

Chris McGrath LLB (Hons), BSc, LLM (Environmental Law), Barrister-at-Law.

Level 2
Bank of NSW Chambers
33 Queen Street
Brisbane Qld 4000

ABN 40 110 324 909

Telephone: (07) 3229 9097
Facsimile: (07) 3229 4078
Mobile: 043 829 9097

Email: chris_mcgrath@bigpond.com

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Jo Bragg
Principal Solicitor
Environmental Defender's Office (Qld) Inc
Level 9, 193 North Quay
Brisbane Qld 4000

By email only to jbragg@edo.org.au

Dear Jo

Re: Advice on prospects of success in *Booth v Yardley*

INTRODUCTION

1. I have been asked to advise Dr Carol Booth on the prospects of success of an application for enforcement orders under s 173D of the *Nature Conservation Act 1992* ("NCA") to restrain Richard (Dick) and Antje (Annie) Yardley from electrocuting flying-foxes to protect a lychee crop on their property at Hoskins Road, Mirriwinni.

FACTS

Admissions by Mr Yardley

2. Dr Booth was informed on 9 January 2006 that there was to be a radio interview on the ABC Far North Queensland Rural Report the following day of Richard Yardley in which he would make admissions of electrocuting flying-foxes. Dr Booth contacted the ABC reporter, Richard Hudson, and requested an opportunity to respond to Mr Yardley's admissions. On the following day, 10 January 2006, the ABC aired the interview with Mr Yardley as well as an interview with Mike Devery, of the Environmental Protection Agency ("EPA"), and an interview with Dr Booth, speaking on behalf of the Queensland Conservation Council. Dr Booth has an audio copy and a transcript of the interview.
3. During the interview on ABC Radio, Dick Yardley said he had electrocuted a total of 1,100 flying-foxes on his electric grids since 2001 for the purpose of crop protection. The pertinent section of the transcript is:

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.

4. On 14 January 2006 there was a story in the Cairns Post newspaper, in which Mr Yardley was quoted as also admitting to electrocuting flying-foxes. The pertinent quote is:

“We took out 700 bats not this last year but the year before using our electric grids,” Mr Yardley said.

5. In his radio interview Mr Yardley stated the NCA did not prevent him using the electric grids. The pertinent section of the transcript is:

“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.”

6. Mr Yardley repeated this view in the story in the Cairns Post. The pertinent statements in the newspaper are:

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 EPA is only an agency,” he said. “They have got plenty of policies but no law.”

Investigation by Dr Booth, EPA and DEH

7. Dr Booth has lobbied the EPA to prosecute Mr Yardley for offences against the NCA. Officers of the EPA and Commonwealth Department of the Environment and Heritage (“DEH”) visited the farm in mid 2006 to investigate the killing of flying-foxes. However, the EPA and DEH have declined to prosecute Mr Yardley. They apparently consider he will retract his admissions if he is prosecuted and they will not have enough evidence to convict him if he does so.
8. Dr Booth has campaigned for flying-fox conservation since 2000. She has investigated illegal killing of flying-foxes in commercial fruit orchards, particularly in orchards with electric grids as they have the potential to injure and kill very large numbers of flying-foxes and cause suffering. She has taken two court proceedings against such electric grids:
- (a) In November and December 2000 Dr Booth investigated the electrocution of flying-foxes on a lychee farm near Kennedy in North Queensland. That investigation resulted in the Federal Court of Australia granting an injunction under the *Environment Protection and Biodiversity Conservation Act 1999*, restraining the fruit grower from electrocuting Spectacled Flying-foxes (reported as *Booth v Bosworth* (2001) 114 FCR 39).
 - (b) In 2005 Dr Booth sought an enforcement order under section 173D of the *Nature Conservation Act 1992* against the electrocution of Black Flying-foxes on a lychee farm near Ingham, in North Queensland (*Booth v Frippery Pty Ltd* [2005] QPEC 095). The application was initially dismissed but an appeal against the primary judgment in 2006 was successful (*Booth v Frippery Pty Ltd* [2006] QCA 74) and the case is to be reheard in the Planning and Environment Court on 10-12 October 2006.

9. Due to the failure of the EPA and DEH to prosecute Mr Yardley, Dr Booth wishes to take civil action herself to restrain Mr Yardley killing flying-foxes using his electric grids.
10. On 21 November 2005 Dr Booth visited the farm. She saw that the grids were still in place but there was no fruit on the lychee trees observable from the road, so she assumed the grids were not in use. There was a widespread failure of lychee crops on the coast in 2005.
11. In August 2006 Dr Booth again visited the farm. She took photographs of the electric grids, two of which are shown below.

Photograph of Yardley farm from Hoskins Road



Photograph of electric grid on Yardley farm



12. As shown in the above photograph, the electric grids are constructed of approximately 15 wires, spaced approximately 20 centimeters apart and strung horizontally between poles.
13. Dr Booth observed three electric grids on the farm and estimated their total length to be approximately 600-800 meters.
14. At the times Dr Booth visited the farm the grids were not operating. The grids would normally only operate during November-January each year during the lychee season.
15. From the farm's location near the Wet Tropics World Heritage Area the flying-foxes that are most likely to have been killed on the farm are Spectacled Flying-Foxes (*Pteropus conspicillatus*), which are listed as vulnerable under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("EPBC Act"). However, there are two other species of flying-foxes found in North Queensland: Black Flying-foxes (*Pteropus alecto*); and Little Red Flying-foxes (*Pteropus scapulatus*). All of these species are mammals indigenous to Australia and are protected animals under the NCA.
16. A title search indicates that the farm is owned by Mr Yardley and his wife, Antje Yardley.
17. In early September a letter of demand was sent on Dr Booth's behalf by EDO to Mr and Mrs Yardley requesting them to undertake to not use the electric grids and to dismantle them.
18. Mr and Mrs Yardley have not responded to that letter but a phone conversation today between yourself and Mr Walters you confirmed that Mr Yardley has received the letter. Mr Walters is not an admitted lawyer but he acts for landholders to "uphold" freehold land rights against environmental laws.¹

LAW

19. While the facts of this case might constitute an offence against s 12 (World Heritage) or s 18 (Listed threatened species) of the EPBC Act, I will not consider that Act in this advice. The reasons for this is that it is simpler to prove an offence against the NCA and because proceedings for an offence against the NCA are in the Planning and Environment Court, where there is an own costs rule. Proceedings for an offence against the EPBC Act occur in the Federal Court and are subject to the normal rule as to costs. The simplicity and lower costs risks of proceedings under the NCA make it unnecessary to consider the EPBC Act further.
20. Proceedings could be taken in the Planning and Environment Court under s 505 of the *Environmental Protection Act 1994* (Qld) for causing unlawful serious or material environmental harm, but s 88 of the NCA is of much more obvious application for killing wildlife. I will therefore concentrate on an offence against s 88 of the NCA here.

¹ This occurred in *Bosworth v Booth* [2004] FCA 1623 and *Burns v State of Queensland & Croton* [2006] QCA 235.

21. The NCA allows any person to seek an enforcement order from the Planning and Environment Court to remedy or restrain a “nominated offence” against the Act.

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.

Section 88

22. The relevant “nominated offence” in this case is s 88 of the Act. Between 19 December 1994 and 17 December 2004, 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.

23. The form of s 88 was amended on 17 December 2004, but the substance of the provision remained materially unchanged for the purposes of these proceedings.
24. An initial point to be noted in relation to s 88 is that, significantly, it contains no mental element and, therefore, if a consequence of a person’s willed act² 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.
25. However, in *Booth v Frippery Pty Ltd* [2006] QCA 74, McMurdo J (with whom Williams JA and Holmes J agreed) stated at [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

² Section 88 is, of course, subject to the general elements of criminality in the *Criminal Code*, including s 23 (Intention).

relevant distinction is that employed by the criminal law between intent and motive.³ 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.

26. A number of minor points may be made to clarify the operation of s 88. The introductory phrase, “subject to section 93”, refers to limited rights of Aboriginal and Torres Strait Islanders to take protected wildlife and has no application to the present proceedings. Conservation plans may be made under s 112 in relation to classes of wildlife and areas of major interest but there are no relevant conservation plans in relation to these proceedings.
27. “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.
28. “Protected animal” is materially defined in the Schedule (Dictionary) of the Act to “mean an animal that is prescribed under this Act”. The related term of “native wildlife” is also defined to mean “any taxon or species of wildlife indigenous to Australia.”
29. Between 19 December 1994 and 24 June 2005 flying-foxes (Genus *Pteropus*) indigenous to Australia were classified as “common mammals” under Schedule 5 of the *Nature Conservation (Wildlife) Regulation 1994*.
30. Since 25 June 2005 flying-foxes (Genus *Pteropus*) indigenous to Australia have been classified as “least concern mammals” under Schedule 5 of the *Nature Conservation (Wildlife) Regulation 1994*.
31. For the purposes of these proceedings, the only relevant “licence, permit, other authority or exemption under a regulation” is a Damage Mitigation Permit, which is provided for in the *Nature Conservation Regulations 1994*.⁴ Under these provisions a person such as Mr Yardley can apply to take protected animals causing damage to property. The EPA has published a guideline for issuing Damage Mitigation Permits for flying foxes stating that lethal grids will not be permitted. Mr Yardley appears to have held a Damage Mitigation Permit in some previous years but not in 2002 or 2004 when he admits that 1,100 flying foxes were killed.
32. Finally, because of the apparent involvement of Mr Walters in advising Mr Yardley, I note that there is no question the NCA applies to freehold land.⁵

Standard of proof

33. The civil standard of proof applies in these proceedings and, therefore, Dr Booth must prove her case on the balance of probabilities. However, because of the

³ *Criminal Code Act 1899* (Qld), s 23(3).

⁴ Between 19 December 1994 and 1 March 2004, s 112 of the Regulations provided for Damage Mitigation Permits. Since 1 March 2004, ss 278-281 of the Regulations have provided for Damage Mitigation Permits (see Tabs 5 and 6 of the Applicant’s Book of Authorities).

⁵ See *Bone v Mothershaw* [2003] 2 Qd R 600; [2002] QCA 120; *Phillips v Spencer* [2005] QCA 317; *Burns v State of Queensland & Croton* [2006] QCA 235.

significant consequences 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.⁶

Retrospectivity

34. There may be some issue concerning whether the relief sought gives retrospective operation to the provisions of the Act, ss 173D, 173F, 173G and 173H, under which the proceedings are brought and the Court is granted power to provide relief. Although taking flying-foxes in Queensland outside a protected area has been an offence under the Act under s 88 since 19 December 1994, Dr Booth's standing and the Court's powers to make orders restraining such offences only commenced on 19 December 2003, at the commencement of the *Environmental Legislation Amendment Act 2003* (Act No 96 of 2003).
35. Mr Yardley admits killing flying-foxes in 2002 and 2004. The killing in 2002 was therefore prior to the commencement of the *Environmental Legislation Amendment Act 2003*.
36. It is well established that the future operation of legislation is not retrospective simply because it relates to or is based upon past events. In the classic decision of *In re A Solicitor's Clerk* [1957] 1 WLR 1219 at 1222-1223 (Tab 18 of the Applicant's Book of Authorities), Lord Goddard CJ said:
- “This appellant was convicted of larceny in 1953 ... and, accordingly, he contends that to apply the provisions of the Act of 1956 to a person convicted before that Act came into operation would make its operation retrospective. ... But in my opinion this Act is not in truth retrospective. It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause of the reason for the making of the order, but the law has no retrospective effect.
37. In *Maxwell v Murphy* (1957) 96 CLR 261 at 267 (Tab 19 of the Applicant's Book of Authorities), Dixon J stated:
- “The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption.”
38. Similarly, see *Rodway v R* (1990) 169 CLR 515 at 518-521. In that case the High Court noted (at 523) that a person has no acquired right to a particular mode of procedure at his trial.
39. In my view seeking or granting relief against the killing of flying foxes in 2002 admitted by Mr Yardley will not be, in truth, retrospective. The orders will create liabilities in the future fixed by reference to past facts, matters or events.
40. In addition and alternatively, as the taking of flying foxes has contravened s 88 of the Act since 19 December 1994, the substantive rights of Mr Yardley have not

⁶ *Caloundra City Council v Taper Pty Ltd* [2003] QPELR 558; [2003] QPEC 019 at [14].

been affected by the changes in the mode of proceedings by which their offences may be brought to trial. From Mr Yardley's perspective the 2003 amendments to the Act are merely procedural.

41. Of course, no argument arises about retrospectivity in relation to the killing in 2004.

Exercise of the Court's discretion

42. 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.⁷

43. 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.⁸

44. 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.⁹

ADVICE ON EVIDENCE

45. In my opinion the main evidence required for these proceedings is an affidavit from Dr Booth annexing the relevant admissions by Mr Yardley and the photographs of the grids.

46. Mr Yardley's admissions are admissible as evidence to prove the killing of flying-foxes. If Mr Yardley denies that the killing occurred his admissions can be relied upon to discredit him and as prior inconsistent statements.¹⁰

47. If Mr Yardley denies killing flying-foxes and says his previous admissions "were just a joke" there is, what I call, "an elephant in the room", namely, the existence of electric grids on his property. The grids have no purpose other than to kill flying foxes. There does not seem to be a suggestion, as occurred in the Frippery Case, that the grids are operated at non-lethal levels. If Mr Yardley denies he has killed flying-foxes in the past the existence of the electric grids is powerful evidence that he is lying. When combined with his past admissions, I consider there is a strong evidentiary basis to establish an offence against s 88 of the NCA.

48. Dr Booth could also annex to her affidavit documents such as the DPI's *To Net or Not to Net* publication to provide evidence about non-lethal means of crop protection. This evidence is not necessary to prove an offence has occurred by may be relevant for the exercise of discretion by the Court.

49. An affidavit of service will also be required.

⁷ *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.

⁸ *Sedevcic* at 340D; *NRMCA (Qld) Ltd v Andrew* at 711-713.

⁹ *Mudie v Grainriver* at 58-59.

¹⁰ Under s 101 of the *Evidence Act 1977* (Qld).

OPINION ON PROSPECTS OF SUCCESS

50. Considering the evidence and law relevant to this case in my opinion there are good prospects of obtaining at least an enforcement order restraining the operation of the electric grids unless approved under the NCA. Orders for the dismantling of the grids or a payment of money for the care and rehabilitation of flying-foxes are less likely to be granted, but are still worth pursuing.

COSTS

51. Proceedings in the Planning and Environment Court are subject to an own costs rule under s 4.1.23 of the *Integrated Planning Act 1997*. Therefore, there is little risk of costs being awarded against Dr Booth if she is unsuccessful in the proceedings.

52. I am prepared to act as counsel in these proceedings on a pro bono basis.

INTERIM RELIEF

53. As the trial is unlikely to be heard before next year, an interim enforcement order should be sought to restrain the operation of the grid in the coming fruit season. To gain an interim injunction Dr Booth bears an onus to establish for the Court that: there is a serious question to be tried in the principal proceedings; and the balance of convenience favours the grant of the interim order/injunction.¹¹ In my opinion there are reasonable prospects of obtaining an interim enforcement order.

PLEADINGS

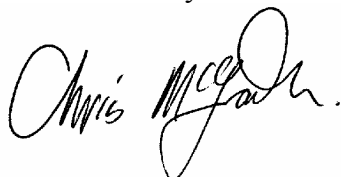
54. I have settled a draft Originating Application and Application in a Pending Proceeding (for the interim relief) and have provided them to you.

CONCLUSION

55. In my opinion there are good prospects of obtaining at least an enforcement order restraining the operation of the electric grids unless approved under the NCA. Orders for the dismantling of the grids or a payment of money for the care and rehabilitation of flying-foxes are less likely to be granted, but are still worth pursuing. An interim enforcement order should be sought to restrain the operation of the grids in the coming fruit season.

Please contact me if you have any questions in relation to this matter.

Yours faithfully



Chris McGrath

¹¹ *American Cyanamide v Ethicon Ltd* [1975] AC 396; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153 per Mason ACJ; *Re Minister for Immigration and Multicultural Affairs; Ex parte Fejzullahu* [2000] HCA 23; (2000) 171 ALR 341 at 343 per Gleeson CJ.