COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

CA NUMBER: 9268 / 05
NUMBER: BD 4658 of 2004

APPLICANT/APPELLANT: **CAROL JEANETTE BOOTH**

FIRST RESPONDENT: **FRIPPERY PTY LTD (ACN 010 890 007)**

SECOND RESPONDENT: **MERVYN MEYER THOMAS**

THIRD RESPONDENT: **PAMELA ANN THOMAS**

OUTLINE OF ARGUMENT OF THE APPLICANT/APPELLANT

Applicant's material

1. The applicant reads the following documents:
   (a) application for leave to appeal (pages A346-A349);
   (b) affidavits of Jo-Anne Bragg, of 3 and 14 November 2004, exhibiting:
      (i) reasons for judgment of the court at first instance (pages A353-A363);
      (ii) formal order at first instance (page A375);
      (iii) draft notice of appeal (pages A365-A372);
   (c) transcript of hearing at first instance (pages A1-A226);
   (d) material at first instance (note that not all exhibits are included):
      (i) originating application (version 3) (pages A229-A232);
      (ii) affidavit of Carol Jeanette Booth (pages A256-A278);
      (iii) affidavit of Dominique Germaine Thiriet (pages A279-A282);
      (iv) affidavit of Graham David Minifie (pages A283-A291);
      (v) affidavit of Hugh John Spencer (pages A292-A298);
      (vi) affidavit of Mervyn Meyer Thomas (pages A299-A335);
      (vii) affidavit of Errol Reginald Young (pages A336-A345).
   (e) the applicant/appellant's Summary of Relevant Facts (dated 20 January 2006).

Introduction

2. This is an application for leave to appeal under section 4.1.56 of the *Integrated Planning Act 1997* ("**IPA**") from an order dismissing an originating application for enforcement orders under s 173D of the *Nature Conservation Act 1992* ("**NCA**"), made by the

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Planning and Environment Court at Townsville in *Booth v Frippery Pty Ltd & Ors* [2005] QPEC 095 ("**the decision**").

3. The first respondent is the registered proprietor of a lychee farm known as Edenvale Orchards at Mutarnee located 65 kilometres north of Townsville off the Bruce Highway.[1] The second and third respondents are, respectively, director and company secretary of the first respondent.[2] The proceedings concern the use of electric grids to restrict or prevent Black flying fox (*Pteropus alecto*) individuals eating the blossom and fruit of lychee trees commercially grown by the respondents on their property.

Questions to be resolved / issues in dispute

4. There are three principal, overlapping, questions that the Court must resolve:

   (a) Whether the applicant should be granted leave to appeal?

   (b) If leave to appeal is granted, whether the appeal should be allowed because one or more errors or mistakes of law are apparent in the decision that may have materially affected the decision?[3]

   (c) If the appeal is allowed, what orders should the Court make in the exercise of its discretion?

Leave to appeal

5. The principal factors relevant to the grant of leave to appeal are well established. Leave to appeal should not be granted unless the decision from which it is sought to appeal is attended with sufficient doubt to warrant its being reconsidered and also that, supposing the decision below to be wrong, substantial injustice would result if leave were refused.[4] These matters will be addressed in detail below.

6. Other factors may be relevant to the grant of leave to appeal, including whether the applicant has any interest in the point sought to be raised, whether the points raised in the appeal are merely academic,[5] and whether the appeal raises issues of considerable public interest?[6] In these regards, there is no dispute that the applicant had standing under section 173D of the NCA to commence the proceedings before the Planning and Environment Court. Her interest in the proceedings and in the appeal is to protect the public interest in the conservation of nature, which is the purpose of the NCA.[7] She has been actively involved with the conservation movement in Queensland for many years, in particular for the conservation of flying foxes.[8] The points raised by the appeal are not merely academic, but are of considerable public interest and general importance for the operation of the NCA and the conservation of flying foxes in Queensland.

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[1] Reasons, paragraph 6, page A355.
[2] Reasons, paragraph 6, page A355.
[3] Appeals are limited by s 4.1.56 of the IPA to errors or mistakes of law or that the Planning and Environment Court lacked or exceeded its jurisdiction. Only errors or mistakes of law are raised in this application and an insignificant error that could not have materially affected the decision is insufficient: *HA Bachrach Pty Ltd v Caboolture Shire Council* (1992) 80 LGERA 230 at 237-238.
[4] *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398-400; *Rayner v Whiting* [2000] 2 Qd R 552 at 553; *Caloundra City Council v Pelican Links Pty Ltd* [2005] QCA 84 at [35].
[5] *Re Ecovale Pty Ltd* [1999] QCA 067; [2000] QPELR 206.
[6] *Friends of Stradbroke Island Association Inc v Sandunes Pty Ltd & Anor* [1998] QCA 374; (1998) 101 LGERA 161 at [3] per McMurdo P.
[7] See page A256-A257, at paragraphs 1-2, and A350, at paragraph 3. This interest was apparently accepted by the trial judge (see page A354 at paragraph 2).
[8] See page A257 at paragraph 4.

Relevant facts

7. The applicant has filed a Summary of Relevant Facts. Some further references to the facts are given in the following discussion where relevant to specific issues.

The statutory scheme

8. The object of the NCA, stated in s 4, is the conservation of nature and the Act forms the centerpiece of the State's laws for this important public purpose.[9] Section 5 of the NCA states how the object is to be achieved. While not perfectly clear from s 5, consideration of the structure of the NCA and its operation in practice indicates the Act achieves its object using two, main mechanisms:

   (a) the establishment of protected areas (such as National Parks) under Part 4; and

   (b) the protection of listed species of native wildlife under Part 5.

9. The protection of listed species of native wildlife under Part 5 of the NCA applies to all land tenures other than protected areas.[10] As a general matter to understand the statutory context (although not specifically relevant to the issues in dispute), Part 5 of the NCA is critical to achieving the object of the Act because protected areas cover only 4.1% of the State.[11] On the 95.9% of the State outside of protected areas, Part 5 of the NCA provides a general protection to protected wildlife.

10. Section 88 is a central provision of Part 5 of the NCA that restricts the taking of protected animals in the 95.9% of the State outside protected areas. Between 19 December 1994 and 17 December 2004, which is the most relevant period for purposes of this appeal, s 88 materially provided:[12]

> **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.

11. Several points that are not in dispute clarify the operation of this section in relation to these proceedings. The section 93 qualification is not relevant.[13] It is common ground that there is no relevant conservation plan and that the respondents did not hold any licence, permit or other authority or exemption under any regulation to take Black flying foxes. The proceedings do raise, however, matters associated with the defence provided for by subs 88(3) as well as issues concerning the elements of the offence created by s 88.

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[9] "Nature" and "conservation", and the subsidiary terms of "biological diversity" and "ecologically sustainable use", are defined in ss 8-11 of the Act.
[10] On this point, see *Phillips v Spencer & Anor* [2005] QCA 317.
[11] See Environmental Protection Agency, *State of the Environment Queensland 2003* (EPA, Brisbane, 2003), p 4.3. Available at http://www.epa.qld.gov.au/soe (viewed 17/1/06).
[12] The trial judge adopted this version of s 88 and it is not materially different from the current section.
[13] Reasons, page A357, paragraph 17.

12. "Take" is defined in the Schedule (Dictionary) of the NCA 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 (emphasis added).

13. It is common ground that Black flying foxes are protected animals and came within the designation "common wildlife"[14] and are, therefore, protected animals for the purposes of s 88 of the NCA.[15] The definitions used in the NCA have changed since 17 December 2004,[16] however, the changes make no material difference to this case.

14. It is significant that the legislative scheme of which s 88 NCA forms part does not merely involve the prohibition of the taking of protected wildlife. The NCA, together with the *Nature Conservation Regulation 1994* ("**the Regulations**"), provides for an administrative scheme by which wildlife are to be managed. Part of this scheme involves the granting of forms of permission to take wildlife when the circumstances envisioned by the legislative scheme are present. Aspects of the legislative scheme can be divined from a reading of Part 5 of the NCA, particularly, ss 71 (classes of wildlife to which the Act applies); 72 (management of wildlife – general); 73 (management principles of protected wildlife); 80 (native wildlife may be prescribed as common wildlife); 83 (property in protected animals); and 95 (payment of conservation value). The scheme is continued in the parts 1 and 2 of chapter 1 of the Regulations with no less than 25 sections (ss 3C-22) devoted to the process by which licences for the purpose of the Act are to be granted. The process includes provision for appeal by disconsolate applicants to the Magistrates Court[17] with appeals on matters of law only to the District Court.[18]

15. The particular permit which might apply to the operation of electric grids to kill or deter flying foxes eating fruit in an orchard is known as a "damage mitigation permit". Division 3 of Part 5, ss 278-282 of Chapter 3 of the Regulations provides for the issue of permits of this kind.[19] It is common ground that the respondents have never held, and do not hold, a damage mitigation permit for the operation of their electric grid. It is significant, it is submitted, for a consideration of the issues as they arise in these proceedings that the respondents chose not to persist in applications for authorisation of any of their activities, lawful or unlawful, pursuant to this legislative scheme.

Grounds of appeal

16. The grounds of appeal set out in the draft Notice of Appeal are lengthy and will not be repeated here. All of the grounds relate to errors or mistakes in law. Errors of law as opposed to errors of fact are often difficult to distinguish, but the following principles are relevant to the grounds of appeal here:[20]

    (a) The effect or construction of a term whose meaning or interpretation is established is a question of law.

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[14] Reasons, paragraph 20, page A358.
[15] See the definitions of "protected wildlife" and "protected animal" in the schedule of the NCA.
[16] The definitions have been changed since Act No 14 of 2004 commenced on 25 June 2005. What was previously described as "common wildlife" is now prescribed as "least concern wildlife".
[17] Sections 17-21 of the Regulations.
[18] Section 22 of the Regulations.
[19] Between 19 December 1994 and 1 March 2004, damage mitigation permits were provided for in a similar scheme in s 112 of the Regulations. There is no material difference between the previous and current provisions for the purposes of these proceedings.
[20] See generally: *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287-288; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-6 per Mason CJ; *Craig v South Australia* (1995) 184 CLR 163 at 179; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 395-397; *Yu Feng Pty Ltd v Maroochy Shire Council* [2000] 1 Qd R 306 at 334-336 and 342-343.

(b) The question whether facts fully found fall within the provision of a statutory enactment properly constructed is generally a question of law.

(c) Failure to take account of a relevant consideration is an error of law.

(d) A wrong finding of fact is not sufficient to demonstrate an error of law unless there is no evidence to support the finding of fact or no material upon which the decision could reasonably have been reached.

(e) Whether a particular inference can be drawn from facts found or agreed is a question of law because, before the inference can be drawn, there is the preliminary question whether the evidence reasonably admits of different conclusions.

(f) In a trial without a jury where there are real and relevant issues of fact which are necessarily posed for judicial decision, or where there are substantial principles of law relevant to the determination of the case dependent for their application upon findings of fact in contention between the parties, the failure of the trial judge to give adequate reasons as to how those various factual issues or principles have been resolved constitutes an error of law.[21]

Grounds 1-4: Whether the taking could have not have been reasonably avoided

17. The primary judge's conclusion in paragraph 45 of his reasons (page A362), that "there were no steps reasonably open to the Respondents in all the circumstances other than to make use of the grids", is central to his reasoning and goes to the heart of the defence envisaged in subs 88(3) of the NCA.

18. Ground 1 of the draft Notice of Appeal concerns the failure of the primary judge to consider both the benefits and costs of the various means of crop protection when interpreting and applying the words, "the taking could not have been reasonably avoided" in subs 88(3) of the NCA. There is no case law on the meaning of this provision but the extensive case law on the concept of reasonable care in negligence law is of assistance in considering what factors should be taken into account in applying this provision. For instance, in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48, Mason J said:

> "The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

19. Deciding whether the "taking could reasonably have been avoided" requires consideration and "balancing out" of a range of factors similar to the factors considered and "balanced out" in determining reasonable care in negligence cases. These factors will vary depending on the facts of each case. In this case the factors to be considered necessarily include both the costs and benefits of the various means that might have been employed by the respondents. The primary judge considered only the costs of canopy netting ($700,000 plus GST) and the cost of the electric grid ($150,000) and concluded "this is a very significant cost saving compared to netting."[22]

20. It appears that the primary judge took some account of the fact that grids do not fully protect the crop,[23] but he does not appear to have taken into account the crop losses that

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[21] *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 381-382, 385 and 388; *Fleming v R* (1998) 197 CLR 250 at 260 per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.
[22] Reasons at page A360, paragraph 30.
[23] Reasons at pages A360-A361, paragraphs 33 and 34.

would have been avoided had the crop been netted. The second respondent estimated that during the years 1999-2004 the respondents' farm lost 80-100% of the lychee crop (amounting to 226,000 kg of fruit), due to flying foxes (other than in 1999/2000 and 2002/2003 when the crop failed due to rain and drought respectively).[24] The gross return on this fruit varies widely and the actual financial cost of this fruit loss to the respondents is not entirely clear from the evidence. The admitted percentage of 80-100% of the crop losses due to flying foxes while the electric grids have been operating itself establishes the significance of this issue for the commercial viability of the respondents' farm. If an attempt is made to quantify the actual financial cost of this loss of fruit, the wholesale price can be as high as $14.80/kg,[25] but the second respondent stated that a "medium price" in 2004 was $3.60-$4.00/kg.[26] Even if the low end of $3.60/kg is used, the loss of 226,000 kg of fruit between 1999 and 2004 amounts to a loss due to flying foxes in the gross return of approximately $813,600 over 6 years while the electric grids were operating. It is not necessary for the Court to determine the precise figure in this appeal. What is readily apparent is that a very significant factor has been omitted from the balancing exercise required by subs 88(3).

21. While the cost of canopy netting the orchard was estimated to be approximately $700,000 plus GST,[27] a major benefit of netting that was ignored by the primary judge is that it "is 100 per cent protective of the crop."[28] That is, no crop losses occur due to flying foxes in a netted orchard. It is a logical inference that, if the crop had been netted in 1999-2004, the respondents would not have suffered the 80-100% crop losses due to flying foxes.

22. The primary judge clearly erred by failing to consider the benefit of netting in preventing crop losses when applying the test of "the taking could not reasonably have been avoided" in s 88(3)(b) of the NCA. Had his Honour considered this factor the only conclusion that was open on the evidence was that netting would result in a comparable or better financial outcome for the respondents. By including this factor, even excluding any benefits of netting to the conservation of biodiversity, the test of whether the taking could reasonably have been avoided could only have been resolved against the respondents. The inadequacy of his Honour's treatment of the evidence in this regard is particularly evident when one considers that the onus of proof on the application of the subs 88(3) defence lay with the respondents, who did not tender any financial accounts.

23. Ground 2 of the draft Notice of Appeal builds on these considerations of the balancing exercise necessary in applying the test in subs 88(3) of the NCA by raising the failure of the primary judge to consider the object of the NCA and the public interest in the conservation of biodiversity. To the extent that subs 88(3) is ambiguous, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.[29] In particular, interpreting the test of what is "reasonable" in avoiding harm should advance the conservation of nature and not merely be based upon financial considerations.

24. Ground 3 of the draft Notice of Appeal is a corollary of Grounds 1 and 2. Consideration only of financial factors is clearly too narrow and frustrates the purpose of the NCA and the operation of s 88. Several examples of other common factual situations can help to illustrate the application of the defence envisaged by subs 88(3) and that financial factors (that is, the cost of something done to prevent the taking of protected animals) interacts

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[24] See, particularly, the oral evidence of the second respondent at page A171, lines 22-55.
[25] Page A172, line 8.
[26] Page A172, line 54.
[27] Reasons at page A360, paragraph 28.
[28] Page A53, lines 21-35.
[29] Section 14A of the *Acts Interpretation Act 1954*.

only at a very late stage. Fundamentally, the availability of the defence is about taking care. For example, a road driver would not have the defence available if, despite road signs advising of koalas crossing at a particular site at night, he or she charged through that area at 150 km/hr and killed a koala crossing the road. A person clearing vegetation for an urban sub-division would be expected to engage an ecologist before felling large eucalypt trees with plenty of hollows.

25. At some stage, cost would intrude in terms of what is reasonable to be done to avoid a possible taking. However, this is a very different approach than to say that one may deliberately take flying foxes because there is a high capital cost in protecting the crop in a way which is unambiguously lawful, in this case, the installation of netting. For this reason, his Honour's finding that there were no steps reasonably open involves an error in construing and applying the section.

26. Ground 4 of the draft Notice of Appeal challenges the primary judge's failure to make any finding as to the number of flying foxes that the respondents had taken using their electric grids since the commencement of s 88 of the NCA on 19 December 1994. It is fundamental to the application of subs 88(3) of the NCA that without deciding how many protected animals have been taken it is impossible to determine whether "the taking could not reasonably have been avoided." The level of taking of protected animals is a preliminary and necessary issue to decide before applying the defence. It is logical that the steps and measures that might be required to reasonably avoid the taking of 1 protected animal will be very different from what might be required to reasonably avoid taking 10,000 or 10,000,000 protected animals.[30]

27. As set out in the applicant's Summary of Relevant Facts, the respondents admitted[31] killing thousands of flying foxes since purchasing their farm in 1987 and, in particular, since 19 December 1994 when flying foxes were protected under s 88 of the NCA. Without allowing any deductions for years when the lychee crop failed and the respondents did not kill any flying foxes,[32] the respondents admitted to killing:

    (a) in the order of 44,875 flying foxes between 19 December 1994 and 1997 when 9 grids were intentionally operated for the purpose of killing flying foxes;[33]

    (b) in the order of 8,745 flying foxes between 1998 and 2004 while the respondents were attempting to develop a non-lethal electric grid system and trialing various models of grids prior to the Mark VII.[34]

28. Even for 2004 alone, which is the best documented year in the evidence[35], in the order of 715 flying foxes were killed by the respondents based on the approximate rates of killing they admitted the various electric grids caused.[36]

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[30] Note that insects are generally not protected animals under the NCA. Common animals (now listed as "least concern") include indigenous amphibians, birds, mammals, reptiles and some specific species of butterflies. See Schedule 5 of the *Nature Conservation (Wildlife) Regulations 1994*.

[31] The respondents did not expressly admit the total number of flying foxes killed. However, the second respondent admitted the number of grids operated each year since 1987, the average or approximate number of flying foxes killed per night for each model of grid and the number of nights the grids were operated annually. From these admissions the approximate total number of flying foxes can be calculated by logical inference by multiplication of these figures.

[32] Based on the figures given by the second respondent at paragraph 62 of his affidavit (page A313), total crop failure has occurred in 2 of the last 6 years. Allowance should be made for this fact. A reduction in the approximate number of flying foxes killed by 30% is reasonable in the circumstances.

[33] See paragraph 5 of the applicant's Summary of Relevant Facts for details of this calculation.

[34] See paragraph 6 of the applicant's Summary of Relevant Facts for details of this calculation.

29. The failure to make any finding regarding the large number of flying foxes that the respondents admitted to killing since 19 December 1994 is a patent error in construing and applying subs 88(3).

Grounds 5 and 6: Whether a lawful activity under the Animal Care Act

30. Grounds 5 and 6 of the draft Notice of Appeal concern the requirement in subs 88(3)(a) that "the taking occurred in the course of a lawful activity", which, necessarily, means an activity that was lawful other than for subs 88(1).

31. The applicant raised with the primary judge that the second respondent's experiments with grids to find a version that was non-lethal were not lawful (apart from s 88 of the NCA) since the *Animal Care and Protection Act 2001* ("**the Animal Care Act**") commenced on 1 March 2002. Section 51 of the Animal Care Act 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.

32. Section 48 of the Animal Care Act 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).
> **(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).

33. The second respondent admitted that the "testing" of the electric grids[37] or "research" into whether Mark VII damaged or injured bats[38] was not registered under the Animal Care Act.[39] The second respondent had previously represented to the Environmental Protection Agency ("**EPA**") he was conducting "research" into the mortality threshold of flying foxes in the trials of his "non-lethal" electric grids.[40] In correspondence from the second

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[35] Consideration of this year is also simplified because no deduction for crop failure needs to be allowed and there is no other reason in the evidence why the admitted average killing rates of the various models of electric grids might not apply.
[36] See paragraph 7 of the applicant's Summary of Relevant Facts for details of this calculation.
[37] The second respondent referred repeatedly to "testing" the Mark VII grid (for example, see page A93, lines 1-30, page A95, lines 1-15).
[38] The second respondent referred to "research … to see the effect [of the Mark VII electric grid] looking for damaged and injured bats" (page A135, lines 39-43).
[39] Page A101, lines 5-25.
[40] The correspondence was dated 27 November 2001 (see page R185 of the respondents' bundle of documents). The relevant statement is set out at paragraph 14 of the applicant's Summary of Relevant Facts.

respondent to the EPA about the trial and specifications of the non-lethal electric grid the second respondent referred to his "research and development" work and even claimed intellectual property in the design of the grid.[41] Indeed, it was a principal part of the respondents' case that they had not contravened s 88 of the NCA because they were developing a non-lethal deterrent for flying foxes to protect fruit crops. The second respondent also admitted that "agricultural science" and "electronics" were scientific disciplines.[42]

34. In this context, the primary judge erred by asking whether the purpose of trialing the electric grids was an "experiment with animals" as opposed to a purpose of protecting the lychee crop to which the effect on some flying foxes was incidental?[43] His Honour confused 'purpose' and 'method' of experimentation. The view taken by the primary judge of the operation of the Animal Care Act would, logically, mean that the Act would not apply even to animals used in a laboratory for medical research (as the purpose of medical research is not "an experiment with animals" and the effects on the lab animals are incidental).

35. The question that the primary judge should have asked in relation to s 51 of the Animal Care Act was whether an animal was used in an activity performed to acquire, demonstrate or develop knowledge or a technique in the scientific disciplines of electronics or agricultural science. An animal is used in this manner if the effect of the activity on the animal is an inherent or necessary part, or an intended consequence, of an activity performed to acquire, demonstrate or develop knowledge or a technique in a scientific discipline. An animal is used in this manner even though some effects or consequences of an activity (such as the death or injury of an animal) are subjectively not intended by the person undertaking the activity. An activity (such as field trials of a new method of crop protection) performed to acquire, demonstrate or develop knowledge or a technique in a scientific discipline (such as agricultural science) may have a non-scientific or commercial application (such as use in the fruit industry).

36. The trial and error method employed by the respondents to develop a "non-lethal" electric grid inherently involved determining what level of electricity or method of applying electricity resulted in, or did not result in, immediately observable deaths of flying foxes. The respondents used flying foxes during the field trials of the grids to determine these facts. The second respondent expressly admitted that he was conducting research into the mortality threshold of flying foxes in the correspondence to the EPA of 27 November 2001, noted above. The trial and error method employed by the respondents was to acquire, demonstrate or develop knowledge or a technique for protecting commercial fruit crops and came within the scientific discipline of agricultural science. In these circumstances the evidence did not reasonably admit of a finding that the respondents' activity in attempting to develop a "non-lethal" electric grid was not required to be registered under s 51 of the Animal Care Act.

37. The conclusions of the primary judge in relation to the requirement for registration under the Animal Care Act appear to be directed at the issue of use of the animals. It is submitted that the application of s 48 is clear and that the contrary finding displays, or unavoidably implies, an error in construing the section. Section 49 requires only that the animal is used "in an activity" or "in connection with an activity". The ultimate purpose of the "activity performed to acquire … or develop knowledge or a technique" is irrelevant for the application of s 48. Further, the primary judge is simply wrong if his

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[41] The correspondence was dated 21 October 2003 (see page R191). The relevant statement is set out at paragraph 15 of the applicant's Summary of Relevant Facts.
[42] Page A101, lines 8-12.
[43] Reasons at page A362, paragraph 43.

Honour is saying that the flying foxes are not used. The error can simply be demonstrated by pointing the futility of the respondents trying to fine tune their electric grids without flying foxes being present (and being taken in one form or another). The primary judge has confused the motivation of the respondents' activity (in this case, the ultimate motivation) with the concepts and facts with which the section is interested.

38. It follows that, on this ground as well, the court below has erred in law in purported to apply the s 88(3) defence.

Ground 7: Whether the activity was directed towards the taking

39. In addition to being an otherwise lawful activity, subs 88(3)(a) requires that the taking occurs in the course of an activity that is "not directed towards the taking". In this context the plain meanings of "direct" and "towards" are:[44]

> **direct** *verb* **1.** to guide with advice; regulate the course of; conduct; manage; control. … **5.** to point or aim towards a place or an object; cause to move, act, or work towards a certain object or end. …
>
> **towards** / *preposition* **1.** in the direction of (with reference to either motion or position): *to walk towards the north* …

40. Based on the plain meaning of the words in the context of subs 88(3), an activity is "directed towards" taking a protected animal if it is "guided, regulated, conducted, managed, controlled, pointed, aimed or working in the direction of" taking the animal.

41. The primary judge found that the operation of the electric grid was not directed towards the taking of flying foxes on the basis that "the use of the grids was objectively directed to protecting the lychee crop."[45] It is submitted that his Honour erred in making this finding by giving a narrower construction than the words of subs 88(3)(a) naturally allow because an activity can logically be "directed towards" taking a protected animal in different ways. An activity will logically be directed towards taking a protected animal if:

    (a) taking is the primary purpose of the activity or one of multiple purposes;

    (b) taking is not the primary purpose but is a means to bring about the purpose; or

    (c) taking is not the primary purpose, but an activity is undertaken knowing that the taking is a probable consequence of the activity.

42. Of particular relevance to the factual situation in this case, an activity should be regarded as "directed towards" the taking if a person proceeds with, or continues, an activity regardless of the fact the person knows (or reasonably ought to know) that taking of a protected animal will result from the activity. As Derrington J said in *R v Beck* [1990] 1 Qd R 30 at 47 in discussing whether the murder of Noosa schoolgirl Shian Kingi was a "probable consequence" following her abduction and rape:

> "It is common experience that expected but unwished-for results follow an act, and if in such a case the act is performed, the result cannot be said to be unintended."

43. Despite attempting, since 1997, to develop a non-lethal electric grid for crop protection the respondents admit they continued to use the early models of these "non-lethal grids" (Marks IV-VI) after learning that flying foxes were being killed by the grids (though in lower rates than previously). That is, only the rate of deaths had changed – the

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[44] *Macquarie Dictionary* (Revised 3rd ed, 2001), pp 539 and 1985.

[45] Reasons at page A362, paragraph 44. This finding must be intended to be a finding that the (otherwise) lawful activity of "using the grids" was "not directed to the taking [of flying foxes]" as this is the relevant requirement of subs 88(3)(a) of the NCA.

respondents knew that the early models were lethal and continued to use them from 1997 to 2004.[46] The continued use of these grids must be said to have been "directed toward" the taking when the respondents knew that deaths of flying foxes were likely to result.

44. Operating an electric grid which is known to electrocute flying foxes is an activity working in the direction of taking wildlife. It can not logically be stated that operating an electric grid which is known to electrocute flying foxes is an activity directed away from the take of wildlife. It is not relevant that the original motivation in developing the grid was not to electrocute flying foxes or that the overall purpose of the activity is crop protection or that you also have a goal to develop a non-lethal grid system. Note also, it is contradictory to maintain that your purpose in operating a grid is non-lethal shock when lethal shock is the probable outcome. Simply, when you turn on a grid and can reasonably be expected to know that it will kill flying foxes your activity is inevitably directed towards this because it is directly contributing to or working towards that outcome.

45. The narrowness of the primary judge's reasoning leads to absurd results in other, ordinary fact situations. Perhaps the starkest example of how erroneous his Honour's reasoning is comes from the situation where a man hunts, shoots and kills a protected animal to eat it because he is hungry. Eating is not a form of "take" as defined in the schedule of the NCA, yet it would be ridiculous if the hunting, shooting and killing of the animal (all of which are forms of "take") were not regarded as "directed towards" the taking because the ultimate purpose is for the animal to be eaten and the man's hunger satisfied. Applying the primary judge's reasoning, the only situation where an activity will be "directed towards" the taking is when taking a protected animal is, strictly, the sole or primary purpose of the activity. That can be supposed to be a rare occurrence and such an interpretation would stifle the protection afforded to native wildlife by s 88.

46. More widely, it is submitted that the legislative intention[47] evident in subs 88(3)(a) is not to provide a defence to the intentional or deliberate inflicting of harm but to truly incidental or unintended results of ordinary activity.[48] Examples of ordinary activities that should be regarded as not "directed towards" taking of protected animals are accidentally hitting a kangaroo while driving on a country road or unintentionally killing a lizard when mowing long grass.

47. When the defence in subs 88(3) does not apply, the taking of protected animals can still be lawful under one of the other mechanisms in s 88, including a permit issued under the Regulations. The respondents' electric grids may, therefore, be authorised by a damage mitigation permit issued under the Regulations.

Ground 8: The purpose of the Act

48. To the extent that subs 88(3) is ambiguous, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.[49] The interpretation of subs 88(3) adopted by the primary judge will frustrate the operation of s 88 of the Act and render the damage mitigation permit regime in the Regulations entirely redundant. The primary judge's interpretation of "not directed towards" the taking and whether taking

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[46] The respondents admitted that the Mark IV killed approximately 5 flying foxes per night, the Mark V killed approximately 3 flying foxes per night and the Mark VI killed approximately 1-2 flying foxes per night.

[47] Of course, the Court's fundamental task in interpreting the NCA 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 having regard to their context and the purpose of the Act: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384.

[48] The Second Reading speech for the NCA (made on 28/4/92) refers to the defence in subs 88(3) being inserted to avoid liability for persons who "incidentally or unintentionally" take wildlife in the course of legitimate activities.

[49] Section 14A of the *Acts Interpretation Act 1954*.

"could reasonably have been avoided", in particular, will frustrate the operation of s 88. On this interpretation any commercial operator, such as a farmer or land developer, can intentionally take very large numbers of protected animals without approval under the NCA or the Regulations if it is financially the cheapest option and the person conducting the operation has a commercial purpose other than the taking itself. Such an interpretation cannot advance the purpose of the NCA.

Grounds 9-13: Expert evidence

49. Grounds 9 and 11 involve findings of fact that were not reasonably open on the evidence.[50] The primary judge found that the Mark VII electric grid is non-lethal to flying foxes[51] because no deaths had been observed by the respondents on this grid during 2004. The primary judge made no finding on whether the Mark VII would injure or harm flying foxes, but the evidence of Dr Spencer on this issue was unchallenged and it was not reasonably open to reject it.

50. While Dr Spencer did accept that "without further research no firm conclusions can be reached" on whether the electric grids are lethal,[52] a concession from an expert witness of the possibility that the opinion is incorrect does not amount to an abandonment of the opinion.[53] Dr Spencer made reasonable concessions but never abandoned his opinion that the Mark VII was likely to "kill, injure or harm flying foxes."[54]

51. In finding that the Mark VII electric grid is non-lethal because no deaths have been observed by the respondents the trial judge overlooked the unchallenged statement by Dr Spencer that, "death [of flying foxes due to receiving an electric shock on the respondents' grids] does not have to occur immediately … [It] can be quite delayed."[55]

52. In the circumstances it was not reasonably open to reject the evidence of Dr Spencer that the Mark VII would kill, injure or harm flying foxes.

53. Ground 10 is no longer relied upon by the applicant and if leave to appeal is granted the applicant will seek to amend the draft Notice of Appeal to delete this ground.

54. Ground 12 raises the apparent acceptance, over objection,[56] of the opinion evidence of the second respondent, a lay witness, as to the cause of death of flying foxes on the electric grids.[57] The second respondent could give evidence of his observations but not what he "believed" caused the deaths as this is clearly a matter requiring expertise.

55. Similarly, Ground 13 raises the apparent acceptance, again over objection,[58] of the opinion evidence of the second respondent regarding additional costs and difficulties associated with netting of the respondents' orchard.[59] These findings were contrary to the expert evidence of Graham Minifie, who was the only expert on this issue and, consequently, such findings were not reasonably open on the evidence.

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[50] As noted previously, whether a particular inference can be drawn from facts found or agreed is a question of law because, before the inference can be drawn, there is the preliminary question whether the evidence reasonably admits of different conclusions.
[51] Reasons at page A359, paragraph 24.
[52] Reasons at page A356, paragraph 15.
[53] This is a matter of common sense, but see *Shorey v PT Ltd* (2003) 197 ALR 410; 77 ALJR 1104; [2003] HCA 27 at [6] per Gleeson CJ, McHugh and Gummow JJ, and at [34]-[38] per Kirby J.
[54] See Dr Spencer's affidavit at page A297, paragraph 27.
[55] Transcript at page A81, lines 15-17. The transcript records, "I can be quite delayed", which logically appears to be a transcription error. The "I" should logically be "It".
[56] See page A234, paragraph 1(b).
[57] Note that while the trial judge refers to "flapping", the term used in the evidence was "frapping".
[58] See page A235, paragraphs 1(c)-1(e).
[59] Reasons at A360, paragraph 29.

Ground 14: Causation as a matter of law

56. Ground 14 raises the error of the primary judge in seemingly not attributing all deaths of flying foxes on the respondents' grids to their actions in constructing and operating the grids where the animals became entangled in the grids. Counsel for the respondents expressly admitted that in such situations the cause of death is the electricity.[60] As a matter of law, the respondents' actions caused the deaths of the flying foxes even if they did not intend the deaths to occur, even if the actions of the flying foxes or a natural process intervened, where the deaths were a natural and ordinary consequence of the respondents' actions.[61] Further, as a matter of law, there may be no single cause of an occurrence or event, and if the respondents' conduct substantially, materially or significantly contributed to the occurrence or event, they may be held to be legally liable.[62] The trial judge erred in law by reasoning otherwise.

Grounds 15 and 16: Failure to consider the entire period for which relief was sought

57. Grounds 15 and 16 raise the failure of the primary judge to consider the entire period for which relief was sought. The primary judge appears to have only considered the lawfulness of the respondents' activities on the 16th and 17th of December 2004[63] rather than since 19 December 1994, which was pleaded in the originating application. This error is particularly important in relation to 1995, 1996 and 1997 when the respondents admitted to operating their electric grids at intentionally lethal levels without any approval under the NCA or the Regulations. The operation of the defence in subs 88(3) in those years was in a very different factual situation.

Grounds 17 and 18: Failure to consider "take" by injury, harm, etc.

58. Grounds 17 and 18 concern the failure of the primary judge to consider forms of taking flying foxes other than by killing the animals. If one directs oneself (as the primary judge appears to have done) just to the events of the nights of 16-17 December 2004, certain facts are not in dispute. The respondents were operating a number of electric grids, one of which was the Mark VII, which was the only one they believed to be non-lethal. They were also operating 5 grids that they knew were likely to kill flying foxes (even in relatively low numbers when compared with earlier forms of electric grids).

59. The primary judge appeared only to direct himself to the question of whether a particular grid was or was not lethal. This involved a failure to consider the whole of the content of "take" as used in s 88.[64] The Mark VII grid was operated, deliberately, to inflict "non-lethal" time-limited electric shocks to flying foxes that came into contact with it.[65] It is submitted that such a process involves harming the animal, whether or not the animal dies or suffers long term consequences to its health and any contrary finding would, necessarily, misconstrue the term "harm". Dr Spencer's unchallenged evidence was that the Mark VII would injure or harm flying foxes, yet the primary judge did not consider these aspects of "take".

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[60] See page A64, line 26.
[61] *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.
[62] *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.
[63] Reasons at page A359, paragraph 28.
[64] See paragraph 2 of the reasons (page A354) which records the amendment of the originating summons to add "harm and/or injure" to "electrocution" and "shooting" as the particulars of harm.
[65] The primary judge held, on the evidence of the second respondent, that the grid caused "momentary paralysis" before release.

60. The use of the other grids produces a stronger involvement of "taking". These grids were operated, deliberately, to inflict electric shocks that regularly resulted in the death of some animals. There is no doubt about the occurrence of "taking" in that process.

Grounds 19-25: The exercise of discretion

61. Ground 19 concerns the consideration given by the primary judge to the knowledge of the EPA of the respondents' activities. While the second respondent gave evidence that he informed the EPA of the operation of "non-lethal" grids on his property, he accepted that he had never told the EPA that grids operating on this property (at least prior to the Mark VII) were still killing flying foxes.[66] It was not reasonably open to consider the acquiescence of the EPA where it was not in fact informed of a vital fact – that the early models of the grids were regularly still killing flying foxes.

62. Ground 20 concerns the consideration by the primary judge that "the provisions of S.112 of the Nature Conservation Regulations 1994 indicate the Respondent would have a reasonable expectation that any application for a Damage Mitigation permit would be granted, but for a requirement to meet Australian Standards."[67] These matters are referred to in an administrative guideline published by the EPA,[68] but are not part of the criteria for the grant of a damage mitigation permit to operate the electric grids for crop protection under the *Nature Conservation Regulation 1994*.[69] The relevant criteria include, amongst other matters, that the taking must be humane and not likely to cause unnecessary suffering to the animal. No evidence of the humaneness (or otherwise) of the operation of the electric grids was presented to the primary judge. It was, therefore, not reasonably open on the evidence for his Honour to infer that a permit would be issued to the respondents other than because of lack of compliance with an Australian Standard or safety issues, or that the respondents "would have a reasonable expectation" that any application for a damage mitigation permit would be granted.

63. Ground 21 concerns the concluding remarks of the primary judge that he would not have exercised his discretion to grant the relief sought by the applicant even if he had found the operation of the electric grids was unlawful.[70] This cursory dismissal of the exercise of the court's discretion leaves an appellate tribunal in doubt as to how the various factual issues or principles have been resolved to reach this conclusion and, consequently, constitutes an error of law.[71] The failure to provide reasons for the exercise of the discretion in this manner is particularly significant given the established principles for the exercise of discretions, such as the power to make enforcement orders under ss 173D-173H of the NCA, which were raised by the applicant.[72] It is well established that in proceedings of this type a 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.[73] 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.[74]

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[66] See pages A144-A147 in relation to misleading statements made by the second respondent to the EPA.
[67] Reasons at page A361, paragraph 37.
[68] A copy of the administrative guideline is provided at pages A272-A278.
[69] Between 19 December 1994 and 1 March 2004 permits for crop protection were provided under s 112 of the Regulations. Since 1 March 2004 such permits have been provided in ss 278-281 of the Regulations.
[70] Reasons at page A363, paragraph 48.
[71] *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 381-382, 385 and 388; *Fleming v R* (1998) 197 CLR 250 at 260.
[72] See the applicant's closing submissions at pages A254-A255, paragraphs 47-50.
[73] See *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.
[74] *Mudie v Grainriver Pty Ltd* [2002] 2 QdR 53 at 58-59.

The primary judge did not explain how he would have performed this balancing exercise had he decided the respondents' activities were unlawful.

64. Grounds 22 and 23 follow on from Ground 20 and relate to various aspects of the balancing exercise that is called for in the exercise of a discretion such as contained in ss 173D-173H of the NCA. In these regards, the fundamental error of the primary judge was to fail to undertake the balancing exercise between private and public interests called for by *Mudie v Grainriver Pty Ltd* [2002] 2 QdR 53 at 58-59.

65. Ground 24 relates to the failure of the primary judge to consider granting relief for the periods 1995, 1996 and 1997 when the respondents admitted operating their electric grids at intentionally lethal levels without a damage mitigation permit under the NCA. The application of the defence in subs 88(3) is materially different in those circumstances.

66. Ground 25 concerns the failure of the primary judge to consider granting relief to restrain the operation of models of the electric grids other than the Mark VII. The respondents admitted that the other models were likely to cause deaths of flying foxes.

Orders sought on appeal

67. If leave to appeal is granted and the appeal is allowed, there is no benefit in returning the matter to the primary judge for further consideration and such a course would only entail further expense by the parties. Therefore, if the appeal is allowed the applicant seeks enforcement orders restraining the operation of the respondents' electric grids, requiring the dismantling of the electric grids, and a donation that the Court considers reasonable in the circumstances for the care and rehabilitation of flying foxes.[75] The Court has the power to make these orders under s 4.1.58 of the IPA, noting the wide power that the primary judge had under ss 173F-173H of the NCA.

68. The form of the enforcement orders sought by the applicant expressly allow for the respondents to continue to operate their electric grids if "authorised in accordance with s 88 of the NCA."[76] This envisages approval by the EPA under a damage mitigation permit issued under the Regulations. It may rightly be regarded as significant to the exercise of the Court's discretion to grant the enforcement orders in this case that making the orders means that the EPA, rather than the Court, can fully assess and approve the respondents' activities in this manner.

Conclusion

69. Leave to appeal should be granted as the decision of the primary judge is attended with sufficient doubt to warrant its being reconsidered and substantial injustice would result if leave were refused. If leave to appeal is granted, the appeal should be allowed because there are numerous errors or mistakes of law apparent in the primary judge's reasons that may have materially affected the decision.

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Counsel for the applicant/appellant
20 January 2006

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[75] The orders the applicant seeks if the appeal is allowed are set out at page A371. Section 173G of the NCA is the legal basis for Order 3, which seeks a donation for the care and rehabilitation of injured Black flying foxes to remedy, as close as practicable, the damage done by the respondents. Unchallenged evidence of the costs of rehabilitating injured flying foxes and a suitable organisation for a donation for this purpose is provided at pages A263-A264, paragraphs 36-37.

[76] See orders 1 and 2 of the Originating Application (Version 3) on page A229.