte Factortame Ltd [No 2]* [1991] 1 AC 603 at 672-673 per Lord Goff; *Bourgoin SA v Ministry of Agriculture, Fisheries & Food* [1986] QB 716; [1985] 3 All ER 585 (CA).

**The form of the injunction is appropriate**

72. Injunctions should be granted in clear and unambiguous terms which leave no room for the persons to whom they are directed to wonder whether or not their future conduct falls within the scope or boundaries of the injunction.<sup>67</sup> The final injunction should bear upon the case alleged and proved against the defendant.<sup>68</sup> The form of the injunction should also be self-contained as far as practicable and not refer to secondary or attached documents.<sup>69</sup> It is submitted that the injunction and consequential order applied for satisfy these formal requirements and are appropriate for the Court to grant.

**CONCLUSION**

73. The scale and repetition of the Respondents' action together with the vulnerability of the Spectacled Flying Foxes to decline and the importance of this species for the ecological and evolutionary processes of the Wet Tropics World Heritage Area are the key evidentiary features of this case. These facts indicate a serious contravention of s12 of the EPBC Act during November-December 2000 and an intended future serious contravention of s12 on an annual basis. There has been and, unless restrained, will be or is likely to be, a significant impact on the world heritage values of the Wet Tropics World Heritage Area.

74. That there has been a clear contravention of s12 and that it is intended to repeat this contravention on an annual basis weighs heavily in favour of the grant of the injunction and the making of the order sought. The public interest in the protection of the world heritage values of the Wet Tropics World Heritage Area and compliance with Australia's international legal obligations are additional factors weighing heavily in favour of the grant of the injunction and the making of the order. Against this it may be said the grant of the injunction will cause economic impact to the Respondents; however, the installation of netting provides a non-lethal alternative for the Respondents to protect their crop that will mitigate any loss. On this basis it will be submitted that the Court should grant the applications for a prohibitory injunction and order requiring the removal of the electric grids.

These submissions were prepared on behalf of the Applicant by Dr Ted Christie of Counsel and Mr Chris McGrath of Counsel.

Dated: 5 July 2001

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<sup>67</sup> See generally *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248, per Lockhart (with whom French J agreed) and Gummow JJ.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*