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 CLOSING SUBMISSIONS FOR FINAL RELIEF

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INTRODUCTION

1. This is an application for an enforcement order under ss 173D and 173F 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 two main issues that the Court must resolve to determine this application, namely, whether:

   (a) the Court is satisfied an offence against s 88 of the Act is being, or has been committed, or will be committed unless the enforcement order is made; and

   (b) the Court is satisfied it should exercise its discretion to grant the relief sought, or any relief.

3. There is no question that the Court has an overriding discretion whether to grant any relief and the form of that relief. This is clear from the use of the word "may" in s 173F and case law concerning the exercise of similar powers in other legislation.[1]

FACTS

The electric grids

4. 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]

5. 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]

Admitted killing of flying-foxes

6. 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]

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[1] *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.

[2] A property details map from DNR is provided in Exhibit CJB-5 of the affidavit of Dr 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 Dr Booth, affirmed 22 September 2006. A photograph of the first respondent standing in front of the grids, taken for the *Cairns Post* newspaper, will also be tendered at trial through the newspaper reporter who wrote the article in Exhibit CJB-11 of the affidavit of Dr Booth.

[4] An audio recording and transcript of the interview is provided as Exhibit CJB-6 to the affidavit of Dr Booth, affirmed 22 September 2006.

[5] Page 33 of the affidavit of Dr Booth, affirmed 22 September 2006.

> "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."

7. 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-January 2004 and 400 flying-foxes during the lychee season in November-January 2002, noting that the lychee season runs from November to January annually.[6]

8. The first respondent made similar public admissions on 14 January 2006 in the *Cairns Post* newspaper.[7] The pertinent quote is:[8]

> "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."

Conservation status of flying-foxes

9. Flying-foxes are considered very important ecologically for their role in seed dispersal of fruits of native rainforest trees and pollination of native trees.[9] Flying-foxes have a low reproductive rate and are long-lived, therefore their populations are slow to recover from catastrophic natural events and other sources of mortality.[10] Even relatively small increases in mortality rates over natural levels may cause an otherwise stable population of flying-foxes to decline.[11]

10. Since the commencement of the Act in 1994, flying-foxes indigenous to Australia[12] have been classified as protected wildlife under the regulations to the Act[13] and, therefore, are protected animals for the purposes of s 88 of the Act.

11. The most likely species of flying-fox that has been killed by the respondents is Spectacled Flying-foxes (*Pteropus conspicillatus*).[14] This species has been listed as vulnerable to extinction since 14 May 2002 under the *Environment Protection and*

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[6] See paragraph 37 of the affidavit of Dr Booth, affirmed 22 September 2006.
[7] Exhibit CJB-11 to the affidavit of Dr Booth, affirmed 22 September 2006.
[8] Page 62 of the affidavit of Dr Booth, affirmed 22 September 2006.
[9] See paragraphs 33-36 of the affidavit of Dr Booth, affirmed 22 September 2006; paragraph 9 of the affidavit of Dr Spencer, affirmed 24 October 2006; and paragraphs 5-9 of the affidavit of Dr Fox, affirmed 10 November 2006.
[10] See Exhibit CJB-15 to the affidavit of Dr Booth, affirmed 22 September 2006; and paragraphs 12-20 of the affidavit of Dr Fox, affirmed 10 November 2006.
[11] See Exhibit CJB-15 to the affidavit of Dr Booth, affirmed 22 September 2006; and paragraphs 12-20 of the affidavit of Dr Fox, affirmed 10 November 2006.
[12] 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 Dr Booth, affirmed 22 September 2006.
[13] 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 20 August 2006 flying-foxes indigenous to Australia were classified as "least concern mammals" under Schedule 5 of the *Nature Conservation (Wildlife) Regulation 1994*. Since 21 August 2006 flying-foxes indigenous to Australia have been classified as "least concern wildlife" under Schedule 6 of the *Nature Conservation (Wildlife) Regulation 2006*.
[14] See paragraphs 33-35 of the affidavit of Dr Booth, affirmed 22 September 2006.

Biodiversity Conservation Act 1999 (Cth)[15] and is recognised as contributing to the world heritage values of the Wet Tropics World Heritage Area.[16]

12. The most recent estimate of the population of Spectacled Flying-foxes in the Wet Tropics World Heritage Area is 296,728 but the population appears to already be in decline. Dr Fox's states:[17]

> In my opinion, based on the most recent estimate of 296,728 Spectacled Flying-foxes in the Wet Tropics region, and their population ecology, the likely impacts of the respondents electric grids are to create extra mortality pressure on populations that appear to already be under an unsustainable amount of mortality pressure. … I believe that the Wet Tropics population of Spectacled Flying-fox is already in decline and that the additional mortality imposed by the respondents electric grids, if continued in the future, will contribute significantly to the population continuing to decline in numbers and prevent the population from recovering. This is likely to have far reaching effects on the future sustainability of the unique rainforests of the Wet Tropics World Heritage Area.

THE NOMINATED OFFENCE

Section 88 of the Act

13. The originating application seeks relief under ss 173D and 173F of the Act for a nominated 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—
> (a) 1 or more animals that are extinct in the wild or endangered wildlife; or

[15] See Exhibit CJB-19 to the affidavit of Dr Booth, affirmed 10 November 2006.
[16] See *Booth v Bosworth* (2001) 114 FCR 39 (Branson J).
[17] See paragraphs 24-25 of the affidavit of Dr Fox, affirmed 10 November 2006.

(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.

14. 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 do not claim to be Aborigines or Torres Strait Islanders, nor is the use of the electric grids claimed to be a matter of Aboriginal tradition or Island custom.

15. The subject land is not within a protected area.[18] There is no question the Act applies to freehold land and is constitutionally valid.[19]

16. "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.

17. 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.[20]

18. The flying-foxes admitted to have been killed by the first respondent are mammals indigenous to Australia[21] and classified as protected wildlife under the regulations to the Act.[22] They are therefore, protected animals, for the purposes of s 88.

19. 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.[23]

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

[19] *Bone v Mothershaw* [2002] QCA 120; [2003] 2 Qd R 600; (2002) 121 LGERA 75 (McPherson, Williams JJA, and Byrne J); *Dore v State of Queensland* [2004] QDC 364 (Bradley DCJ); *Burns v State of Queensland* [2004] QSC 434 (de Jersey CJ); *Phillips v Spencer* [2005] QSC 053 (Jones J); *Phillips v Spencer* [2005] QCA 317 (de Jersey CJ, McMurdo P, and Jerrard JA); *Dore v Penny* [2006] QSC 125 (Jones J); *Burns v State of Queensland & Croton* [2006] QCA 235 (Jerrard JA, Cullinane and Jones JJ).

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

[21] 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 Dr Booth, affirmed 22 September 2006.

[22] 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*.

[23] *Booth v Frippery Pty Ltd* [2006] QCA 74 at [31].

Standard of proof

20. 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].

21. In light of the facts set out above, particularly the first respondent's public admissions and the existence of operational electric grids on the land, the applicant submits that an offence against s 88 of the Act is established on the balance of probabilities.

EXERCISE OF THE COURT'S DISCRETION

22. 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.

23. 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.

24. 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.

25. 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 ss 173D and 173F of the Act.

Object of the Act and the public interest in the conservation of nature

26. The object of the Act, stated in s 4, is the conservation of nature and this weighs in favour of the grant of the enforcement order.

27. In addition to being the object of the Act, there is also a strong public interest in the conservation of nature and protection of the environment[24], noting that flying-foxes contribute to pollination and seed dispersal in many species of native plants and are, therefore, important for ecosystem function generally.

[24] *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 477-482 per Barwick CJ and 486-487 per Jacobs J; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 149 at 155 per Mason ACJ.

The applicant's interest in the proceedings

28. Consistent with the objects of the Act, the applicant's interest in the proceedings is the conservation of nature and she has no financial interest in the outcome of the proceedings.[25] In *Booth v Frippery* [2006] QPEC 116 at p 18, Rackemann DCJ found:

> the material amply satisfies me that Dr Booth has a proper interest in the matter, not in a personal financial sense, but in her concern for the matters of conservation in relation to the bats, which is consistent with the purpose of the Act and I see no basis to refuse to grant relief as a matter of discretion, based on any perceived lack of interest or lack of proper interest on her behalf.

Strength of the applicant's case

29. The first respondent's public admissions of deliberately killing 1,100 flying-foxes in recent years and the fact that the respondents did 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. Admissions, even if oral, may constitute the sole, though sufficient, evidence in support of a civil judgment.[26] The comments of Jacobs J in *Voulis v Kozary* (1975) 180 CLR 177 at 193 are apt for the facts of this case:

> These admissions, made in the circumstances in which they were made, have an overwhelming persuasiveness unless they can be explained in some convincing way. The statements and conduct were not merely on incidental aspects of the matter. They went to the core. They were not in any way inadvertent or casual or extracted from circumstances which might lessen their weight. They were not made in response to questions which suggested the answers which were given. Admissions so made must be given very great probative value. Their value cannot simply be displaced by an unfavourable view of the credibility in his evidence or parts thereof of the party who seeks to rely on them. That value may only be displaced by a convincing explanation of how they came to be made.

30. In addition, the principle in *Jones v Dunkel* (1959) 101 CLR 298 applies to cases such as this where the respondents have failed to give evidence. Branson J summarised the relevant principles in *Booth v Bosworth* (2001) 114 FCR 39 at 50 [42]:

> I conclude that the appropriate approach for me to adopt in this case having regard to the failure of the respondents to give evidence is as follows:
>
> (a) as the burden of proof with respect to each of the facts in issue between the parties lies on the applicant, the applicant must establish evidence of each of the facts in issue notwithstanding that some relevant and important evidence is peculiarly within the knowledge of the respondents;
>
> (b) the failure of the respondents to give evidence does not of itself amount to proof of any fact in issue;
>
> (c) however, provided that there is before the Court evidence tending to establish each of the facts in issue (albeit that it may be "meagre in the extreme" - see *Jones v Dunkel* per Kitto J at 305), in assessing the probability of the existence of a fact in issue (ie in weighing the evidence on that issue) use may be made of the failure of the respondents to give evidence apparently in their possession relevant to that fact in issue. That is, it is open to the Court to draw the inference that the evidence which the respondents could have given to the Court would not have been favourable to their case and thus more confidently to draw inferences available to be drawn from the evidence that is before the Court.

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[25] See paragraph 1 of the affidavit of Dr Booth, affirmed 22 September 2006.
[26] *M'Kewen v Cotching* (1857) 27 LJ Ex 41.

31. Consequently, in this case the Court may infer from the failure of the respondents to give evidence to contradict or explain their previous public admissions that those public admissions were truthful and the respondents did in fact kill the number of flying-foxes the first respondent admitted to have killed.

Serious, calculated, deliberate, and not merely technical breach

32. Another factor that weighs strongly in favour of the exercise of the Court's discretion to grant the enforcement order is that the offence committed by the respondents is a serious, calculated and deliberate offence carried on over several years in circumstances where the killing of flying-foxes was largely hidden and unlikely to be detected. 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. The respondents knew of the requirement to obtain a damage mitigation permit under the Act and chose not to apply once it became clear no permit would be granted for the use of the electric grids.

Educative and deterrent effect of the grant of an enforcement order

33. Another matter going to the exercise of the Court's discretion is that the grant of an enforcement order may appropriately fulfill an educative and deterrent function against similar breaches of the Act. Black CJ and Finkelstein J recently stated principles for the grant of public interest injunctions in cases such as this one involving the protection of public rights and interests:[27]

> Although 'deterrence' is more commonly used in the vocabulary of the law than 'education', the two ideas are closely connected and must surely overlap in areas where a statute aims to regulate conduct. Thus, … the grant of a statutory public interest injunction to mark the disapproval of the Court of conduct which the Parliament has proscribed, or to discourage others from acting in a similar way, can be seen as also having an educative element. For that reason alone the grant of such an injunction may be seen, here, as potentially advancing the regulatory objects of the EPBC Act. Indeed, some of those objects are expressed directly in the language of 'promotion', including the object provided for by s 3(1)(c), namely to promote the conservation of biodiversity, which is an object that the legislation links to the establishment of an Australian Whale Sanctuary 'to ensure the conservation of whales and other cetaceans': s 3(2)(e)(ii).
>
> Consistently with this view it has been said in relation to s 80(4) of the TP Act that whilst the Court should not grant an injunction unless it is likely to serve some purpose, it may be that in a particular case an injunction will be of benefit to the public by marking out the Court's view of the seriousness of a respondent's conduct: see *Hughes v Western Australian Cricket Association (Inc) & Ors* (1986) ATPR 40-748 at 48,135 and *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 4 FCR 296 at 300.
>
> Similarly, it has been said, again in the context of s 80 of the TP Act, that the purpose of an appropriately drafted injunction may be merely to reinforce to the marketplace that the restrained behaviour is unacceptable: *ACCC v 4WD Systems Pty Ltd* (2003) 200 ALR 491 at [217]. That is to say, a public interest injunction may have a purpose that is entirely educative. In *ACCC v 4WD Systems*, the enjoined behaviour had ceased and there was little likelihood of repetition and yet it was considered appropriate to grant an injunction.
>
> More generally, we agree with the view expressed by Sackville J in *ACCC v Chen* (2003) 132 FCR 309 that the fact that an injunction granted under s 80 of the TP Act may prove difficult or even impossible to enforce is not necessarily a bar to the grant of relief, although it is a material consideration to be weighed against other circumstances relevant to the exercise of the Court's discretion ...

[27] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116 at [22]-[27].

> … it might well be open to the Court, in the proper exercise of its discretion at the trial, to grant the relief sought by way of statutory public interest injunction even though there might be no prospect of the conduct being repeated by the respondent or even because there is no prospect of the injunction being enforced.
>
> The same considerations may operate, perhaps more strongly, in relation to the declaratory relief that is also sought by the appellant.

34. In a similar manner, Robertson DCJ considered the value of deterrence and sending "a very strong message that contravention of approvals will not be tolerated" in granting declarations under s 4.1.21 of the IPA in *Caloundra City Council v Taper Pty Ltd* [2003] QPELR 558 ; [2003] QPEC 019 at [100]-[101].

35. There have been two other cases[28] involving the use of electric grids to kill flying-foxes and the practice therefore appears not to be limited to the respondents before the Court in this case. The grant of an enforcement order may therefore have an educative and deterrent effect of similar breaches of the Act by others.

Potential for respondents to seek and obtain approval under the Act

36. The enforcement order 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.[29]

37. If the EPA grants such a permit the respondents will be entitled to operate their electric grids. The enforcement order, therefore, effectively does nothing more than require the respondents to gain approval from the EPA as required under the Act and regulations. It can be noted, however, that the stated policy of the EPA is not to issue damage mitigation permits for electric grids,[30] therefore, it appears unlikely that such a permit will be granted for the foreseeable future.

Non-lethal methods of crop protection

38. 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[31] but the respondents have failed to implement such a method of crop protection.

Conduct of the respondents and intention to use grids in the future

39. In the absence of evidence from the respondents as to their future intentions the Court may infer that they intend to use the electric grids in the future unless restrained by the Court. Of course, 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) of the Act).

40. The Court may also infer the respondents' intention not to voluntarily comply with the Act and to use their electric grids from their previous admissions and conduct in

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[28] See *Booth v Bosworth* (2001) 114 FCR 39; and *Booth v Frippery Pty Ltd* [2006] QCA 74.
[29] See s 23 of the *Nature Conservation (Administration) Regulation 2006* and ss 181-185 of the *Nature Conservation (Wildlife Management) Regulation 2006*.
[30] See Exhibit CJB-8 of the affidavit of Dr Booth, affirmed 22 September 2006.
[31] See para 41 and exhibit CJB-17 of the affidavit of Dr Booth, affirmed 22 September 2006.

relation to these proceedings. The first respondent has previously stated a view that he is not bound by the law and may kill flying-foxes that enter his land without authority from the government. 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:[32]

> "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."

41. The first respondent repeated this view in the story in the *Cairns Post*. The pertinent statements in the newspaper are:[33]

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

42. The first respondent initially refused to accept service of the originating process in a hostile and aggressive manner.[34]

Difficulty of monitoring use of electric grids

43. The use of the electric grids has only come to light due to ill advised public admissions by the first respondent. Such public admissions are unlikely to occur again in the future should the respondents operate their electric grids. The use of the grids is very difficult to monitor as their operation occurs at night on private property.

44. The first respondent's adverse attitude to the law as well as the difficulty of monitoring an enforcement order limited to not using the electric grids weighs strongly in favour for an enforcement order being made to dismantle the electric grids.

Returning flying-fox population as close as practicable to prior condition

45. 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. The Tolga Bat Hospital is located close to the respondents' farm and provides a facility to carry out such an order using money provided by the respondents.

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[32] Pages 32-33 and 36 of the affidavit of Dr Booth, affirmed 22 September 2006.
[33] Page 62 of the affidavit of Dr Booth, affirmed 22 September 2006.
[34] See the affidavit of John Robert Harrison, sworn 3 October 2006; and William Arnold Smith, sworn 12 October 2006.

46. In considering what may be a reasonable amount to order the respondents to donate to the Tolga Bat Hospital, it can be noted the average length of stay for a bat at the Hospital is 6 weeks and the average cost per released bat, assuming all labour is voluntary, is $80.[35] Multiplying 1,100 animals killed by this amount totals, $88,000. However, the applicant accepts even without evidence of the respondents' financial status that they are very poor and, for that reason and because the applicant does not wish to cause them financial hardship, the applicant submits a donation of $8,800 is reasonable in the circumstances.

Economic loss

47. The only factor that weighs against the grant of the 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. The respondents have not disclosed their financial records and provide little or 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.

48. What weight to give to any economic loss that the respondents may suffer if the enforcement order should be considered against harm that their grids cause to the conservation of nature. It has been noted above that the most likely species to be killed by their grids is Spectacled Flying-foxes which are recognised as part of the world heritage values of the Wet Tropics World Heritage Area. When considering similar matters in the exercise of judicial discretion Branson J stated in *Booth v Bosworth* (2001) 114 FCR 39 at 67-68 [115]:

> In weighing the factors which support an exercise of the Court's discretion in favour of the grant of an injunction under subs 475(2) of the Act against those factors which tell against the grant of such an injunction, it seems to me that it would be a rare case in which a Court could be satisfied that the financial interests of private individuals, or even the interests of a local community, should prevail over interests recognised by the international community and the Parliament of Australia as being of international importance.

49. The applicant submits that the approach of Branson J is the approach that should be applied in the circumstances of this case.

CONCLUSION

50. There is strong evidence that an offence against s 88 of the Act has occurred in the past and is likely to occur in the future unless an enforcement order is granted restraining the operation of the electric grids. The grids should be removed to ensure compliance with the Court's orders. The respondents should be ordered to rectify the damage they have done as close as practicable by paying for injured and sick flying-foxes to be rehabilitated.

Chris McGrath
Counsel for the applicant
21 November 2006

[35] Paragraph 14 of the affidavit of Jenny Maclean, affirmed 10 November 2006.