IN THE PLANNING AND ENVIRONMENT COURT
AT BRISBANE No. BD 2845 of 2006

BETWEEN: **CAROL JEANETTE BOOTH**
Applicant

AND: **RICHARD GEORGE YARDLEY**
First Respondent

ANTJE GESINA YARDLEY
Second Respondent

APPLICANT'S WRITTEN OUTLINE OF ARGUMENT FOR INTERIM ENFORCEMENT ORDER

INTRODUCTION

1. This is an application for an interim enforcement order under s 173E of the *Nature Conservation Act 1992* ("**the Act**") to restrain the electrocution of flying-foxes by fruit growers on a farm at Mirriwinni, 70km south of Cairns.

ISSUES IN DISPUTE

2. There are three main issues that the Court must resolve to determine this application, namely, whether:[1]

   (a) the applicant has standing to bring the action;

   (b) there is a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the originating application the applicant will be held entitled to relief; and

   (c) the balance of convenience favours the grant of the interim enforcement order.

FACTS

3. The respondents own and operate a lychee, star fruit and pomelo farm at Hosking Road, Mirriwinni, being land described as Lot 1 on RP 712412, County of Nares, Parish of Bellenden Ker, in the State of Queensland ("**the land**").[2]

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[1] See *Central Queensland Speleological Society Incorporated v Central Queensland Cement Pty Ltd (No 1)* [1989] 2 Qd R 512, noting the recent, important decision in *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 at [19] per Gleeson CJ and Crennan J and [65] per Gummow and Hayne JJ emphasizing the "prima facie case test" over the "serious question to be tried test" and the approach in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622-623.

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4. Three aerial electric grids have been constructed on the land for the purpose of electrocuting flying-foxes (Genus *Pteropus*) to protect the fruit crop on the land ("**the electric grids**").[3]

5. The first respondent has publicly admitted killing approximately 1,100 flying-foxes by operating the electric grids to electrocute the flying-foxes since 2001. The first respondent admitted this during an interview on ABC Radio aired on 10 January 2006.[4] He stated during that interview:[5]

> "Not this last year but the year before we used our electric grids. We took out 700, we killed 700 bats in the electric grids. Another year before that by the time we got a damage mitigation permit which we now know we don't have to get, the bats had eaten our crop right out because they took too long to give us that. The year before that we took out 400 in our electric grids."

6. The precise years in which the first respondent admits to killing the flying-foxes are somewhat confusing, but he appears to be admitting to killing 700 flying-foxes during the lychee season in November-December 2004 and 400 flying-foxes during the lychee season in November-December 2002.

7. The first respondent made similar public admissions on 14 January 2006 in the *Cairns Post* newspaper.[6] The pertinent quote is:[7]

> "We took out 700 bats not this last year but the year before using our electric grids," Mr Yardley said. "Before that we only used to kill about 100 a season."

8. In his radio interview aired on 10 January 2006 the first respondent stated the Act did not prevent him using the electric grids to kill flying-foxes and the State Government could not stop him from doing so. The pertinent sections of the transcript are:[8]

> "There's no law that says we can't use electric grids. EPA is only an agency and they have policies that say we can't do it, but that doesn't mean it's law. We can still use our electric grids." …
>
> Interviewer: "Are you concerned about the State Government taking you to court?"
> First respondent: "Definitely not."
> Interviewer: "You believe you'd win a Court case?"
> First respondent: "Yes. We mightn't win it in Queensland because we're that corrupt at the present time, but we'll win it when we get out of Queensland."

9. The first respondent repeated this view in the story in the *Cairns Post*. The pertinent statements in the newspaper are:[9]

> But Mr Yardley said other methods of control did not work as well or cost too much and he was prepared to go to court to defend his use of the high-voltage zapper.

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[2] A property details map from DNR is provided in Exhibit CJB-5 of the affidavit of Carol Jeanette Booth, affirmed 22 September 2006. Regional and location maps, and aerial photographs of the farm are provided as Exhibits CJB-2 and CJB-3 to that affidavit.
[3] Photographs of the electric grids are provided in Exhibit CJB-6 of the affidavit of Carol Jeanette Booth, affirmed 22 September 2006.
[4] An audio recording and transcript of the interview is provided as Exhibit CJB-6 to the affidavit of Carol Jeanette Booth, affirmed 22 September 2006.
[5] Page 33 of the affidavit of Carol Jeanette Booth, affirmed 22 September 2006.
[6] Exhibit CJB-11 to the affidavit of Carol Jeanette Booth, affirmed 22 September 2006.
[7] Page 62 of the affidavit of Carol Jeanette Booth, affirmed 22 September 2006.
[8] Pages 32-33 and 36 of the affidavit of Carol Jeanette Booth, affirmed 22 September 2006.
[9] Page 62 of the affidavit of Carol Jeanette Booth, affirmed 22 September 2006.

> "The [Environmental Protection Agency] is only an agency," he said. "They have got plenty of policies but no law."

10. Since the commencement of the Act in 1994, flying-foxes indigenous to Australia[10] have been classified as protected wildlife under the regulations to the Act[11] and, therefore, are protected animals for the purposes of s 88 of the Act.

11. Flying-foxes are considered very important ecologically for their role in seed dispersal of fruits of native rainforest trees and pollination of native trees. The species of flying-foxes most likely to be killed by the respondents is the Spectacled Flying-fox, which is recognised as contributing the values of the Wet Tropics World Heritage Area[12], which is a protected area under the Act and an area of high nature conservation value.

12. The respondents held a damage mitigation permit under the *Nature Conservation Regulations 1994* ("**the regulations**") to kill 100 Spectacled or Black Flying-foxes between 16 October 2000 and 31 January 2001[13] but have not otherwise been authorised under the Act or regulations to kill flying-foxes.[14]

13. The applicant has filed an application for enforcement orders under s 173D of the Act to restrain and remedy the killing of flying-foxes by the respondents.

14. The hearing and determination of the enforcement orders in the principal proceedings will not occur before February 2007 at the earliest.

15. The lychee season runs from November to January annually[15] during which time the respondents apparently intend to operate their electric grid to kill flying-foxes. The respondents have not refused to give an undertaking not to operate their grids in the coming season unless approved under the Act.[16]

16. Based on the admitted killing in previous years, between the filing of the application for the enforcement order and the hearing and determination of the application the respondents may kill hundreds of flying-foxes in contravention of s 88 of the Act.

RELEVANT LAW

17. These proceedings are similar in nature to applications for interim enforcement orders under ss 4.2.32 and 4.3.24 of the *Integrated Planning Act 1997*, and similar provisions

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[10] The scientific classification of flying-foxes and the species that are indigenous to Australia are explained at paragraphs 28 and 29 of the affidavit of Carol Jeanette Booth, affirmed 22 September 2006.

[11] Between 19 December 1994 and 24 June 2005 flying-foxes indigenous to Australia were classified as "common mammals" under Schedule 5 of the *Nature Conservation (Wildlife) Regulation 1994*. Between 25 June 2005 and 10 August 2006 flying-foxes indigenous to Australia were classified as "least concern mammals" under Schedule 5 of the *Nature Conservation (Wildlife) Regulation 1994*. Since 11 August 2006 flying-foxes indigenous to Australia have been classified as "least concern wildlife" under Schedule 6 of the *Nature Conservation (Wildlife) Regulation 2006*.

[12] See paragraphs 33-35 of the affidavit of Carol Jeanette Booth, affirmed 22 September 2006 and the decision in *Booth v Bosworth* (2001) 114 FCR 39 (Branson J).

[13] See Exhibit CJB-16, page 100, of the affidavit of Carol Jeanette Booth, affirmed 22 September 2006.

[14] See the affidavit of Larissa Joy Waters, affirmed 12 October 2006.

[15] See paragraph 37 of the affidavit of Carol Jeanette Booth, affirmed 22 September 2006.

[16] The respondents have not replied to a letter of demand sent to them on 1 September 2006. See the affidavit of Jo-Anne Bragg, affirmed 28 September 2006.

under previous legislation, which have been considered by the Court on several occasions.[17]

18. As noted above, the issues the Court must determine are whether:

    (a) the applicant has standing to bring the action;

    (b) there is a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the originating application the applicant will be held entitled to relief; and

    (c) the balance of convenience favours the grant of the interim enforcement order.

Standing

19. The Full Court's decision in *Central Queensland Speleological Society Incorporated v Central Queensland Cement Pty Ltd (No 1)* [1989] 2 Qd R 512, itself a case involving taking of bats, involved an application for an interlocutory injunction to according to common law principles. The need to establish standing for the relief sought and the consequences of a failure to give an undertaking as to damages were critical to the majority's decision in that case.

20. However, the Act alters the position at common law by allowing any person to seek an enforcement order from the Court to remedy or restrain a "nominated offence":

> **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.

21. The applicant is "a person" and, therefore, has standing to seek an enforcement order from the Court to remedy or restrain an offence against s 88 of the Act. The decision in the *Speleological Society Case* should therefore be distinguished in light of the legislative changes to standing for enforcement orders under the Act.

Prima facie case

22. The Full Court in the *Speleological Society Case* applied the test of whether there was "a serious question to be tried", reflecting a series of cases at that time,[18] but this has recently been altered by a majority of the High Court in *Australian Broadcasting*

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[17] *Hainke v Maroochy Shire Council* [1995] QPLR 193; *Schroders Australia Property Management Ltd v Redland Shire Council & Anor* [1995] QPLR 79; *Wishart v Brisbane City Council* [1997] QPELR 248; and *Brisbane City Council v Ferro* [1999] QPELR 30.

[18] Particularly, *American Cyanamide v Ethicon Ltd* [1975] AC 396; and *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153 per Mason ACJ.

Corporation v O'Neill [2006] HCA 46 at [19] per Gleeson CJ and Crennan J and [65] per Gummow and Hayne JJ emphasizing the "prima facie case test" over the "serious question to be tried test" and the approach in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622-623.

23. Gleeson CJ and Crennan J said in *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 at [19]:

> "… in all applications for an interlocutory injunction, a court will ask whether the plaintiff has shown that there is a serious question to be tried as to the plaintiff's entitlement to relief, has shown that the plaintiff is likely to suffer injury for which damages will not be an adequate remedy, and has shown that the balance of convenience favours the granting of an injunction. These are the organising principles, to be applied having regard to the nature and circumstances of the case, under which issues of justice and convenience are addressed. We agree with the explanation of these organising principles in the reasons of Gummow and Hayne JJ[19], and their reiteration that the doctrine of the Court established in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*[20] should be folIowed[21]."

24. Gummow and Hayne JJ said in *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 at [65]:

> "Interlocutory injunctions
>
> [65] The relevant principles in Australia are those explained in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*[22]. This Court (Kitto, Taylor, Menzies and Owen JJ) said that on such applications the court addresses itself to two main inquiries and continued[23]:
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> > 'The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief ... The second inquiry is ... whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.'
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> By using the phrase 'prima facie case', their Honours did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. That this was the sense in which the Court was referrering to the notion of a prima facie case is apparent from an observation to that effect made by Kitto J in the course of argument[24]. With reference to the first inquiry, the Court continued, in a statement of central importance for this appeal[25]:
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> > 'How strong the probability needs to be depends, no doubt, upon the nature of the rights [the plaintiff] asserts and the practical consequences likely to flow from the order he seeks.'"

25. Gummow and Hayne JJ did not reject the use of the phrase "serious question" provided it was understood to be consistent with the approach in *Beecham*. Their Honours stated at [70]:

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[19] See [65]-[72].
[20] (1968) 118 CLR 618.
[21] See also *Firth Industries Ltd v Polyglas Engineering Pty Ltd* (1975) 132 CLR 489 at 492 per Stephen J; *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666 at 708 per Mahoney JA; *World Series Cricket v Parish* (1977) 16 ALR 181 at 186 per Bowen CJ.
[22] (1968) 118 CLR 618.
[23] (1968) 118 CLR 618 at 622-623.
[24] (1968) 118 CLR 618 at 620.
[25] (1968) 118 CLR 618 at 622.

> "When *Beecham* and *American Cyanamid* are read with an understanding of the issues for determination and an appreciation of the similarity in outcome, much of the assumed disparity in principle between them loses its force. There is then no objection to the use of the phrase 'serious question' if it is understood as conveying the notion that the seriousness of the question, like the strength of the probability referred to in *Beecham*, depends upon the considerations emphasised in *Beecham*."

26. Kirby J dissented from the approach of the majority to this issue in *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 at [138]. Hayne J did not express a clear view on this issue.[26]

27. The principles that emerge from the majority in *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 are somewhat confusing. Gleeson CJ and Crennan J appear to first adopt the "serious question to be tried test" before accepting the approach of Gummow and Hayne JJ who themselves considered the phrase "serious question" could be used in a certain way. The principle that appears to emerge is that the applicant for an interlocutory injunction must establish that there is a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the originating application the applicant will be held entitled to relief. The applicant submits that this test should be applied to the application for an interim enforcement order; however, there is unlikely to be a material difference in the outcome of the application if the serious question to be tried test is applied.

28. The originating application in this case seeks relief under s 173D of the Act for an offence against s 88 of the Act. Section 88 provides:

> **88 Restrictions on taking protected animal and keeping or use of unlawfully taken protected animal**
> (1) This section—
> (a) is subject to section 93; and
> (b) does not apply to the taking of protected animals in a protected area.
> (2) A person must not take a protected animal unless the person is an authorised person or the taking is authorised under this Act.
> Maximum penalty—
> (a) for a class 1 offence—3000 penalty units or 2 years imprisonment; or
> (b) for a class 2 offence—1000 penalty units or 1 year's imprisonment; or
> (c) for a class 3 offence—225 penalty units; or
> (d) for a class 4 offence—100 penalty units.
> (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 keep or use the animal.
> (5) A person must not keep or use an animal that is either of the following unless the person is an authorised person or the keeping or use is authorised under this Act—
> (a) a protected animal if, at any time, it has been taken and the taking was not authorised under this Act or a law of another State;
> (b) a descendant of an animal mentioned in paragraph (a).
> Maximum penalty—
> (a) for a class 1 offence—3000 penalty units or 2 years imprisonment; or
> (b) for a class 2 offence—1000 penalty units or 1 year's imprisonment; or
> (c) for a class 3 offence—225 penalty units; or
> (d) for a class 4 offence—100 penalty units.
> (6) In this section—
> ***Class 1 offence*** means an offence against this section that involves—

[26] See *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 at [248].

(a) 1 or more animals that are extinct in the wild or endangered wildlife; or
(b) 5 or more animals that are vulnerable or near threatened wildlife; or
(c) 10 or more animals that are rare wildlife; or
(d) 1 or more echidna, koala or platypus.

Class 2 offence means an offence against this section that is not a class 1 offence and involves—
(a) 3 or 4 animals that are vulnerable or near threatened wildlife; or
(b) 4 or more, but no more than 9, animals that are rare wildlife; or
(c) 10 or more animals that are common wildlife.

Class 3 offence means an offence against this section that is not a class 1 or class 2 offence and involves—
(a) 1 or 2 animals that are vulnerable or near threatened wildlife; or
(b) 2 or 3 animals that are rare wildlife; or
(c) 5 or more, but less than 10, animals that are common wildlife.

Class 4 offence means an offence against this section other than a class 1, 2 or 3 offence.

29. Section 93 of the Act provides for taking of protected wildlife by an Aborigine or Torres Strait Islander under Aboriginal tradition or Island custom. That section has not commenced. Additionally, the respondents are Caucasian in appearance[27] and, therefore, do not appear to be Aborigines or Torres Strait Islanders, nor is the use of the electric grids a matter of Aboriginal tradition or Island custom.

30. The subject land is not within a protected area.[28] Note also that there is no question the Act applies to freehold land.[29]

31. "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.

32. The respondents are not authorised persons under the Act, nor is the taking in the coming year authorised under the Act, for example under a damage mitigation permit issued under the regulations.[30]

33. The flying-foxes admitted to have been killed by the first respondent are mammals indigenous to Australia[31] and classified as protected wildlife under the regulations to the Act.[32] They are therefore, protected animals, for the purposes of s 88.

34. The defence in s 88(3) of the Act cannot be relied upon by the respondents as the first respondent's admissions indicate he has intentionally killed flying-foxes and the operation of the grids is therefore *directed towards* the taking.[33]

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[27] See the affidavit of Larissa Joy Waters, affirmed 12 October 2006.
[28] See the affidavit of Larissa Joy Waters, affirmed 12 October 2006.
[29] *Bone v Mothershaw* [2002] QCA 120; [2003] 2 Qd R 600; *Phillips v Spencer* [2005] QCA 317; *Burns v State of Queensland & Croton* [2006] QCA 235.
[30] See the affidavit of Larissa Joy Waters, affirmed 12 October 2006.
[31] The scientific classification of flying-foxes and the species that are indigenous to Australia are explained at paragraphs 28 and 29 of the affidavit of Carol Jeanette Booth, affirmed 22 September 2006.
[32] Between 19 December 1994 and 24 June 2005 flying-foxes indigenous to Australia were classified as "common mammals" under Schedule 5 of the *Nature Conservation (Wildlife) Regulation 1994*. Between 25 June 2005 and 10 August 2006 flying-foxes indigenous to Australia were classified as "least concern mammals" under Schedule 5 of the *Nature Conservation (Wildlife) Regulation 1994*. Since 11 August 2006 flying-foxes indigenous to Australia have been classified as "least concern wildlife" under Schedule 6 of the *Nature Conservation (Wildlife) Regulation 2006*.
[33] *Booth v Frippery Pty Ltd* [2006] QCA 74 at [31].

35. In light of this factual background, the first respondent's public admissions and the existence of the electric grids on the land establish a prima facie case that the admitted killing of flying-foxes since 2001 was a breach of s 88 and the likely killing in the coming fruit season will breach s 88 of the Act.

36. The grant of the relief sought in the originating application raises a number of discretionary issues[34] but, considering the admitted killing and the objects of the Act, there is a prima facie case in the sense that if the evidence remains as it is there is a probability that at the trial of the originating application the applicant will be held entitled to relief. The admitted killing indicates that in fact there is a strong probability that at least an enforcement order will be made restraining the operation of the electric grids unless approved under the Act.

Balance of convenience

37. The following factors weigh strongly in favour of the interim enforcement order being granted:

    (a) **Strength of the applicant's case**: The first respondent's public admissions of deliberately killing 1,100 flying-foxes in recent years and that the respondents do not hold a permit to do so under the Act or regulations mean that the applicant has a very strong case that the respondents have contravened s 88 of the Act and will be granted relief in the principal proceedings.

    (b) **Likelihood that respondents will breach s 88 of the Act in the coming fruit season**: The first respondent has said publicly that he does not consider he is subject to the Act. The existence of the electric grids, for which there is no other apparent purpose than electrocuting flying-foxes, creates the potential for the offence to occur. The respondents have refused to give an undertaking not to operate the grids in the coming season unless approved under the Act. These facts indicate that there is a strong likelihood the respondents will breach s 88 of the Act in the coming fruit season if the interim enforcement order is not granted. Based on the admitted killing in previous years, the respondents may kill hundreds of flying-foxes in the coming fruit season prior to the hearing of the principal proceedings.

    (c) **Undertaking as to damages is not required**: The applicant does not give an undertaking as to damages as s 173E of the Act removes this requirement. Together with the widened standing provided by s 173D, this section displays a clear legislative policy intent to facilitate meritorious claims to be brought by members of the public to enforce the Act.

    (d) **The public interest in the conservation of nature**: The conservation of nature, the object of the Act and the clear object of s 88 of the Act, is undoubtedly a matter of public interest. In *Castlemaine Tooheys Ltd v South Australia*, in refusing to grant an application for an interlocutory injunction on the balance of convenience, Mason ACJ stated the principal as follows:[35]

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[34] 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.

[35] (1986) 161 CLR 148 at 155.

> "It [the balance of convenience] 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."

Flying-foxes are considered very important ecologically for their role in seed dispersal of fruits of native rainforest trees and pollination of native trees. The species of flying-foxes most likely to be killed by the respondents is the Spectacled Flying-fox, which is recognised as contributing the values of the Wet Tropics World Heritage Area[36], a protected area under the Act and an area of high nature conservation value.

(e) **Irreparable harm for which damages will not be adequate compensation**: The evidence indicates that, between the filing of the application for the enforcement order and the hearing and determination of the application the respondents are likely to kill hundreds of flying-foxes in contravention of s 88 of the Act unless restrained by the Court. This will constitute irreparable harm for which damages will not be adequate compensation.[37] The applicant cannot seek damages for the killing of flying-foxes and once killed, the damage to the environment is essentially irreparable although it may be mitigated by an order to assist in the rehabilitation of injured flying-foxes.

(f) **Potential for respondents to seek and obtain approval under the Act**: The interim enforcement order merely restrains the operation of the electric grids "unless authorised in accordance with s 88 of the Act". This allows the respondents to seek a damage mitigation permit under the regulations from the Environmental Protection Agency ("**EPA**"), which administers the Act. If the EPA grants such a permit the respondents will be entitled to operate their electric grids. The interim enforcement order, therefore, effectively does nothing more than require the respondents to gain approval from the EPA as required under the Act and regulations.

(g) **Non-lethal methods of crop protection have been available for many years and the respondents have failed to implement them**: Full exclusion netting is a non-lethal means of protecting fruit crops from flying-foxes that has been available for many years[38] but the respondents have failed to implement such a method of crop protection.

38. The only factor that weighs against the grant of the interim enforcement order is the potential that the respondents may suffer financial losses if they are prevented from operating their electric grids to protect their crops in the coming fruit season. The applicant has no evidence of what their potential damages or losses might be. This is a matter that might be considered by the EPA in any application by the respondents for a damage mitigation permit.

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[36] See paragraphs 33-35 of the affidavit of Carol Jeanette Booth, affirmed 22 September 2006 and the decision in *Booth v Bosworth* (2001) 114 FCR 39 (Branson J).

[37] The need for irreparable injury also is not decisive in cases involving the environment: *Richardson v Forestry Commissioner* (1988) 164 CLR 261 at 275-6.

[38] See para 41 and exhibit CJB-17 of the affidavit of Carol Jeanette Booth, affirmed 22 September 2006.

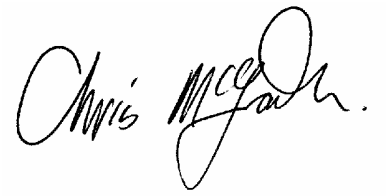
39. In light of these factors, it is submitted that the injury to the conservation of nature that is likely to be suffered if an interim enforcement order is refused strongly outweighs the injury which the respondents will suffer if an interim enforcement order is granted.

CONCLUSION

40. The Full Court's decision in the *Speleological Society Case* no longer reflects the law in Queensland for third party enforcement of nature conservation laws. Sections 173D and 173E of the Act have created open standing to enforce the Act and removed the requirement to give an undertaking as to damages when seeking an interim enforcement order.

41. There is a prima facie case in the sense that if the evidence remains as it is there is a probability that at the trial of the originating application the applicant will be held entitled to relief. The admitted killing indicates that in fact there is a strong probability that at least an enforcement order will be made restraining the operation of the electric grids.

42. The balance of convenience strongly favours the grant of an interim enforcement order restraining the respondents from operating the electric grids unless authorised under the Act and pending the determination of the principal proceedings by the Court.



Chris McGrath
Counsel for the applicant
12 October 2006