SUPREME COURT OF QUEENSLAND

CITATION:	*Booth v Frippery P/L & Ors* [2006] QCA 74
PARTIES:	**CAROL JEANETTE BOOTH** (applicant/appellant) **JAMES ANTHONY PURTILL** (appellant) **v** **FRIPPERY PTY LTD** ACN 010 890 007 (first respondent) **MERVYN MEYER THOMAS** (second respondent) **PAMELA ANN THOMAS** (third respondent)
FILE NO/S:	Appeal No 9268 of 2005 P & E Appeal No 4658 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Planning and Environment Appeal
ORIGINATING COURT:	Planning and Environment Court at Townsville
DELIVERED ON:	17 March 2006
DELIVERED AT:	Brisbane
HEARING DATE:	27 February 2006
JUDGES:	Williams JA, Holmes and McMurdo JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed** **2. The proceeding remitted to the Planning and Environment Court for rehearing** **3. The respondents are to pay the costs of the applicant/appellant (Carol Jeanette Booth) of the application for leave to appeal and the appeal** **4. The Chief Executive is to pay the costs of the respondents incurred in consequence of his application and joinder** **5. The respondents should be indemnified from the Appeal Costs Fund for costs payable to the applicant/appellant (Carol Jeanette Booth)**
CATCHWORDS:	ANIMALS – VARIOUS STATUTORY PROVISIONS – PROTECTION OF FAUNA AND GAME LAWS – OFFENCES – QUEENSLAND – TAKING OR KEEPING FAUNA – where the respondents sought to keep flying foxes

away from their lychee orchard using an electric grid system – where earlier versions of the electric grids had caused the death of flying foxes – where the applicant/appellant argued that the operation of the grids contravened s 88 of the *Nature Conservation Act* 1992 (Qld) – where the applicant/appellant brought proceedings in the Planning and Environment Court seeking orders to restrain the use of the electric grids – where the lower court dismissed the application – where limited leave to appeal was granted in relation to the proper interpretation of s 88(3) of the *Nature Conservation Act* 1992 (Qld) – whether the words in s 88(3)(a) "not directed towards the taking" should be interpreted to provide a defence where the taking of a protected animal was unintended or unintentional

APPEAL COSTS FUND – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – WHEN GRANTED – where the appeal involved the interpretation of s 88(3) of the *Nature Conservation Act* 1992 – where the interpretation of this section has not been the subject of any previous decision of this court – where the interpretation of s 88(3) does not precisely accord with any of the respective arguments – whether it is appropriate that the respondents be indemnified from the Appeal Costs Fund for costs payable to the applicant/appellant

Animal Care and Protection Act 2001 (Qld), s 51
Criminal Code Act 1899 (Qld), s 23(3)
Integrated Planning Act 1997 (Qld), s 4.1.56
Nature Conservation Act 1992 (Qld), s 4, s 5, s 7, s 73, s 88, s 88(1), s 88(2), s 88(3), s 88(3)(a), s 89, s 89(3), s 162, s 173D, s 173D(4) s 173F, s 173G
Nature Conservation Regulation 1994 (Qld), s 281

COUNSEL: S J Keim SC**,** with C J McGrath, for the applicant/appellant
G J Gibson QC, with J S Brien, for the appellant
J R Baulch SC for the respondents

SOLICITORS: Environmental Defenders Office (Qld) for the applicant/appellant
Environmental Protection Agency for the appellant
Roberts Nehmer McKee for the first, second and third respondents

[1] **WILLIAMS JA:** The facts and issues relevant to this appeal are fully set out in the reasons for judgment of McMurdo J which I have had the advantage of reading. I agree with all that is said therein, but wish to add some very brief observations of my own.

[2] As pointed out by McMurdo J, the provisions of the *Nature Conservation Act* 1992 (Qld), ("the Act") and in particular the scope of operation of s 88 thereof, give rise to what will often be a delicate, but potentially inflammatory, balancing exercise.

Much acceptable human activity, sometimes necessary human activity, puts wildlife at risk of being injured or killed. That was clearly recognised by the legislature and the Act provides, inter alia, for the granting of licences, permits and other authorities to facilitate achieving the appropriate balance.

[3] An owner is clearly entitled to fence his property. The landowner's general intention would at least be to keep his animals in and to keep unwanted animals out. Even the most basic fence may in certain circumstances cause injury, or even death, to an animal. Clearly it was not envisaged that a landowner would require a licence or permit under the Act in order to erect a simple fence.

[4] During the hearing at first instance the appellant advanced a positive case by calling witnesses who suggested that the respondents should protect their lychee crop by installing netting. That, to my mind, highlights the difficulty of placing too strict an interpretation on various provisions of the Act. There is no doubt that many flying foxes could be injured by flying into the netting, and indeed some would also be trapped by it. On a strict interpretation that would constitute a taking for purposes of the Act and in consequence the erection of the netting would be illegal. But that measure was being put forward as a lawful means of controlling the flying fox problem.

[5] Any system designed to deter flying foxes from eating the fruit could inflict, albeit momentarily, some injury to the flying foxes; even a system using loud noises or bright lights could impact on the senses of the flying foxes in a way that at least on some occasions some mild injury could be inflicted. Depending on further findings of fact it may well be that the use of non-lethal electric grids would fall into the same category. It is necessary that there be a clear dividing line between what is an acceptable method of control and what is conduct rendered illegal by the Act.

[6] Because of such considerations it is important to construe provisions of the Act, such as s 88, in a way which recognises the critical balancing factors involved.

[7] It is against that background that I agree with all that has been said by McMurdo J in his reasons and with the orders he has proposed.

[8] **HOLMES J:** I have had the advantage of reading the reasons of Williams JA and McMurdo J, and agree with all they have said. I would add only this observation: that in construction of s 88, it is of some relevance that subsection (2), the offence provision, provides an exception where the taking is "authorised under this Act". That, as McMurdo J has noted, is a reference to authorisation by permit under the *Nature Conservation Regulation* 1994 (Qld).

[9] Part 5 of Chapter 3 of the Regulation is headed "Permits for taking, keeping or using animals". Division 3 of that Part provides for the grant of damage mitigation permits, allowing the taking, keeping or use of a protected animal which is "causing or may cause damage to property".[1] Section 281 of the Regulation sets out the matters of which the Chief Executive must be satisfied before granting such a permit. In practical terms, the Chief Executive might, in the case of a farmer threatened with crop loss through the predations of a particular species, grant a permit if satisfied of these things: the potential for damage; that the land holder had

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1 Section 278.

made reasonable but unsuccessful attempts to prevent or minimise the damage; that there was a prospect of significant economic loss; that action under the permit would not adversely affect the animal's survival in the wild; and that the proposed way of taking it was humane and not likely to cause unnecessary suffering. Thus there is a mechanism for a considered assessment of a proposed taking, by reference to the existing situation and its consequences for the landholder, possible harm to the animal and its species, and any alternatives. The regulation is a clear legislative recognition of the balancing exercise entailed in such cases.

[10] Given the statutory context which includes the permit system, this Court's construction of s 88(3), as providing a more limited defence than thought at first instance, is not as onerous in its consequences as might at first blush appear.

[11] I agree with the orders proposed by McMurdo J.

[12] **McMURDO J:** The first respondent, Frippery Pty Ltd, has grown lychees on its land north of Townsville since 1987. The other respondents, Mr and Mrs Thomas, are respectively its director and secretary. The orchard has long been troubled by flying foxes, which eat the blossom and fruit. The respondents have sought to keep them away by structures in various forms called grids, through which runs an electric current. Earlier versions at least of the grids have caused the death by electrocution of large numbers of flying foxes.

[13] The appellant, Ms Booth, says that the operation of the grids has contravened s 88 of the *Nature Conservation Act* 1992 (Qld) ("the Act"). She brought proceedings against the respondents in the Planning and Environment Court, for an enforcement order pursuant to s 173D of the Act. In particular she sought orders to restrain the further use of the electric grids and to dismantle them, as well as an order for the payment of an amount, as assessed by the court, to a certain entity concerned with the welfare of flying foxes. The case came before Pack DCJ, who after a three day hearing last September, delivered a reserved judgment dismissing the application in its entirety.

[14] In this court, Ms Booth sought to challenge the judgment on a number of grounds, each of which was said to involve a question of law for which leave to appeal[2] should be given. At the same time, the Chief Executive of the Department of the Environmental Protection Agency applied to be joined as a party to the application for leave to appeal, in order to argue that his Honour erred in a particular respect in his interpretation of s 88. For reasons then given, this court permitted the joinder of the Chief Executive and granted leave to appeal but limited to that question argued by the Chief Executive, which was also one of the grounds pursued by Ms Booth. The question to which this appeal is confined is then one of the proper interpretation of s 88(3) of the Act which provides a defence to a charge of the offence which is alleged.

The applicant's case at the trial

[15] Section 173D of the Act provides that any person may bring a proceeding for an order to remedy or restrain the commission of an offence against certain sections of that Act, which is called an enforcement order. An offence against s 88 is one. By

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[2] Under the *Integrated Planning Act* 1997 (Qld), s 4.1.56

s 173D(4) the Chief Executive may elect to be joined in the proceeding. By s 173F, the court may make an enforcement order if satisfied the offence has been committed, is being committed, or unless the order is made, will be committed. Section 173G describes the types of orders which can be made, which include orders in the nature of both prohibitory and mandatory injunctions. This proceeding therefore required the proof of an offence, or the likelihood of a future offence. Mr and Mrs Thomas were joined apparently on the basis that they were and are 'executive officers'[3] of their company, and as such are bound to ensure that it complies with the Act, such that if it does not, they also commit an offence: s 162.

[16] Ms Booth gave evidence that on 16 and 17 December 2004, she entered the respondents' property, inspected part of it and observed many dead flying foxes. She claimed that the operation of the electric grids had for many years been killing flying foxes in large numbers, and that this had been in contravention of s 88 of the Act.

[17] As it happened, s 88 was amended with effect from 17 December 2004, but the amendment is not significant to the outcome of this appeal. In particular, the provision under consideration, which is s 88(3), was not amended. Section 88 then provided as follows:

> "**88 Restriction on taking etc. protected animals**
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> (1) Subject to section 93, a person, other than an authorised 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; or
>
> (c) an exemption under a regulation.
>
> Maximum penalty – 3000 penalty units or 2 years imprisonment.
>
> (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.
>
> (5) In this section –
>
> ***authorised person*** means a person as follows performing functions under this Act in relation to the protected animal –
>
> (a) the chief executive

[3] As defined in the Schedule

(b) a conservation officer, public service officer or other employee of the department acting under the chief executive's authority."

[18] The applicant's case was that the respondents had contravened s 88(1) by the "taking" of flying foxes. The Act defines the word "take"[4] in relation to an animal 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" the animal. The case was that the flying foxes had been and were being "taken" in two ways. First they were being killed by electrocution as they came into contact with a grid. Secondly, where they were not killed by electrocution they were nevertheless in receipt of an electric shock which, it was argued, involved an "injuring or harming" of the animal and thereby a "taking". That second aspect assumed a particular importance because according to Mr Thomas, whose evidence was accepted by the primary judge, he had successfully developed a type of grid, called the Mark VII, which was not life threatening. He said that its effect was limited to a momentary shock, designed to turn the animal away and perhaps to deter it from returning. But even in that way, the flying foxes were said to have been injured or harmed, according to a witness called as an expert by the applicant.

[19] His Honour made no finding as to whether this momentary shock by the Mark VII was such as to injure or harm a flying fox. He did find that the Mark VII was "non lethal". But undoubtedly, other grids, still in use on the property, were more dangerous and had killed large numbers of flying foxes. His Honour found that by the time of the trial last September each of the grids was convertible to a Mark VII "with a relatively low expenditure" and the respondents were well advanced in their conversion preparations.

[20] In terms then of s 88(1), the applicant proved that the respondents had taken protected animals at least by killing flying foxes with the grids other than the Mark VII. That conduct would not have been proscribed had the respondents held a licence, permit or other authority. In November 2003, Mr Thomas had applied for a permit from the Environmental Protection Authority, but shortly after he withdrew the application. There was then no circumstance which in terms of the then s 88(1) would have resulted in the respondents taking of flying foxes being outside the proscription in s 88(1).

[21] Accordingly his Honour had to consider whether the respondents had made out a defence in terms of s 88(3). He held that they had done so. In particular he held that the operation of the electric grids was a "lawful activity" and one which "was not directed towards the taking" of the animals. He further held that the taking could not have been reasonably avoided, a conclusion which is not in question on this appeal because of the limited basis upon which leave to appeal has been given.

[22] The primary judge saw the relevant activity as being "the use of the grids".[5] He rejected Ms Booth's argument, which does not arise for consideration here, as to whether that use was in all respects a "lawful activity". She had argued that in the respondents' development of a less dangerous grid, by trialling various designs, the respondents had contravened s 51 of the *Animal Care and Protection Act* 2001

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4 Section 7 and the Schedule to the Act

5 Judgment para [44]

(Qld) by using flying foxes for what were said to have been "scientific purposes". Save in that respect, the use of the grids was apparently accepted to be a "lawful activity". And according to other findings, that experimentation with earlier versions of the grid should not re-occur now that the Mark VII had been developed.

[23] The question then was whether this activity of the use of the grids "was not directed towards the taking". His Honour held that it was not, but rather "that the use of the grids was objectively directed to protecting the lychee crop".[6] And in rejecting the argument as to the experimentation being for "scientific purposes", his Honour had said "the purpose was clearly to protect the lychee crop. To my mind the effect on some flying foxes was incidental to that purpose".[7]

[24] In that way, his Honour construed s 88(3)(a) as requiring the proof of a *purpose*, which is a purpose other than the taking of the animal. Undoubtedly the respondents' purpose was to protect their crop, rather than to "take" and in particular to kill flying foxes as an end in itself. The question for determination in this appeal is whether that involved a wrong interpretation of the sub-section.

[25] Each of the appellants contends that it does, although upon somewhat different arguments. For Ms Booth, it was submitted that an activity could be directed towards taking a protected animal in one of three ways, being:

> "if
>
> (a) taking is the primary purpose of the activity or one of multiple purposes;
> (b) taking is not the primary purpose, it is a means of bringing about the purpose; or
> (c) taking is not the primary purpose, but an activity is undertaken knowing that the taking is a probable consequence of the activity."

[26] For the Chief Executive it is argued that an activity is "not directed towards the taking" of a protected animal only if the taking of that animal is not an intended consequence of the activity. But as to what that means, it is submitted that "the taking of the flying foxes was an intended consequence of the operation of the electric grids because the respondents deliberately operated the grids knowing that they might kill, injure or harm flying foxes". So upon this argument, the defence cannot be proved if the activity was deliberate and its consequence was known by the defendant to be a possibility.

[27] For the respondents, it is argued that his Honour was correct to look at the purpose of the activity, that is to look at their actual motive in operating the grids, which was the protection of the crop, not the taking of an animal.

[28] His Honour's interpretation would make the defence available in many more cases than under either of those argued by the appellants. For example, the hunting of a protected animal for food could be said to be an activity not directed towards the taking of the animal but towards the provision of food. In turn, the element of the defence as required by paragraph (b) of s 88(3) could be made out because the

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6 Judgment para [44]
7 Judgment para [43]

taking of the animal could not be reasonably avoided in the course of the activity of hunting it. The result would be that such a case would be outside the reach of s 88 and its intended protection of wildlife. And this is a statute which, for example, otherwise provides for the rights of Aborigines and Torres Strait Islanders to take, use or keep protected wildlife according to Aboriginal tradition or Island custom. It is also a statute which provides for conservation plans as well as for the issue of licences, permits or authorities in individual cases. An apparent intention of the Act is to provide a regime for balancing the often competing interests of the preservation of animal and plant life with the economic and social interests of persons who wish to use their land. Were s 88(3) to be interpreted as it was by the primary judge, the proscription within s 88(1) would in practice be very limited, and the regime of permits or authorities would have a small role indeed. The same would apply in relation to taking a protected plant, which is proscribed in similar terms by s 89 and for which a defence is provided in identical terms within s 89(3).

[29] The object of this Act is the conservation of nature: s 4. That object is to be achieved by the means which is summarised within s 5. They include:

> "(d) Protection of native wildlife and its habitat
>
> - the protection of the biological diversity of native wildlife and its habitat by -
>
> (i) the dedication and declaration of protected areas; and
>
> (ii) prescribing protected and prohibited wildlife; and
>
> (iii) the management of wildlife in accordance with –
>
> (A) the management principles; and
>
> (B) the declared management intent; and
>
> (C) any conservation plan;
>
> for the wildlife; and
>
> (iv) entering into conservation agreements;
>
> (e) Use of protected wildlife[8] and areas to be ecologically sustainable
>
> - providing for the ecologically sustainable use of protected wildlife and areas by the preparation and implementation of management and conservation plans consistent with the values and needs of the wildlife or areas concerned, particularly plans dealing with the management of –
>
> (i) protected areas; and
>
> (ii) the taking or use of wildlife; and
>
> (iii) protected wildlife and its habitat; and
>
> (iv) critical habitats and areas of major interest;"

Wildlife is protected by the application of the principles as expressed in s 73, which include principles of the conservation of wildlife to ensure its survival and natural

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[8] And protected wildlife is defined by the Schedule to include "common wildlife" meaning native wildlife that is prescribed as common wildlife: Schedule

development, the removal of the effects of threatening processes relating to the wildlife and ensuring that any use of wildlife is ecologically sustainable.

[30] This interpretation of s 88(3) could well negate much of the intended effect of the statute. The objective of the conservation of wildlife would give way to the objectives of an individual. As long as the taking of the animal was not an end in itself, a defendant who in pursuing an economic self interest could prove the matter in paragraph (a) of s 88(3) no matter how disproportionate were the environmental consequences. That seems at odds with the way in which this statute was intended to balance the competing public and private interests involved in cases such as the present one. And it is unlikely that this balancing was intended to be affected in the form of an expressed defence to a charge of a contravention. Instead, the apparent intention was to balance those interests through the regime of conservation plans, licences, permits and other authorities.

[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.[9] 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.

[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[10] 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".[11]

[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.

[34] As already noted, the Act was amended with effect from 17 December 2004, so that s 88 is now in these terms (in part):

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

10 To the *Nature Conservation Bill* 1992 (Qld) at p 21

11 The Minister's Second Reading Speech was in the same terms: Hansard 28 April 1992 p 4589

"**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."

[35] Sub-section (3) was not amended. And the amendments made to s 88 do not suggest that the words in sub-section (3) should now be given a different interpretation. In particular, there is still provision for a person to take a protected animal by an authority or permit granted to that person. That comes from the

qualification in s 88(2) if the taking is authorised under this Act, as it is if authorised by a permit.[12] The present terms of s 88 were also relevant in this case, for it was open to Ms Booth to rely upon an offence committed after December 2004, and had any offence been proved, the likelihood of the commission of a further offence. Section 88, both before and after the December 2004 amendments, had to be considered. But there was no change to the meaning of s 88(3).

[36] To return then to the facts of this case, the defence would be available only if the respondents had firstly proved that the operation of the grids was not intended to result in the taking, i.e. the killing, injuring or harming of a flying fox. That question was not considered by the primary judge because of his different interpretation of the sub-section. The necessary factual findings were not made by his Honour and they cannot be made in this court. They would involve also a consideration of whether the momentary infliction of an electric shock would of itself involve the harming or injuring of a flying fox. If it does then the operation of even the Mark VII would involve a "taking", and an operation which was directed towards a taking in that sense. In that way the operation of the device might be different from, for example, the protection of crops by things such as nets or walls, where the protective device is not itself intended to inflict any momentary shock. On at least one view of the evidence then, the Mark VII was intended to cause an effect which may or may not have involved some harming or injuring of the animal. The impact of that electric shock was the subject of controverted evidence at the trial, about which findings were not made. The question of whether to momentarily shock is to 'harm' or 'injure' the flying fox should be determined with the benefit of such findings.

[37] Accordingly, depending upon facts yet to be found, the respondents may or may not have a defence under sub-section (3). But on the facts which were found by his Honour, a defence was not established and as the existence of such a defence was essential to the outcome, it follows that this appeal should be allowed. Because of the need for further factual findings the case will have to return to the Planning and Environment Court. Further, it would not be appropriate for the matter to be reheard or further heard by Pack DCJ, because the further factual findings which are relevant could well be affected by his Honour's findings already made and his expressed views as to the credibility or reliability of certain witnesses.

Orders

[38] The appeal should be allowed and the proceeding should be remitted to the Planning and Environment Court for rehearing. The respondents should pay the costs of Ms Booth, of the application for leave to appeal and the appeal. When applying for leave to be joined, the Chief Executive undertook that he would not seek an order for costs and that he would pay to the respondents their costs incurred in consequence of his application and joinder. Accordingly he will be ordered to pay those costs to the respondents.

[39] It is appropriate that the respondents be indemnified from the Appeal Costs Fund for the costs payable to Ms Booth, because the appeal has succeeded upon a question of the interpretation of this section which has not been the subject of any

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12 A damage mitigation permit granted under s 281 of the *Nature Conservation Regulation* 1994 (Qld)

previous decision of this court, and where the interpretation within this judgment does not precisely accord with any of the respective arguments.