

IN THE PLANNING AND ENVIRONMENT COURT
AT TOWNSVILLE

No. BD 4658 of 2004

BETWEEN: **CAROL JEANETTE BOOTH**

Applicant

AND: **FRIPPERY PTY LTD (ACN 010 890 007)**

First Respondent

MERVYN MEYER THOMAS

Second Respondent

PAMELA ANN THOMAS

Third Respondent

APPLICANT'S CLOSING SUBMISSIONS ON RELEVANT LAW

1. These written submissions are intended to supplement the outline of relevant legislation and case law provided in the opening address of counsel for the Applicant. Counsel will make oral submissions on the evidence, although these submissions contain references to the evidence, where relevant. The issues these submissions cover are:
 - (a) issues for determination by the Court;
 - (b) jurisdiction and standing;
 - (c) section 88;
 - (d) the subsection 88(3) defence;
 - (e) causation;
 - (f) standard of proof;
 - (g) Respondents' objections to the Applicant's evidence;
 - (h) Applicant's objections to the Respondents' evidence;
 - (i) retrospective operation of the law;
 - (j) exercise of the Court's discretion.

APPLICANT'S CLOSING
SUBMISSIONS ON RELEVANT LAW
Filed on behalf of the Applicant

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Issues for determination by the Court

2. The two principal issues to be determined by the Court are:
 - (a) whether the Respondents have committed an offence against s 88 of the *Nature Conservation Act 1992* (“**the Act**”); and
 - (b) if an offence has occurred, what relief should the Court grant in the exercise of its discretion?

Jurisdiction and standing

3. The jurisdiction of the Court and the Applicant’s standing are clear from ss 173A and 173D of the Act, which provide:

173A Definitions for div 2

In this division—

court means the Planning and Environment Court.

nominated offence means an offence against section 62, 88, 88A, 89, 90, 91, 92, 94, 97 or 109.

person includes a body of persons, whether incorporated or unincorporated. ...

173D Proceeding for enforcement orders

- (1) A person may bring a proceeding in the court—
 - (a) for an order to remedy or restrain the commission of a nominated offence (an *enforcement order*) ...
- (2) The person may bring a proceeding for an enforcement order whether or not any right of the person has been, or may be, infringed by, or because of, the commission of the offence.

Section 88

4. The relevant “nominated offence” in this case is s 88 of the Act. Between 19 December 1994 and 17 December 2004, s 88 materially provided (see Tab 1 of the Applicant’s Book of Authorities):

Restriction on taking etc. protected animals

88.(1) Subject to section 93, a person must not take, use or keep a protected animal, other than under—

- (a) a conservation plan applicable to the animal; or
- (b) a licence, permit or other authority issued or given under a regulation;
- (c) an exemption under a regulation.

Maximum penalty—3 000 penalty units or imprisonment for 2 years.

(2) Subsection (1) does not apply to the taking of protected animals in a protected area.

(3) It is a defence to a charge of taking a protected animal in contravention of subsection

(1) to prove that—

- (a) the taking happened in the course of a lawful activity that was not directed towards the taking; and
- (b) the taking could not have been reasonably avoided.

(4) Subsection (3) does not allow a person to use or keep the animal.

5. The form of s 88 was amended on 17 December 2004, but the substance of the provision remained materially unchanged for the purposes of these proceedings (see Tab 2 of the Applicant’s Book of Authorities).

6. An initial point to be noted in relation to s 88 is that, significantly, it contains no mental element and, therefore, if a consequence of a person's willed act¹ is to take protected animals, the act may constitute an offence against the Act even if the person did not intend this consequence of their act.
7. A number of minor points may be made to clarify the operation of s 88 before dealing with other significant points in relation to these proceedings. The introductory phrase, "subject to section 93", refers to limited rights of Aboriginal and Torres Strait Islanders to take protected wildlife and has no application to the present proceedings. Conservation plans may be made under s 112 in relation to classes of wildlife and areas of major interest but there are no relevant conservation plans in relation to these proceedings.
8. "Take" is defined in the Schedule (Dictionary) of the Act to include "hunt, shoot, wound, kill, skin, poison, net, snare, spear, trap, catch, dredge for, bring ashore or aboard a boat, pursue, lure, injure or harm" an animal.
9. "Protected animal" is materially defined in the Schedule (Dictionary) of the Act to "mean an animal that is prescribed under this Act as threatened, rare or common wildlife ...". The related term of "native wildlife" is also defined to mean "any taxon or species of wildlife indigenous to Australia."
10. The relevant class of protected animals for these proceedings is common wildlife. Section 8 of the *Nature Conservation (Wildlife) Regulation 1994* provides that "native wildlife specified in schedule 5, parts 1 and 2 is common wildlife." Since the commencement of that regulation on 19 December 1994, schedule 5, Part 1 (Common animals) has relevantly provided that the following mammals are common wildlife:

4 Mammals

(1) A common mammal is a mammal indigenous to Australia other than—

 - (a) a presumed extinct, endangered, vulnerable or rare mammal; or
 - (b) a dingo (*Canis familiaris dingo*).
11. The Black Flying Fox (*Pteropus alecto*), is a mammal indigenous to Australia,² and is not included in the presumed extinct, endangered, vulnerable or rare mammal. This species is, therefore, a protected animal for the purposes of s 88 of the Act.
12. For the purposes of these proceedings, the only relevant "licence, permit, other authority or exemption under a regulation" is a Damage Mitigation Permit, which is provided for in the *Nature Conservation Regulations 1994*.³ Under these provisions a person such as the Respondents can apply to take protected animals causing damage to property. The administering authority of the Act has published a guideline for issuing Damage Mitigation Permits for flying foxes stating that lethal grids will not be permitted and that trials of non-lethal grids will only be permitted in specified circumstances, including the requirement to be electrically safe and to comply with Australian Standard AS3350.2.76 (Electrical fence energizers) or AS3859 (Effect of

¹ Section 88 is, of course, subject to the general elements of criminality in the *Criminal Code*, including s 23 (Intention).

² Paragraphs 4-6 of the affidavit of Dominique Germaine Thiriet (21 December 2004).

³ Between 19 December 1994 and 1 March 2004, s 112 of the Regulations provided for Damage Mitigation Permits. Since 1 March 2004, ss 278-281 of the Regulations have provided for Damage Mitigation Permits (see Tabs 5 and 6 of the Applicant's Book of Authorities).

current passing through the human body).⁴ It is common ground that the Respondents have never held a Damage Mitigation Permit for the operation of their electric grid. The Respondent also states at paragraph 75 of his affidavit affirmed 4 July 2005 (Exhibit 8) “There are fundamental differences between the fencing contemplated by AS3350.2.76 and the MKVII system such that it is impossible for the MKVII system to comply with this standard”.

The subsection 88(3) defence

13. The Respondents bear the onus of establishing the defence in subs 88(3). The Applicant submits that the defence does not apply in this case for three reasons:

- (a) the taking did not happen in the course of a lawful activity;
- (b) the activity was objectively directed towards the taking; and
- (c) the Respondents have not proven the taking could not reasonably have been avoided.

14. The taking did not happen in the course of a lawful activity (that is, where the activity is unlawful other than under s 88(1) of the Act) since the commencement of the *Animal Care and Protection Act 2001* on 1 March 2002. Section 51 of the *Animal Care and Protection Act 2001* provides:

51 Requirement for registration

(1) A person must not use an animal for a scientific purpose, or allow an animal to be used for a scientific purpose unless the person is-

- (a) registered [under Chapter 4, Part 2]; or
- (b) an individual retained by a registered person acting in the course of the individual’s retainer; or
- (c) a student at a college, institute, school, university or other institution that is registered and acting in the course of the person’s studies with the institution.

Maximum penalty – 300 penalty units or 1 year’s imprisonment.

15. As vertebrates and mammals, flying foxes come within the definition of “animal” in s 11 of the *Animal Care and Protection Act 2001*.

16. Section 48 of the *Animal Care and Protection Act 2001* defines “scientific purpose” as follows:

48 When animal is used for “scientific purposes”

(1) An animal is used for “scientific purposes” if it used-

- (a) in an activity performed to acquire, demonstrate or develop knowledge or a technique in a scientific discipline; or

Examples of an activity for paragraph (a)-

- diagnosis
- environmental studies
- field trials
- producing biological products
- product testing
- research
- teaching.

- (b) in connection with an activity mentioned in paragraph (a).

⁴ See exhibit CJB-9, pp 58 and 60, of the affidavit of Carol Jeanette Booth (21 December 2004).

- (2) However, despite subsection (1), banding or tagging a fish is not use of the bird or fish for scientific purposes.
- (3) The use of an animal for scientific purposes also includes using any of the remains of an animal that was killed for the purpose of carrying out an activity mentioned in subsection (1).
17. In his evidence-in-chief, Mr Thomas relied on the fact that he had been trialing and developing his “non-lethal” grid system since 1997 for the purpose of protecting his farm and providing a cheaper, non-lethal crop protection system to other fruit growers than netting of orchards. He and Mr Errol Young gave detailed specifications of the electronics of the Respondents’ electric grid system. Mr Thomas even gave a demonstration of his electrical prowess to the Court through a display of the MKVII timing system in comparison to an electrical unit from an electric cattle-fence.⁵
18. In cross-examination Mr Thomas agreed that electronics and agricultural science were scientific disciplines and that he was not registered under the *Animal Care and Protection Act 2001*.⁶
19. It is a matter upon which the Court may take judicial notice that electronics and agricultural science are scientific disciplines.
20. It is clear that Mr Thomas is, in fact, using an animal in an activity performed to acquire, demonstrate or develop knowledge or a technique in a scientific discipline within the meaning of s 48 of the *Animal Care and Protection Act 2001*. The activity is the field trial of his “non-lethal” electric grids and the relevant scientific disciplines are electronics and agricultural science.
21. The s 88(3) defence, therefore, is not available to the Respondents’ because their activity has not been lawful (other than under the Act) since the commencement of the *Animal Care and Protection Act 2001* on 1 March 2002.
22. In addition to the fact that the activity has been unlawful (apart from s 88 of the Act) since the commencement of the *Animal Care and Protection Act 2001*, s 88(3) is also not available to the Respondents as their activity is objectively directed towards the taking of flying foxes. The admitted purpose of operating the electric grid is to give an electric shock to flying foxes that collide with the grid. Dr Spencer’s evidence is that the proposed level of electricity in the MKVII grid is likely to kill, injure or harm flying foxes (applying a plain meaning definition of these words).⁷ Consequently, the activity is directed towards the taking (even though the Respondents may subjectively be attempting to develop a non-lethal grid). In addition, the Respondents have proceeded to use their grids knowing that at least a small number of animals were likely to be killed. A person cannot proceed with reckless indifference to the fact that protected animals are likely to be killed and later claim the activity was not directed towards the taking.
23. The Respondents have not proven, on the balance of probability, that the taking could not reasonably have been avoided (netting the orchard, for instance, is a reasonable alternative). The term, “reasonably avoided” should also be interpreted in a way that achieves the purpose of the Act, the conservation of nature.

⁵ Transcript pp 127-129.

⁶ Transcript p 133.

⁷ Affidavit of Hugh John Spencer (31 August 2005) at paragraph [27].

Causation

24. The principles of causation are important to these proceedings. As noted earlier, s 88 contains no mental element and, therefore, if a consequence of a person's willed act is to take protected animals, the act may constitute an offence against the Act even if the person did not intend this consequence of their act.
25. It is well established that, as a question of law, causation is a question of common sense, appreciating that the purpose of the inquiry is to attribute legal responsibility: *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506; *Royall v R* (1991) 172 CLR 378; *Environment Agency v Empress Car Co (Arbortillery) Ltd* [1999] 2 AC 22 (see Tabs 14-16 of the Applicant's Book of Authorities).
26. A person may be held to have caused an occurrence or event even though they did not intend it to occur, even if a third party, the victim or natural process intervened, if the occurrence or event is a natural and ordinary consequence of the person's action.⁸
27. There may be no single cause of an occurrence or event, but if a person's conduct substantially or significantly contributed to the occurrence or event, they may be held to be legally liable.⁹
28. The significance of these principles for these proceedings is that, even if the Court accepts the evidence of Mr Thomas that the deaths of flying foxes in 2004 occurred due to "frapping",¹⁰ or "entanglement in the wires", then the Respondents have still caused the deaths and, therefore, have "taken" protected animals for the purposes of s 88 of the Act because the "frapping" is a normal and ordinary consequence of the Respondents' action in constructing and operating the electric grids.

Standard of proof

29. The civil standard of proof applies in these proceedings and, therefore, the Applicant must prove her case on the balance of probabilities. The Applicant accepts that, because of the significant consequences for the Respondents of the relief that is sought, applying the *Briginshaw* sliding scale the standard of proof is at the top of the range of that sliding scale: *Caloundra City Council v Taper Pty Ltd* [2003] QPELR 558; [2003] QPEC 019 at [14] (Tab 12 in the Applicant's Book of Authorities).

Respondents' objections to the Applicant's evidence

30. The Respondents' list of objections filed on 25 July 2005 state that the Respondents object to parts of the affidavits of Carol Jeanette Booth and Dominique Germaine Thiriet on the grounds that, "the evidence was unlawfully obtained in circumstances such as call for its exclusion from evidence."
31. The discretion to not admit otherwise admissible evidence on the ground that the evidence was illegally or improperly obtained is generally applied to criminal

⁸ *Royall v R* (1990) 172 CLR 378 at 387-389 per Mason CJ, 398 per Brennan J, 424 per Toohey and Gaudron JJ, and 441 per McHugh J; *Environment Agency v Empress Car Co (Arbortillery) Ltd* [1999] 2 AC 22 at 29-36 per Lord Hoffmann.

⁹ *Royall v R* (1990) 172 CLR 378 at 398 per Brennan J, 411-412 per Deane and Dawson JJ, and 423 per Toohey and Gaudron JJ.

¹⁰ Affidavit of Mervyn Thomas (4 July 2005) at para 18.

proceedings¹¹ rather than civil proceedings, but the Applicant accepts that the discretion applies generally in both criminal and civil proceedings. The basis of the discretion in criminal proceedings is that as a matter of public policy the courts should not condone deliberate breaches of the law by the police to obtain convictions.

32. Although not binding authority for the Court, in *Southern Equities Corporation Ltd (in liq) v Bond* (2001) 78 SASR 554 at 563-571 (Tab 21 of the Applicant's Book of Authorities), Lander J gave a learned judgment of the application of the discretion in civil proceedings and concluded (at 570-571) that:¹²

"I am inclined to the view that the *Bunning v Cross* discretion is available to the Court in civil proceedings for the very reason it exists in criminal proceedings and that is to protect the administration of justice. ... There are, however, not the same competing public policies operating. In civil proceedings there is the public policy that all admissible evidence ought to be before the Court to allow it to arrive at the correct result. On the other hand there are the public policies in protecting the individual from unlawful and improper conduct at the hands of another and in protecting the integrity of the Court's procedures."

33. The issue for determination, therefore, becomes how the Court should exercise the discretion in this case.
34. The Applicant submits the following factors are relevant to the exercise of the Court's discretion.
35. The fact that Dr Booth and Ms Thiriet entered the Respondents' land without consent and thereby trespassed weighs against the admission of the evidence.
36. The following matters lie in favour of the admission of the evidence:
- (a) The purpose of the Act, stated in s 4 (the conservation of nature).
 - (b) The purpose of the amendment of the Act inserting ss 173A-173M is to allow orders not to protect individual proprietary interests but to conserve nature.¹³
 - (c) The trespass was solely for the purpose of investigating whether the Respondents were contravening the Act.
 - (d) The Applicant and Ms Thiriet remained on the Respondents' property for a very short time on two occasions (each of half an hour duration), the minimum time necessary to ascertain the evidence of and offence against the Act, and they did not damage or interfere with the property in any way or approach any residence.
 - (e) The Applicant is granted standing under s 173D of the Act to commence proceedings to restrain offences against the Act, but has no power to obtain a warrant or other lawful means to enter the property without the Respondents' consent.

¹¹ *R v Ireland* (1970) 126 CLR 321; *Bunning v Cross* (1978) 141 CLR 54.

¹² Note that decisions of NSW and Federal Courts are less relevant in Queensland following the *Evidence Act 1995*, in which s 138 altered the common law principles for this discretion.

¹³ *Environmental Legislation Amendment Bill 2003 Explanatory Notes*, pp 11-12 (Tab 3 of the Applicant's Book of Authorities).

- (f) The evidence of flying fox deaths could not be observed from outside the property and could not have been obtained without entering the Respondents' property.
 - (g) It is likely that if the Applicant had requested permission to enter the Respondents' land they would have refused or altered their practices so that no evidence of flying fox deaths was apparent.
 - (h) The Applicant had previously approach the relevant regulatory authority, the Environmental Protection Agency ("EPA"), with evidence of contraventions of the Act by the Respondents and other fruit growers and the EPA had taken no effective enforcement action.
 - (i) The Respondents' conduct involved a serious and deliberate breach over a long period of time of the Act for commercial gain that could not have been detected and brought to the attention of the EPA and the Court without this evidence being obtained.
37. In light of these matters the Applicant submits that the public policy lies in favour of the admission of the evidence.

Applicant's objections to the Respondents' evidence

38. The Respondents' affidavit material contains numerous statements of opinion, identified in the Applicant's List of Objections filed on 16 August 2005, that the makers of possess no relevant expertise. It is trite law that such lay-opinion is not admissible.¹⁴ In relation to the level of electricity that kills, injures or harms flying foxes, the Respondents' witnesses may only state the level and nature of the operation of the electric grid system at which no flying fox deaths have been observed by them.
39. The affidavit of Mr Thomas also contains numerous statements of opinion involving a question of law and the application of a legal standard. Such opinions are inadmissible and irrelevant.¹⁵

Retrospectivity

40. There may be some issue concerning whether the relief sought gives retrospective operation to the provisions of the Act, ss 173D, 173F, 173G and 173H, under which the proceedings are brought and the Court is granted power to provide relief. Although taking Black Flying Foxes (*Pteropus alecto*) in Queensland outside a protected area has been an offence under the Act under s 88 since 19 December 1994, the Applicant's standing and the Court's powers to make orders restraining such offences only commenced on 19 December 2003, at the commencement of the *Environmental Legislation Amendment Act 2003* (Act No 96 of 2003).
41. It is well established that the future operation of legislation is not retrospective simply because it relates to or is based upon past events. In the classic decision of *In re A*

¹⁴ *Clarke v Ryan* (1960) 103 CLR 486 at 491-492 (Tab 22 of the Applicant's Book of Authorities).

¹⁵ *RW Miller & Co Pty Ltd v Krupp (Australia) Pty Ltd* (1991) 34 NSWLR 129 at 130F-131B (Tab 23 of the Applicant's Book of Authorities).

Solicitor's Clerk [1957] 1 WLR 1219 at 1222-1223 (Tab 18 of the Applicant's Book of Authorities), Lord Goddard CJ said:

“This appellant was convicted of larceny in 1953 ... and, accordingly, he contends that to apply the provisions of the Act of 1956 to a person convicted before that Act came into operation would make its operation retrospective. ... But in my opinion this Act is not in truth retrospective. It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause of the reason for the making of the order, but the law has no retrospective effect.

42. In *Maxwell v Murphy* (1957) 96 CLR 261 at 267 (Tab 19 of the Applicant's Book of Authorities), Dixon J stated:

“The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption.”

43. Similarly, see *Rodway v R* (1990) 169 CLR 515 at 518-521 (Tab 20 of the Applicant's Book of Authorities). In that case the High Court noted (at 523) that a person has no acquired right to a particular mode of procedure at his trial.

44. The affidavit of Mr Thomas (4 July 2005) admits to offences being committed by the respondents during the 1990s and subsequently. The procedure under which these proceedings are brought commenced on 19 December 2003 and the proceedings were commenced on 20 December 2004. Any order by the Court, if it is made, will occur in late 2005.

45. In these circumstances, should the relief in the proceedings be based upon acts prior to 19 December 2003, this will not be, in truth, retrospective. The orders will create liabilities in the future fixed by reference to past facts, matters or events.

46. In addition and alternatively, as the taking of flying foxes has contravened s 88 of the Act since 19 December 1994, the substantive rights of the respondents have not been affected by the changes in the mode of proceedings by which their offences may be brought to trial. From the respondents perspective the 2003 amendments to the Act are merely procedural.

Exercise of the Court's discretion

47. It is well established that in proceedings of this type the Court has a wide discretion as to the nature of any relief that is granted, and is not required to grant relief even if a relevant offence is established on the evidence: *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 339-341; *NRMCA (Qld) Ltd v Andrew* [1993] 2 Qd R 706 at 711-713; *Booth v Bosworth* (2001) 114 FCR 39 at 66-68; *Mudie v Grainriver Pty Ltd* [2002] 2 QdR 53 at 58-59; *Caloundra City Council v Taper Pty Ltd* [2003] QPELR 558 at [92]-[94]; *Woolworths Ltd v Caboolture Shire Council* [2004] QPELR 634; [2004] QPEC 026. (see Tabs 8-13 of the Applicant's Book of Authorities).

48. Relief is more readily granted to the Attorney-General and other relevant regulatory authorities and less readily granted if an applicant has no interest in the proceedings: *Sedevcic* at 340D; *NRMCA (Qld) Ltd v Andrew* at 711-713.

49. The Court's function in determining what is to be done in such cases is to perform a balancing exercise with a view to matters of both private and public interest: *Mudie v Grainriver* at 58-59.
50. The Applicant submits that, in balancing the matters of both private and public interest in this case, the following factors are relevant to the exercise of the Court's discretion to grant an enforcement order under s 173D of the Act:
- (a) the objects of the Act (s 4) and the public interest in the conservation of biodiversity, noting that Black Flying Foxes contribute to pollination and seed dispersal in many species of native plants¹⁶ and are, therefore, important for ecosystem function generally;
 - (b) the strength of the Applicant's case that the Respondents have committed the alleged offences, including the admissions made by the Respondents;
 - (c) the fact that this is a serious, calculated and deliberate offence carried on over many years by the Respondents in circumstances where the killing of flying foxes was largely hidden and unlikely to be detected;
 - (d) conversely, the offence is not merely a technical breach of the Act that is unnoticeable other than to a person well versed in the law;
 - (e) the limited potential for the Respondents to obtain a Damage Mitigation Permit from the Chief Executive administering the Act under s 281 of the *Nature Conservation Regulations 1994*;
 - (f) the ease of by-passing the Respondents' MKVII electric grid directly to mains power to re-create a more lethal system (Mr Thomas stated in cross-examination it "would take 30 seconds");
 - (g) the availability of non-lethal methods to protect the Respondents' lychee crop, in particular the availability of netting to protect the crop;
 - (h) as the flying foxes killed by the Respondents cannot be revived, to return the flying fox population as close as practicable to the condition it was in immediately before the offence was committed (s 173G(1)(d)), the most practicable order that the Court can make is for the Respondents to contribute an amount the Court considers reasonable in the circumstances to the care and rehabilitation of injured flying foxes; and
 - (i) the Court's power to make an order may be exercised whether or not it appears to the Court that the person against whom the order is made intends to engage, or to continue to engage, in the activity (s 173H(1)(a)).

Chris McGrath
Counsel for the Applicant
7 September 2005

¹⁶ Affidavit of Carol Jeanette Booth (21 December 2004) paras [23]-[29] and affidavit of Hugh John Spencer (31 August 2005) at [9].