

NOTICE OF APPEAL
COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

CA NUMBER: 9268 / 05

NUMBER: BD 4658 of 2004

APPELLANT: **CAROL JEANETTE BOOTH**
FIRST RESPONDENT: **FRIPPERY PTY LTD (ACN 010 890 007)**
SECOND RESPONDENT: **MERVYN MEYER THOMAS**
THIRD RESPONDENT: **PAMELA ANN THOMAS**

NOTICE OF APPEAL

To the Respondents

And to the Registrar, Planning and Environment Court at Townsville

TAKE NOTICE that the Appellant appeals to the Court of Appeal under section 4.1.56 of the *Integrated Planning Act 1997* against part of the order in *Booth v Frippery Pty Ltd and Ors* [2005] QPEC 095. The part of the order appealed from is the order that the application for enforcement orders under section 173D of the *Nature Conservation Act 1992* be dismissed.

A. THE DETAILS OF THE JUDGMENT APPEALED AGAINST ARE -

Date of judgment: 22 September 2005

Description of Proceedings: BD 4658 of 2004

Description of parties involved in the proceedings:

Carol Jeanette Booth as Applicant

and

Frippery Pty Ltd (ACN 010 890 007) as First Respondent

Mervyn Meyer Thomas as Second Respondent

Pamela Ann Thomas as Third Respondent

NOTICE OF APPEAL
Filed on behalf of the Appellant
Form 64, UCPR r 747(1)

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Name of Primary Court Judge: His Honour Judge Pack DCJ

Primary Court: Planning and Environment Court

Location of Primary Court: Townsville

B. GROUNDS –

The section 88(3) defence

1. That the Planning and Environment Court made an error or mistake in law by failing to consider both the benefits and costs of the various means of crop protection that the Respondents might have reasonably employed when interpreting and applying the words, “the taking could not have been reasonably avoided”, in section 88(3)(b) of the *Nature Conservation Act 1992*.¹ In particular, the Court failed to consider the admitted crop losses and consequential economic losses that would have been avoided had the Respondents installed netting over their fruit orchard to exclude flying foxes.
2. That the Planning and Environment Court made an error or mistake in law by failing to consider the objects of the *Nature Conservation Act 1992* and the public interest in the conservation of biodiversity when interpreting and applying the words, “the taking could not have been reasonably avoided”, in section 88(3)(b) of the *Nature Conservation Act 1992*.²
3. That the Planning and Environment Court made an error or mistake in law by only considering the subjective, economic circumstances of the Respondents and the economic costs of the different means of crop protection that the Respondents could employ when interpreting the words, “the taking could not have been reasonably avoided”, in section 88(3)(b) of the *Nature Conservation Act 1992*.³
4. That the Planning and Environment Court made an error or mistake in law by failing to consider the admitted number of flying foxes that had been taken by the Respondents in contravention of section 88(1) of the *Nature Conservation Act 1992* when interpreting and applying the words, “the taking could not have been reasonably avoided”, in section 88(3)(b) of the Act. In particular, the Court failed to consider (or make any finding on) that the Respondents admitted taking thousands of flying foxes using their electric grids when this matter was a preliminary and necessary issue to decide before determining whether “the taking could not have been reasonably avoided”.
5. That the Planning and Environment Court made an error or mistake in law in interpreting and applying the requirement to be registered under section 51, and the definition of “scientific purposes” in section 48, of the *Animal Care and Protection Act 2001*. The Court, thereby, erred in determining whether the Respondents’ activities in taking flying foxes while trialing a “non-lethal electric grid” system of crop protection was a lawful activity for the purposes of section 88(3)(a) of the *Nature Conservation Act 1992*. In particular, the Court 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

¹ *Booth v Frippery Pty Ltd & Ors* [2005] QPEC 095 at [28]-[34] and [45]-[46].

² *Booth v Frippery Pty Ltd & Ors* [2005] QPEC 095 at [28]-[34] and [45]-[46].

³ *Booth v Frippery Pty Ltd & Ors* [2005] QPEC 095 at [28]-[34] and [45]-[46].

on some flying foxes was incidental?⁴ The Court confused ‘purpose’ and ‘method’ of experimentation. The Court should have asked 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).

6. That the Planning and Environment Court made an error or mistake in law by making a finding that the evidence did not reasonably admit of, namely that the Respondents’ activity in attempting to develop a “non lethal” electric grid was not required to be registered under section 51 of the *Animal Care and Protection Act 2001*. The Respondents admitted attempting, since 1997, to develop by field trials a “non lethal” electric grid system for crop protection for their own farm and for the fruit industry generally. 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, observable deaths of flying foxes. The Respondents used flying foxes during the field trials of the grids to determine these facts. 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. The Respondents admitted that they were not registered under the *Animal Care and Protection Act 2001*.
7. That the Planning and Environment Court made an error or mistake in law in interpreting and applying the words, “not directed towards the taking”, in section 88(3)(a) of the *Nature Conservation Act 1992*. In particular, the Court erred by interpreting the words to find 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.”⁵ Such a finding involved an error of construction because whether an activity is “directed towards” taking a protected animal is not a question of the ultimate, subjective purpose of the person undertaking the activity but a matter of objective fact. An activity is “directed towards” the taking of a protected animal if it inherently involves the taking to achieve the ultimate, subjective purpose of the person undertaking the activity. An activity is “directed towards” the taking of a protected animal if the 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.
8. That the Planning and Environment Court made an error or mistake in law by failing to give an interpretation to section 88(3) of the *Nature Conservation Act 1992* that will best achieve the purpose of the Act.

⁴ *Booth v Frippery Pty Ltd & Ors* [2005] QPEC 095 at [43].

⁵ *Booth v Frippery Pty Ltd & Ors* [2005] QPEC 095 at [44].

Expert evidence

9. That the Planning and Environment Court made an error or mistake in law by finding that the Respondents' activity in constructing and operating the Mark VII electric grid is non-lethal to flying foxes⁶ or that "without further research no firm conclusions can be reached" on whether the electric grids are lethal,⁷ when such a finding was not reasonably open because the only expert evidence on this issue was that the Mark VII electric grid was likely to kill flying foxes and that death may be delayed and may not be observable on or adjacent to the electric grid.
10. That the Planning and Environment Court made an error or mistake in law by finding that the opinion of the relevant expert called by the Appellant at the trial, Dr Hugh Spencer, was mistaken in his assessment of the lethal capacity of the Respondents' electric grid when his evidence on this point was not challenged by the Respondents in cross-examination and he was not given the opportunity to respond to this point.
11. That the Planning and Environment Court made an error or mistake in law by failing to find the Respondents' construction and operation of the Mark VII electric grid was likely to "take" flying foxes for the purposes of section 88(1) of the *Nature Conservation Act 1992* by causing injury or harm to the animals when the evidence did not reasonably admit different conclusions because the only expert evidence on this issue was that the Mark VII electric grid was likely to injure or harm flying foxes.
12. That the Planning and Environment Court made an error or mistake in law by accepting, against objection, opinion evidence of Mervyn Meyer Thomas, a lay-witness, regarding the cause of deaths of flying foxes on the electric grids.⁸
13. That the Planning and Environment Court made an error or mistake in law by accepting, against objection, opinion evidence of Mervyn Meyer Thomas, a lay-witness, regarding additional costs and difficulties associated with netting of the Respondents' fruit orchard.⁹ These included increased cost because the orchard is divided by a creek and a road, delay in the lychee crop maturing and fire risk from oil sprayed on the nets. Such findings were not reasonably open when the only expert evidence on the netting of the Respondents orchard, provided by Graham Minifie, contradicted such findings.

Causation

14. That the Planning and Environment Court made an error or mistake in law by finding the admitted deaths of some flying foxes on the Respondents' electric grids were not caused by the Respondents' actions in constructing and operating the grids but by a process of "flapping" (sic),¹⁰ that is, entanglement of flying foxes between wires.¹¹ The Court should have held that, 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

⁶ *Booth v Fripperly Pty Ltd & Ors* [2005] QPEC 095 at [24].

⁷ *Booth v Fripperly Pty Ltd & Ors* [2005] QPEC 095 at [15].

⁸ *Booth v Fripperly Pty Ltd & Ors* [2005] QPEC 095 at [23].

⁹ *Booth v Fripperly Pty Ltd & Ors* [2005] QPEC 095 at [28] and [29].

¹⁰ The term used in the evidence was "frapping".

¹¹ *Booth v Fripperly Pty Ltd & Ors* [2005] QPEC 095 at [23].

process intervened, where the deaths were a natural and ordinary consequence of the Respondents' actions. Further, the Court should have held that, as a matter of law, there may be no single cause of an occurrence or event, but if the Respondents' conduct substantially, materially or significantly contributed to the occurrence or event, they may be held to be legally liable.

Failure to consider entire period for which relief was sought

15. That the Planning and Environment Court made an error or mistake in law in the exercise of (or the failure to exercise) the Court's discretion to grant the relief sought by only considering the taking of flying foxes on 16 and 17 December 2004 and in the future,¹² and, thereby, failing to consider the taking of flying foxes by the Respondents since the relevant species of flying foxes became a protected animal under the *Nature Conservation Act 1992* on 19 December 1994, when the relief sought related to the period since that date.
16. That the Planning and Environment Court made an error or mistake in law in the exercise of (or the failure to exercise) the Court's discretion to grant the relief sought by failing to consider deaths of flying foxes during 1995, 1996 and 1997 when the electric grids were admitted to have been operated at intentionally lethal levels for the purpose of killing flying foxes and the Respondents admitted they did not hold a permit or other authorization under the *Nature Conservation Act 1992* for the taking.

Failure to consider "take" by injury, harm, etc.

17. That the Planning and Environment Court made an error or mistake in law in the exercise of (or the failure to exercise) the Court's discretion to grant the relief sought by only considering the taking of flying foxes contrary to section 88 of the *Nature Conservation Act 1992* by killing and failing to consider taking by "injury" or "harm" in circumstances where the only expert evidence on this issue was that the operation of the Mark VII electric grid was likely to "kill, injure or harm" flying foxes (applying a plain meaning to those words).
18. That the Planning and Environment Court made an error or mistake in law by finding the admitted deaths of some flying foxes on the Respondents electric grids by a process of "flapping" (sic),¹³ were not "taking" within the meaning of section 88 of the *Nature Conservation Act 1992*¹⁴ when "take" is defined in 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 (emphasis added).

Exercise of discretion

19. That the Planning and Environment Court made an error or mistake in law in the exercise of (or the failure to exercise) the Court's discretion to grant the relief sought by considering that the Environmental Protection Agency ("EPA"), which administers the *Nature Conservation Act 1992*, was "well aware" of the Respondents' activities in operating the electric grids.¹⁵ The evidence did not

¹² *Booth v Frippery Pty Ltd & Ors* [2005] QPEC 095 at [27] and [28].

¹³ The term used in the evidence was "frapping".

¹⁴ *Booth v Frippery Pty Ltd & Ors* [2005] QPEC 095 at [23].

¹⁵ *Booth v Frippery Pty Ltd & Ors* [2005] QPEC 095 at [21].

reasonably admit such a finding or inference as the Respondents admitted the EPA was not aware that the electric grids were actually killing flying foxes (at all or at the numbers admitted by the Respondents).

20. That the Planning and Environment Court made an error or mistake in law in the exercise of (or the failure to exercise) the Court's discretion to grant the relief sought by considering that the only reasons a permit would not be issued by the EPA to the Respondents for the operation of the electric grids are lack of compliance with an Australian Standard or safety issues.¹⁶ These matters are referred to in an administrative guideline published by the EPA 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*.¹⁷ 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 Planning and Environment Court. It was, therefore, not reasonably open on the evidence for the Court 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, but for a requirement to meet Australian Standards".¹⁸
21. That the Planning and Environment Court made an error or mistake in law in the exercise of (or the failure to exercise) the Court's discretion to grant the relief sought by failing to provide adequate reasons for why the Court would not have granted the (or any) relief sought if the "taking" had been found to be unlawful.¹⁹
22. That the Planning and Environment Court made an error or mistake in law in the exercise of (or the failure to exercise) the Court's discretion to grant the relief sought had the Court found the taking had been unlawful by failing to take into account the objects of the *Nature Conservation Act 1992* and the public interest in the grant of the relief sought.
23. That the Planning and Environment Court made an error or mistake in law in the exercise of (or the failure to exercise) the Court's discretion to grant the relief sought had the Court found the taking had been unlawful by failing to take into account the non-lethal methods of crop protection available to the Respondents.
24. That the Planning and Environment Court made an error or mistake in law in the exercise of (or the failure to exercise) the Court's discretion by failing to consider granting the relief sought in relation to an order under section 173G(1)(d) of the *Nature Conservation Act 1992*, at least in relation to flying foxes intentionally killed or otherwise taken by the Respondents during 1995, 1996 and 1997 when the Respondents admitted operating the electric grids at intentionally lethal levels without a permit or other authorization according to law. The Respondents, through their counsel, admitted that their conduct in operating the intentionally lethal grids "that occurred more than 8 years ago" was an offence against the Act.

¹⁶ *Booth v Frippery Pty Ltd & Ors* [2005] QPEC 095 at [26] and [37].

¹⁷ Between 19 December 1994 and 1 March 2004 permits for crop protection were provided under section 112 of the *Nature Conservation Regulation 1994*. Since 1 March 2004 permits for crop protection have been provided in sections 278-281 of the Regulations.

¹⁸ *Booth v Frippery Pty Ltd & Ors* [2005] QPEC 095 at [37].

¹⁹ *Booth v Frippery Pty Ltd & Ors* [2005] QPEC 095 at [48].

25. That the Planning and Environment Court made an error or mistake in law in the exercise of (or the failure to exercise) the Court's discretion under section 173H of the *Nature Conservation Act 1992* by failing to consider granting the relief sought to restrain the operation of the Respondents electric grids to kill or otherwise take flying foxes using electric grids other than the Mark VII.

C. ORDERS SOUGHT -

1. That the First Respondent, Second Respondent and Third Respondent be restrained from the commission of an offence against section 88 of the *Nature Conservation Act 1992* by electrocuting, delivering a non-lethal electric shock to, and/or shooting Black Flying Foxes (*Pteropus alecto*) at 376 Volk Road, Mutarnee, being land described as Lot 85 on CWL 1576, County of Cardwell, Parish of Waterview, in the State of Queensland, unless authorised in accordance with section 88 of the *Nature Conservation Act 1992*.
2. That within 3 months of the date of this order, the First Respondent, Second Respondent and Third Respondent, and/or their employees or agents dismantle any electric grid system constructed for the purpose of electrocuting or delivering a non-lethal electric shock to Black Flying Foxes (*Pteropus alecto*) at 376 Volk Road, Mutarnee, being land described as Lot 85 on CWL 1576, County of Cardwell, Parish of Waterview, in the State of Queensland unless the taking of Black Flying Foxes by electrocution or delivering a non-lethal electric shock using such an electric grid is specifically authorised under section 88 of the *Nature Conservation Act 1992*.
3. That the First Respondent, Second Respondent and Third Respondent remedy, as close as practicable, the commission of an offence against section 88 of the *Nature Conservation Act 1992* by electrocuting, delivering a non-lethal electric shock to, and/or shooting Black Flying Foxes (*Pteropus alecto*) between and including 19 December 1994 and December 2004 at 376 Volk Road, Mutarnee, being land described as Lot 85 on CWL 1576, County of Cardwell, Parish of Waterview, in the State of Queensland, by donating [an amount that the Court considers reasonable in the circumstances], collectively, within 3 months of the date of this order to the Tolga Bat Hospital operated by the Tolga Bat Rescue & Research Inc, PO Box 685, Atherton Tablelands, Queensland, 4883 for the purpose of the care and rehabilitation of injured Black Flying Foxes.
4. That the First Respondent, Second Respondent and Third Respondent pay the Appellant's costs of the appeal on the standard basis.

D. LEAVE TO APPEAL

This appeal is brought pursuant to leave given by on 2005.

Leave to appeal was given for the following questions –

(a)

(b)

Leave to appeal was given because

E. RECORD PREPARATION

I/We undertake to cause a record to be prepared and lodged, and to include all material required to be included in the record under the rules and practice directions and any order or direction in the proceedings.

F. PARTICULARS OF THE APPELLANT

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G. PARTICULARS OF THE RESPONDENTS

Name: Frippery Pty Ltd, Mervyn Meyer Thomas and Pamela Ann Thomas
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 Respondent's solicitor's name and firm name:
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Signed:
 Jo-Anne Bragg
 Solicitor for the Appellant

Dated: 3 November 2005

This Notice of Appeal is to be served on:

Frippery Pty Ltd, M Thomas and P Thomas
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