IN THE PLANNING AND ENVIRONMENT COURT
AT BRISBANE No. BD 4658 of 2004

BETWEEN: **CAROL JEANETTE BOOTH**

Applicant

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

First Respondent

MERVYN MEYER THOMAS

Second Respondent

PAMELA ANN THOMAS

Third Respondent

APPLICANT'S CLOSING SUBMISSIONS ON LAW FOR RE-TRIAL

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INTRODUCTION

1. This is a re-hearing of 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 Mutarnee, north of Townsville.[1]

2. 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. The second and third respondents are, respectively, director and company secretary of the first respondent. The proceedings concern the use of electric grids to

[1] Pack DCJ heard the first trial in Townsville: *Booth v Frippery Pty Ltd & Ors* [2005] QPEC 095, but his Honour's decision was set aside by the Court of Appeal: *Booth v Frippery Pty Ltd & Ors* [2006] QCA 74.

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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.

3. These written submissions are intended to supplement the outline of relevant legislation and case law provided in the opening address of counsel for the Applicant. Counsel will make oral submissions on the evidence, although these submissions contain references to the evidence, where relevant.

ISSUES IN DISPUTE

4. The main issues that the Court must resolve to determine this application are:[2]

   (a) whether the applicant has shown on the balance of probabilities[3] that the respondents have in the past[4] or will in the future kill, injure or harm flying foxes by the use of the electric grids constructed on the farm (i.e. whether there has been or will be a "take" of a protected animal);

   (b) whether the respondents have shown on the balance of probabilities that the defence in subs 88(3) applies to their past, present and stated future conduct because:

      (i) the taking happened or will happen in the course of a lawful activity;

      (ii) the lawful activity was not directed towards the taking; and

      (iii) the taking could not reasonably have been avoided; and

   (c) if the Court is satisfied an offence against s 88 of the Act has occurred or will occur, whether it should exercise its discretion to grant the relief sought or any relief.

5. 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.[5]

6. At the hearing on 13 September, counsel for the respondents handed up written submissions of "no case to answer" but these submissions are without foundation and do not reflect the real issues to be determined by the Court. Counsel for the respondents submits that there is no evidence flying foxes have been protected animals under the Act before August 2006. That submission is wrong as the statutory material provided to the Court at the outset of the trial indicates mammals indigenous to Australia have been protected animals since the commencement of the Act on 19

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[2] Having regard to the Court's power to grant an enforcement order in s 173F and the nominated offence in question in these proceedings, namely an offence against s 88 of the Act. Wilson SC DCJ analysed the relevant issues for granting relief in a case involving culling of flying foxes contrary to the *Nature Conservation Act* in *Booth v Yardley* [2007] QPELR 229; [2006] QPEC 119.

[3] The onus of which lies on the applicant but in this case is considerably assisted by the respondents' evidence.

[4] Since the commencement of the Act and protection of flying foxes under it in 1994.

[5] *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; *Booth v Yardley* [2007] QPELR 229; [2006] QPEC 119 at [8].

December 1994.[6] Counsel for the respondents also raises the corporations' power of the Commonwealth, but that is irrelevant as there is no question of the legislative ability of the Queensland Parliament to enact the Act.[7] Counsel for the respondents also raises the monetary limit of the District Court but, in doing so, misunderstands that a judge holding a commission and exercising the jurisdiction of the Planning and Environment Court is not limited to the monetary limit of the District Court.[8] Counsel for the respondents also raises a difficulty with the exercise of judicial power of the Commonwealth under the *Judiciary Act 1903* but that issue does not arise in these proceedings.[9]

JURISDICTION AND STANDING

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

> **173A Definitions for div 2**
> In this division—
> ***court*** means the Planning and Environment Court.
> ***nominated offence*** means an offence against section 62, 88, 88A, 89, 90, 91, 92, 94, 97 or 109.
> ***person*** includes a body of persons, whether incorporated or unincorporated. …
>
> **173D Proceeding for enforcement orders**
> (1) A person may bring a proceeding in the court—
> (a) for an order to remedy or restrain the commission of a nominated offence (an ***enforcement order***) …
> (2) The person may bring a proceeding for an enforcement order whether or not any right of the person has been, or may be, infringed by, or because of, the commission of the offence.

8. The explanatory notes to the amending legislation that inserted s 173D into the Act make it clear that the legislative intention of the provision was for the purpose of conserving nature consistent with the objects of the Act.[10] The explanatory notes state:[11]

> Statutory declarations and enforcement orders are to be used for the purpose of conserving nature. They are not and should not be regarded as punative.

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[6] See tabs 1-7 of the applicant's book of legislation and authorities. It ordinarily goes without saying that the Court will take judicial notice when an Act or statutory instrument commenced as shown in reprints produced by the government printer. If authority is needed for that proposition, see s 43 of the *Evidence Act 1977*.

[7] There is no question the *Nature Conservation Act 1992* and the *Integrated Planning Act 1997* are constitutionally valid and apply to freehold land in Queensland, including the respondents' land: *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); *Booth v Yardley* [2006] QPEC 119 at [33] (Wilson DCJ).

[8] See Ch 4, Pt 1 of the *Integrated Planning Act 1997*.

[9] This matter was address at some length in *Booth v Yardley* [2006] QPEC 116 (Rackemann DCJ) and *Booth v Yardley* [2006] QPEC 116 (Wilson DCJ).

[10] *Environmental Legislation Amendment Bill 2003 Explanatory Notes*, pp 11-12.

[11] *Environmental Legislation Amendment Bill 2003 Explanatory Notes*, p 11.

STANDARD OF PROOF

9. 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]; *Booth v Yardley* [2007] QPELR 229 at [17].

TAKING A PROTECTED ANIMAL

10. 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
> (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.

11. The form of s 88 was different, but materially identical, between 19 December 1994 and 17 December 2004. During that period s 88 materially provided:

> **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.

12. 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.

13. The subject land is freehold land that is not within a protected area. There is no question the Act applies to freehold land and is constitutionally valid.[12]

14. "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.

15. 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.

16. Flying-foxes are mammals indigenous to Australia and classified as protected wildlife under the regulations to the Act.[13] They are therefore, protected animals, for the purposes of s 88.

Causation

17. The principles of causation are important to these proceedings, particularly due to the respondents dispute claim that animals may die on the electric grids due to "frapping". Even if the Court were to find this were the case and the animals' death do not result directly from electrocution, the respondents would still be liable for having caused the deaths.

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[12] *Bone v Mothershaw* [2002] QCA 120; [2003] 2 Qd R 600; (2002) 121 LGERA 75 (McPherson, Williams JJA, and Byrne J); *Phillips v Spencer* [2005] QCA 317 (de Jersey CJ, McMurdo P, and Jerrard JA).

[13] See the affidavit of Dominique Germaine Thiriet affirmed 21 December 2004 at [4]-[6] and the affidavit of Dr Hugh Spencer affirmed on 31 August 2005 at [9]. 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*.

18. Section 88 contains no mental element and, therefore, if a consequence of a person's willed act is to take protected animals, the act may constitute an offence against the Act even if the person did not intend this consequence of their act. As a question of law causation is a question of common sense appreciating that the purpose of the inquiry is to attribute legal responsibility.[14]

19. A person may be held to have caused an occurrence or event even though they did not intend it to occur, even if a third party, the victim or natural process intervened, if the occurrence or event is a natural and ordinary consequence of the person's action.[15]

20. There may be no single cause of an occurrence or event, but if a person's conduct substantially or significantly contributed to the occurrence or event, they may be held to be legally liable.[16]

21. The significance of these principles for these proceedings is that, even if the Court accepts the evidence of Mr Thomas[17] that the deaths of flying foxes in 2004 occurred due to "frapping",[18] or "entanglement in the wires", then the respondents have still caused the deaths and, therefore, have "taken" protected animals for the purposes of s 88 of the Act because the "frapping" is a normal and ordinary consequence of the Respondents' action in constructing and operating the electric grids.

22. The only expert witness called with expertise in relation to the likely effects of the respondents' electric grids on flying foxes was Dr Spencer. He disputed Mr Thomas' explanation of "frapping". Dr Spencer's largely unchallenged evidence is "there is a very high likelihood that each of the different versions of electric grids operated by Mr Thomas kill, injure and harm flying foxes" (applying a plain meaning definition of these words).[19] The significance of Mr Thomas' observational evidence is to support a conclusion that large numbers of flying foxes come into contact with his grid system. Based on this point and Dr Spencer's evidence, there are likely to be very large numbers of flying foxes that are killed, injured or harmed even by the respondents' Mark VII grid. The conservation significance of flying foxes appears not to be disputed.[20]

THE SUBSECTION 88(3) DEFENCE

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

    (a) the taking did not happen in the course of a lawful activity;

    (b) the activity was objectively directed towards the taking; and

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[14] *Royall v R* (1991) 172 CLR 378; *Environment Agency v Empress Car Co (Arbertillery) Ltd* [1999] 2 AC 22.

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

[16] *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.

[17] Noting the objection taken to this opinion on the basis of his lack of expertise.

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

[19] Affidavits of Hugh John Spencer affirmed 31 August 2005 at [27] and affirmed 16 February 2007 at [17].

[20] Noting no challenge was made to this issue during cross-examination. See the affidavits of Dr Booth affirmed 9 February 2007 at [29]-[35]; Dr Spencer affirmed 31 August 2005 at [9].

(c) the respondents have not proven the taking could not reasonably have been avoided.

Field trials of grids not lawful

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

> **51 Requirement for registration**
> **(1)** A person must not use an animal for a scientific purpose, or allow an animal to be used for a scientific purpose unless the person is-
> (a) registered [under Chapter 4, Part 2]; or
> (b) an individual retained by a registered person acting in the course of the individual's retainer; or
> (c) a student at a college, institute, school, university or other institution that is registered and acting in the course of the person's studies with the institution.
> Maximum penalty – 300 penalty units or 1 year's imprisonment.

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

26. Section 48 of the *Animal Care and Protection Act 2001* defines "scientific purpose" as follows:

> **48 When animal is used for "scientific purposes"**
> **(1)** An animal is used for **"scientific purposes"** if it used-
> (a) in an activity performed to acquire, demonstrate or develop knowledge or a technique in a scientific discipline; or
> *Examples of an activity for paragraph (a)-*
> - diagnosis
> - environmental studies
> - field trials
> - producing biological products
> - product testing
> - research
> - teaching.
> (b) in connection with an activity mentioned in paragraph (a).
> **(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).

27. In his evidence-in-chief, Mr Thomas relied on the fact that he had been trialing and developing his "non-lethal" grid system since 1997 for the purpose of protecting his farm and providing a cheaper, non-lethal crop protection system to other fruit growers than netting of orchards. He and Mr Errol Young gave detailed specifications of the electronics of the respondents' electric grid system. At the first hearing before Pack DCJ, Mr Thomas even gave a demonstration of his electrical prowess to the Court through a display of the MKVII timing system in comparison to an electrical unit from an electric cattle-fence.[21]

28. In cross-examination before Pack DCJ, Mr Thomas agreed that electronics and agricultural science were scientific disciplines and that he was not registered under the

[21] Transcript of first trial pp 127-129.

Animal Care and Protection Act 2001.[22] It is a matter upon which the Court may take judicial notice that electronics and agricultural science are scientific disciplines.

29. It is clear that Mr Thomas is, in fact, using an animal in an activity performed to acquire, demonstrate or develop knowledge or a technique in a scientific discipline within the meaning of s 48 of the *Animal Care and Protection Act 2001*. The activity is the field trial of his "non-lethal" electric grids and the relevant scientific disciplines are electronics and agricultural science. The s 88(3) defence, therefore, is not available to the respondents' because their activity has not been lawful (other than under the Act) since the commencement of the *Animal Care and Protection Act 2001* on 1 March 2002.

Activity directed towards the taking

30. In *Booth v Frippery Pty Ltd* [2006] 2 Qd R 210 at 217 [31]-[33], McMurdo J with whom Williams JA and Holmes J agreed stated (footnote omitted):

> [31] In my view the intended effect of s 88(3), and its counterpart in s 89(3), is to provide a defence where the taking of a protected animal, or a protected plant, was unintended and in the course of the defendant's activity, was not reasonably avoidable. The relevant distinction is that employed by the criminal law between intent and motive. If a defendant intended that the activity should result in the taking of a protected animal, the defence is not available, regardless of the motive by which the defendant was induced to form that intention.
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> [32] That is not to accept either of the arguments respectively advanced by the appellants. In this provision the notion of probable consequence is not employed. The words "directed towards the taking" require a consideration of the defendant's actual thinking and of what was or was not the consequence which the defendant meant the activity to have. So the submission for the Chief Executive that the defence is not available if the respondents knew that the operation of the grids *might* kill injure or harm flying foxes should not be accepted. That submission, if accepted, could unfairly deny a defence in many cases. For example, a person driving on a country road at night might know that his or her car could kill or injure wildlife. As the Explanatory Notes made clear, this provision was inserted to provide a defence, additional to those provided under the *Criminal Code*, for people who "may incidentally or unintendedly take wildlife while carrying out legitimate activities".
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> [33] This interpretation accords with the stated objects of the Act and the scheme which it employs. In particular, it is consistent with that balancing of different interests to which I have referred that persons should be able to engage in activity, which is otherwise lawful, although it incidentally causes harm to wildlife, if that is a consequence they are not meaning to achieve and which, in the course of that activity, is not reasonably avoidable.

31. The reasoning of the Court of Appeal indicates that, on the evidence before the Court in the re-trial, s 88(3) is not available to the respondents as their activity is objectively directed towards the taking of flying foxes even though their subjective purpose is to protect their crop. The admitted purpose of operating the electric grid is to give an electric shock to flying foxes that collide with the grid. The second respondent admits[23] to have continued to use versions of the grids while observing deaths on them.

32. 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

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[22] Transcript of first trial p 133.
[23] Paragraphs [16]-[27] of the affidavit of Merv Thomas affirmed 4 July 2005.

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."

33. Despite the respondents claiming to have attempted, 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 respondents knew that the early models were lethal and continued to use them from 1997 to 2004.[24] 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. This goes beyond the example given by McMurdo J in the appeal regarding an activity that *might* result in taking a protected animal.

34. The same conclusion must be reached in relation to the Mark VII grid in light of Dr Spencer's largely unchallenged evidence is "there is a very high likelihood that each of the different versions of electric grids operated by Mr Thomas kill, injure and harm flying foxes" (applying a plain meaning definition of these words).[25] The respondents cannot ignore expert views with impunity and claim that they do not intend to cause events that are said to be highly likely to occur due to their actions.

35. Operating an electric grid which is known to kill, injure or harm 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, injure or harm flying foxes your activity is inevitably directed towards this because it is directly contributing to or working towards that outcome.

36. Consequently, the activity is directed towards the taking (even though the respondents may subjectively be attempting to develop a non-lethal grid). In addition, the respondents have proceeded to use their grids knowing that at least a small number of animals were likely to be killed. A person cannot proceed with reckless indifference to the fact that protected animals are likely to be killed and later claim the activity was not directed towards the taking.

Whether the taking could be reasonably avoided

37. There is no case law on the meaning of whether "the taking could not have been reasonably avoided" in subs 88(3) of the Act. However 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:

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[24] 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.

[25] Affidavits of Hugh John Spencer affirmed 31 August 2005 at [27] and affirmed 16 February 2007 at [17].

> "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."

38. 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.

39. The evidence of Adam Leard (adopting the previous affidavits of Graham Minifie) and Jon Norling indicated that netting of the orchard is both practical and economically beneficial because the cost of the netting will be re-couped through fruit that is saved.

40. The respondents have not proven, on the balance of probability, that the taking could not reasonably have been avoided (netting the orchard, for instance, is a reasonable alternative). The term, "reasonably avoided" should also be interpreted in a way that achieves the purpose of the Act, the conservation of nature.

EXERCISE OF THE COURT'S DISCRETION

41. 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; *Booth v Yardley* [2007] QPELR 229.

42. 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.

43. 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.

44. The applicant submits that, in balancing the matters of both private and public interest in this case, the following factors are relevant to the exercise of the Court's discretion to grant an enforcement order under s 173D of the Act:

    (a) the objects of the Act (s 4) and the public interest in the conservation of biodiversity, noting that Black Flying Foxes contribute to pollination and seed dispersal in many species of native plants[26] and are, therefore, important for ecosystem function generally;

[26] Affidavit of Carol Jeanette Booth (9 February 2007) paras [29]-[35] and affidavit of Hugh John Spencer (31 August 2005) at [9].

(b) the strength of the applicant's case that the respondents have committed the alleged offences, including the admissions made by the Respondents;

(c) the large number of flying foxes that are admitted to contact the grid, thereby leading to a high likelihood of large numbers of animals being killed, injured and harmed;

(d) the fact that this is a serious, calculated and deliberate offence carried on over many years by the Respondents in circumstances where the killing of flying foxes was largely hidden and unlikely to be detected;

(e) 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;

(f) the limited potential for the Respondents to obtain a Damage Mitigation Permit from the Chief Executive administering the Act under the regulations;

(g) the ease of by-passing the Respondents' MKVII electric grid directly to mains power to re-create a more lethal system (Mr Thomas stated in cross-examination before Pack DCJ it "would take 30 seconds");

(h) the availability of non-lethal methods to protect the Respondents' lychee crop, in particular the availability of netting to protect the crop that is economically sensible in the context of the fruit losses that are avoided;

(i) 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;

(j) the impracticality of enforcing an order to cease operating the grids without an additional order requiring them to be removed; and

(k) 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)).

45. In light of the factors set out above, the applicant submits that there is a very strong case that the first two orders sought should be granted. While not conceding the point, the applicant notes that Wilson DCJ in *Booth v Yardley* [2006] QPELR 229; [2006] QPEC 119 at [31] considered that an order for a donation to be made for the care of injured flying foxes "seems to me to be outside the intended parameters of" subs 173G(1)(d).

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