

THE PLANNING AND ENVIRONMENT COURT  
JUDGE RACKEMANN

P & E Application No BD2845 of 2006

CAROL JEANETTE BOOTH

Applicant

and

RICHARD GEORGE YARDLEY

First Respondent

and

ANTJE GESINA YARDLEY

Second Respondent

BRISBANE

..DATE 03/11/2006

ORDER

HIS HONOUR: This is an application in pending proceedings pursuant to section 173E of the Nature Conservation Act 1992. The orders which I am asked to make today are interim enforcement orders.

Pursuant to section 173E the Court may make such an order pending decision of a proceeding for an enforcement order, if the Court is satisfied it would be appropriate to make the order. However, while the Court may make the order subject to conditions, it may not require, as a condition of the order, any undertaking for damages, and none is offered.

The primary proceeding is for an enforcement order. Such proceedings are permitted to be brought pursuant to section 173D, which provides that a person may bring a proceeding in the Court for an order to remedy or restrain the commission of a nominated offence.

The expression "Court" and the expression "nominated offence" are defined in section 173A. "Court", for the purposes of these provisions, means the Planning and Environment Court. It may be noted that whilst, as the agent for the respondents pointed out, the Planning and Environment Court is created pursuant to the Integrated Planning Act, its jurisdiction pursuant to section 4.1.2 of that Act is the jurisdiction given to it under any Act.

The making of an enforcement order is subject to section 173A, which permits a Court to make an enforcement order if it is

satisfied the nominated offence is being, or has been, committed, or will be committed unless the enforcement order is made.

In this case it is suggested that the Court will ultimately have the power to make an enforcement order because it will be satisfied that a nominated offence, namely an offence pursuant to section 88 of the Nature Conservation Act, has been committed in the past and will be committed unless an enforcement order is made.

Section 88 of the Nature Conservation Act places restrictions on taking a protected animal. In particular, in this case it is contended that an offence has been, and a further offence will be, committed, in the absence of any restraint, by reason of the respondents' use of electrical grids to prevent flying foxes from feeding on the crop of lychees on their farm.

In determining whether it is appropriate to make such an order, it is relevant to have regard to all relevant matters, including the extent to which the applicant has shown that there is a prima facie case in the primary proceeding and the balance of convenience.

Those concepts have, of course, been discussed on several occasions in the context of interlocutory injunctions generally. In a recent decision of the High Court in *Australian Broadcasting Corporation v. O'Neill* (2006) HCA 46, the Court has again reviewed the principles, particularly in relation to the dichotomy between the establishment of a prima

facie case and the raising of a serious question to be tried. An examination of the judgments shows some convergence between those notions.

In the joint judgment of Gleeson and Creenan JJ, approving reference was made to the analysis of Gummow and Hayne JJ, who endorsed the prima facie case formulation from the earlier decision of the High Court in *Beecham Group Ltd v. Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

They added, however, at paragraph 65 as follows:

"By using the phrase 'prima facie case', their Honours did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. That this was the sense in which the Court was referring to the notion of a prima facie case is apparent from an observation to that effect made by Kitto J in the course of argument. With reference to the first inquiry, the Court continued, in a statement of central importance for this appeal:

'How strong the probability needs to be depends, no doubt, upon the nature of the rights [the plaintiff] asserts and the practical consequences likely to flow from the order he seeks.'

...

When *Beecham* and *American Cyanamid* are read with an understanding of the issues for determination and an appreciation of the similarity in outcome, much of the assumed disparity in principle between them loses its force. There is then no objection to the use of the phrase 'serious question' if it is understood as conveying the notion that the seriousness of the question, like the strength of the probability referred to in *Beecham*, depends upon the considerations emphasised in *Beecham*."

It has already been observed that, in order to succeed in the primary proceeding, the applicants will need to satisfy the Court that the nominated offence has been committed, or will be committed unless the enforcement order is made. Where the Court is so satisfied, an order may be made of the type in section 173G. Those orders may direct a party to stop or not to start an activity, amongst other things.

Section 173H makes it clear that an order which requires someone to stop or not start an activity may be exercised whether or not it appears the person intends to engage or continue to engage in the activity. It seems to me that power is one which refers to the activity the subject of the order in section 173G. The primary conditions to the making of an order under section 173F remain.

In terms of the nominated offence, it is the offence under section 88, which currently provides, in part, as follows:

"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.

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(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.
- ..."

Section 93 relates to aborigines and Torres Strait Islanders. The evidence before me suggests that the respondents are not aborigines or Torres Strait Islanders exercising their rights, and nothing to the contrary was contended.

Similarly there is no suggestion that the taking, in this case, is in a protected area. The expression "protected area" is one of defined meaning under the Act. There is evidence, sworn on information and belief, that the relevant land is not within a protected area and indeed that is common ground. In fact the agent, who represented the respondents, relied upon the fact that it is not in a protected area to support one of the arguments with which I will deal later.

The prohibition in subsection 2 on the taking of the animal is subject to the qualification that the person is not an authorised person, or his taking is not authorised under the Act. Again it was a matter of common ground between the parties that the respondents are not authorised people, nor was their taking authorised under any permit or the like under the Act.

The material shows that, at earlier points in time, the respondents did have some limited authority, to take flying

foxes. The most recent of those authorities was one which was valid from 27 November 2003 to 4 February 2004, which permitted the taking of 45 Spectacled flying foxes by means of shooting only. The conditions of that permit prohibited the use of lethal electric grids. At an earlier time the respondents had an authority to use the grids to take 100 animals, but the licensing position has obviously changed.

It appears plain therefore, that, on the face of the legislation, the respondents were required not to take a protected animal. The expression "take" is itself defined for the purposes of the Act in Schedule 10 to mean in relation to an animal:

"(i) hunt, shoot, wound, kill, skin, poison, net, snare, spear, trap, catch, dredge for, bringing ashore or aboard a boat, pursue, lure, injure or harm the animal; or

(ii) attempt to do an act mentioned in subparagraph (i)

..."

In this case it is contended that the respondents committed an offence under section 88(2) and will, unless restrained, commit a further offence under that section by the use of the electric grids in a way which would kill, injure or harm flying foxes which come into contact with them.

A flying fox is a protected animal within the meaning of the section. A protected animal is defined by reference to animals of certain classes as prescribed for the purposes of the Act. The relevant regulations make it clear that the flying fox, as a mammal, falls within a category of protected animal under the Act at present. That position applied at all material times, although the categories have changed over time.

In support of her case that the electric grids result in the taking of the flying foxes, the applicant relies upon two categories of material. The first is material which establishes that there are grids erected on the property and that the grids are of a kind which would cause death or injury to bats which come into contact with them. That evidence is provided, in particular, by a combination of the evidence of Dr Booth as to the existence of the grids, Mr Joy as to the nature of those grids and Dr Spencer as to their effects.

In addition to that, the applicant relies upon evidence of admissions by Mr Yardley. The material filed on behalf of the applicant referred to a number of different admissions said to have been made in the media, however, evidence has only been called, in this application, to positively establish that Mr Yardley was the person who made the remarks reported in one of those instances. That related to a radio interview which included the following passages:

"Q3: "So since the State government said you're not allowed to use the electric grids have you actually used them?"

Answer:

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"Yes, last - not this last year but the year before we used our electric grids, we took out - or killed 700 bats in the electric grids. Another year before that by the time we got a damaged mitigation permit, which now we 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 and it's quite humane, it just kills them very quickly."

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Q4 "It's a lot of bats though?"

Answer:

"I know and that's why when we started off - we have a very small electric grid system for the size farm we have and we are prepared to lose five to 10 per cent to bats and that's all we were losing to start off till the Government made us turn them off and we've become a foodline for the bats now and we need - we have to now build more electric grids to take out or to kill more bats because we've become a foodline, before we weren't."

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Q6 "And that's when you decided to keep using the grids?"

Answer:

"Well, we wrote letters and never got them answered from the Minister, Director-General and the Premier and we decided that seeing as they don't answer the letters then they mustn't have any objection to using the grid, so we just turned the grid back on."

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Q 11 "Are you concerned about the State Government taking you to Court?"

Answer:

"Definitely not."

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Q 12 "You believe you'd win a Court case?"

Answer:

"Yes..."

The interview was conducted on the 17th of January 2006.

The respondents did not read any affidavit material in this application which attempted to dispute that they intend to kill or injure flying foxes by use of the grids. Before the proceedings commenced the applicant's solicitor wrote a letter of demand which did not produce any undertaking not to use the grids, and indeed, in the course of these proceedings, the agent for the respondents made it clear that they would not give any such undertaking.

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It seems, at least on the material before me at this stage, that there is a relatively strong prima facie case that the applicant will be able to establish, at the final hearing, that the respondents have committed an offence or will, unless an enforcement order is made, commit an offence pursuant to section 88. Certainly, the material in relation to that is sufficient to conclude, at this point for the purposes of a consideration of an interim enforcement order, that the prospects are sufficient to justify the preservation of the flying foxes pending trial subject, of course, to a consideration of other relevant factors, including the balance of convenience.

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The agent for the respondents pointed to the defence which is provided for in subsection 3. The defence says that it is a defence "to prove" the matters referred to in (a) and (b). It seems to me that implicitly carries with it the requirement that it is a defence to be established by the

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respondents in relation to any contravention.

The respondents, as I have noted, have not placed any material before the Court to attempt directly to establish that such a defence exists. In fact, the only material they relied upon this morning was material which went to an admissibility point, upon which I have already ruled. Leaving that to one side, however, their prospects of establishing such a defence appear, at this stage, to be insufficient to change the conclusion which I have already expressed in relation to the sufficiency of the prospects in terms of justifying interim relief of the type which is sought here.

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The question of the defence in relation to subsection 3 has recently been the subject of a decision of the Court of Appeal in a matter of Booth v. Frippery Pty Ltd & Others [2006] QCA 74. That case involved the use of grids, some of which were nonlethal. Those who used the grids successfully argued at first instance that the defence was available because the activity of using the grids was directed towards the protection of the crop rather than the taking of the protected animals.

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The leading judgment was written by McMurdo J who said as follows:

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"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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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 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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"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..."

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In this case the evidence that the respondents have installed and maintained, on their property, an electric grid system of a kind designed to be fatal to flying foxes and the evidence of the admissions made in the course of the interview, suggest that the activity of protecting their crop by the use of electric grids was directed towards the taking of the flying foxes.

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The applicant made it clear that there are other aspects of the defence which she would be contending were also not made out, in particular whether the use of a grid system could, in

any event, be characterised as a "lawful activity" and whether subsection b was satisfied, in the sense that the taking, that is the injuring, harming or killing, could have been reasonably avoided by the use of some other means of crop protection. It is unnecessary for me to go into the details of those. It is sufficient for me to record the view that I have already stated, that a sufficient prima facie case has been demonstrated on the material to warrant the making of an order, subject to other relevant considerations, particularly the balance of convenience.

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Before I pass to the balance of convenience, however, I should record that the agent for the respondents contended that section 88 was simply inapplicable to the respondents. That argument seemed to be put forward on at least two bases. The first was the contention that the Nature Conservation Act, insofar as it affected people with freehold property, was beyond the jurisdictional competence of the Queensland Parliament. I have already dealt with that submission in the context of my ruling on the admissibility of evidence earlier in the day.

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For the reasons which I gave I do not consider that argument to be sustainable.

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It was also contended that section 88 is only directed towards people with land within a protected area. It was pointed out in this respect that the regulations place restrictions on granting permits, and in doing so make a reference to the term

"land holder" which is defined, in the schedule to the Nature Conservation Act, by reference to reserved land under the land Act, leased land under the Land Act, or in some circumstances land under the Aboriginal Land Act. What the point misses, however, is that the definition in the schedule is an inclusive definition, not an exclusive one.

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Section 88 is found in part 5 of the Act dealing with wildlife and habitat conservation, not in part 4 of the Act which deals with protected areas.

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There is nothing on the face of section 88 which, to my mind, limits its operation to protected areas, indeed quite to the contrary. Subsection 1(b) states that the section does not apply to the taking of protected animals in a protected area.

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Allied to these submissions was a submission to the effect that such a provision could not operate in respect of animals which had passed into the ownership of the respondents.

In this respect I note that section 83 provides that all protected animals are the property of the State, subject to the exceptions that are referred to in the statute. I see no proper basis for reading section 83 down so that it refers only to animals in protected areas.

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In any event, I see no reason why the State could not, as it has purported to do in section 88, prohibit persons from taking protected animals subject to the statutory provisos set out in that section.

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Turning to the balance of convenience, this, of course, is not a case where one is balancing the inconvenience to one party against inconvenience to another party. Inconvenience to the respondents is, of course, a relevant consideration, but what that is to be balanced with, in this case, is the effect on wildlife, in particular the flying foxes which, without the benefit of an interim enforcement order, may be taken in the period between now and when the matter is determined.

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That balancing exercise will, of course, not always be one which is particularly straightforward. In this case it is true that the species, with which we are concerned, currently only enjoy the status "of least concern" in accordance with the regulations, that the area of the electric gridding is relatively small compared to that involved in other cases, and that it is difficult to know, in advance, how many bats might be affected if an order is not made or what the particular impact upon their community might be.

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It must be recognised, however, that the conservation status of a specie, as being of least concern, does not mean either that it is not protected or that it is not important. The affidavit material, particularly that of Dr Booth, and also that of Dr Spencer, attest to the important function which flying foxes play in the environment.

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What is evident too is that the period of the year within which we have entered upon, is a period when the flying foxes

become subject to contact with the grids, because it coincides with the period when the crops are most attractive to them. Further the flying foxes are in the period of their cycle where they are giving birth or have given birth and the young are still dependent on their mothers.

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It might be observed also that, if one is to take any indication from the admissions made by the male respondent in the radio interview, the grids on the subject site have the capacity to impact on a not insignificant number of bats, and indeed many more than he has ever been licensed to take either by way of the grids or by way of shooting.

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It seems to me that there is much to be said for the proposition that the bats should be preserved from death or injury until such time as the primary proceedings can be determined. I note the overall object of the Nature Conservation Act, which is the conservation of nature.

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That is not to say, however, that in every case the balance of convenience would necessarily fall on the side of the preservation of wildlife. One must, of course, have regard to the matters of inconvenience which are competing. It must be remembered that the final proceedings are not being determined today and there is at least the possibility that any detriment to be suffered by the respondents, by reason of the order, will be found to be detriment to which they should not have been put, if they are vindicated in the ultimate hearing of the matter.

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## Transcript of Proceedings

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However, it is difficult to put much weight on that factor in this case when the respondents chose not to rely, for the hearing of this application, on any material which went to the details of the extent of damage which could be expected or the financial consequences thereof.

It seems to also be a case where, if an order is made then it ought not be in place for a lengthy period of time, since this seems to be a matter which could be got to trial relatively quickly from this point. However, I have also borne in mind that we are in the middle of a period in which the fruit is subject to attack from the bats and even a short period of time may have adverse consequences for the respondents and, of course, any loss they suffer will not be remedied, in the absence of the undertaking as to damages.

Having regard to all of the factors including the extent to

which a prima facie case has been established and the strength

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would be a matter of, it would seem, death rather than simply  
some lower degree of harm, the absence of any detailed  
information to verify the extent of potential inconvenience  
and loss to the respondents, it seems to me that this is an  
appropriate case for the making of an order.

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Before making an order, however, I should traverse a number of  
other matters which were referred to in the argument.

One concerned the identity of the applicant. The Act has open  
standing provisions, which permit a person to bring these  
proceedings. As the Court of Appeal pointed out in *NRMCA v.*  
*Andrew*, that does not mean that the identity of the applicant  
and whether they have a legitimate interest will be  
irrelevant, in all circumstances, to the exercise of  
discretion as to whether or not to grant a remedy. However,  
the material amply satisfies me that Dr Booth has a proper  
interest in the matter, not in a personal financial sense, but  
in her concern for the matters of conservation in relation  
to the bats, which is consistent with the purpose of the Act  
and I see no basis to refuse to grant relief as a matter of  
discretion, based on any perceived lack of interest or lack of  
proper interest on her behalf.

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It was submitted by the agent for the respondents that a  
constitutional issue arose and, in particular, an issue  
of the kind discussed in *Kable v. the Director of Public*  
*Prosecutions for the State of New South Wales* (1996) 189 CLR  
51. The contention appears to be that, investing this Court

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with the jurisdiction which I am asked to exercise today, has the effect of compromising the institutional integrity of this Court. Kable's case has, of course, been subject to further analysis including in *Farndon v. Attorney-General for the State of Queensland* [2004] HCA 46.

When the matter was raised notice was given to the various Attorneys-General pursuant to section 78B of the Judiciary Act. Of course, notice does not necessarily have to be given whenever anybody asserts that there is a constitutional point, no matter how unarguable it might be. Nevertheless, despite submissions at the time that there was demonstrably nothing in the point, I decided to take the cautious approach of ensuring that the Attorneys-General had reasonable notice of the matter. So the original hearing date was adjourned. Notice has been given. Responses have been received from all bar one Attorney-General. The Act does not require that the Court awaits receipt of all responses. The requirement is for a reasonable time to elapse. In my view a reasonable time has elapsed. In any event, I note that pursuant to section 78B the Court is not prevented from proceeding in any event in relation to: "the grant of urgent relief of an interlocutory nature where the court thinks it is necessary in the interest of justice to do so."

The question of an interim enforcement order, in this case, being by way of interlocutory relief, has a degree of urgency given the time of year and the prospect of imminent taking of bats if the grid is used at this time of year.

Ultimately I do not consider that the argument based upon *Kable's* case is sustainable. As the High Court made clear in *Farndon's* case, *Kable* was quite an exceptional set of circumstances in which the Supreme Court of New South Wales was purportedly invested with a power to imprison a particular person, without trial or conviction, upon forming the view that the person was more likely than not to commit a "serious act of violence."

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As McHugh J pointed out in *Farndon's* case, it was the terms, background and parliamentary history of the legislation which gave rise to the perception that the Supreme Court of that State might be acting in conjunction with the New South Wales parliament and the executive government, to keep Mr *Kable* imprisoned. The facts of this case are, of course, very different.

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We are not dealing with provisions which lead to imprisonment. They are not specific to a particular person. There is nothing about the terms, background or parliamentary history to the Nature Conservation Act which could give rise to the perception of which McHugh J spoke.

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There is nothing about the Act which, in my view, would compromise the integrity of the Court. The process which is followed in considering such applications is an ordinary judicial process and, indeed, it is somewhat akin to an injunctive remedy which is, of course, a familiar remedy for

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courts to be concerned with.

I had earlier dealt with the contentions, by the agent for the respondents, in relation to the validity of the Nature Conservation Act. There were a number of other contentions contained in his outlines of argument. I do not consider that any of them are sustainable. I should mention some.

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It was contended that the Nature Conservation Act does not bind the respondents because they are not the subject of any voluntary conservation agreement under the Act. That is, however, irrelevant to section 88.

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Some issue was sought to be taken, in the submissions, about whether the Environmental Defender's Organisation is properly using funds to support this type of litigation, but the funding of that office is not a matter which goes to the standing of the applicant in these proceedings, or is relevant to whether relief should be granted or not.

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Reference was made to treaties, particularly the intergovernmental agreement on the environment, however, I fail to see how a consideration of those documents affects the conclusions I have come to in respect to section 88 of the Nature Conservation Act.

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Some point seemed to be made, in the submissions, about the fact that section 88 is a section which creates an offence, whereas this proceeding is a civil matter of an enforcement

order. The fact that section 88 is a section which creates an offence does not mean that it is necessary for there to be a conviction under that section before proceedings for an enforcement order or an interim enforcement order can be brought, nor is it an abuse of the processes of the Court to bring such proceedings in the absence of a prosecution. Even if criminal proceedings were on foot and unresolved it would still not necessarily be improper to have parallel proceedings for enforcement orders or interim enforcement orders (see *Environmental Protection Agency v. Hudson Timber Products Ltd & Ors* [2005] QPEC 69).

There are other matters contained in the written outlines, which are somewhat diffuse at times. There is nothing in anything which the agent for the respondents raised which dissuades me from the view that it is both legally competent for me to make an interim enforcement order and it is appropriate in the circumstances to do so.

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HIS HONOUR: I order that, pending a decision of the proceedings for an enforcement order, or other earlier order varying or discharging this order, and unless and until the respondents have obtained an authority under the Nature Conservation Act to take flying foxes by the use of the electric grid on their property at Hosking Road, Mirriwinni, being land described as Lot 1 RP712412 County of Nares, Parish of Bellenden Ker, the respondents stop and/or not start

electrocuting flying foxes by the use of the grid system on  
that property and forthwith disconnect the electricity supply  
from the grid system and not reconnect it during the currency  
of this order.

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I give the parties liberty to apply if there is a difficulty  
with respect to the order.

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HIS HONOUR: I will direct:

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(1) inspection be completed by Wednesday, the 8th of  
November. Inspection may be completed by the parties  
faxing copies of documents to each other;

(2) that, on or before Friday, the 10th of November the  
applicant deliver her points of contention together with  
copies of any further reports of experts proposed to be  
called at trial; copies of statements of any lay  
witnesses other than those appearing by subpoena and a  
list of the names of all witnesses proposed to be called,  
including those to be subpoenaed;

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(3) that by the 17th of November the respondents deliver  
their response to the points of contention to the  
applicant together with copies of reports of any experts  
proposed to be called at trial, copies of statements of  
any lay witnesses, other than those proposed to be  
subpoenaed, and a list of the names of all witnesses  
proposed to be called, including those to be subpoenaed.

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I set the matter down for hearing in Brisbane for three days  
commencing the 21st of November 2006.

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