

# PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Booth v Yardley & Anor* [2006] QPEC 119

PARTIES: **CAROL JEANETTE BOOTH**

*Applicant*

V

**RICHARD GEORGE YARDLEY**

*First Respondent*

*And*

**ANTJE GESINA YARDLEY**

*Second Respondent*

FILE NO/S: BD 2845/2006

DIVISION: Planning and Environment

PROCEEDING: Application

ORIGINATING COURT: Planning and Environment Court

DELIVERED ON: 30 November 2006

DELIVERED AT: Brisbane

HEARING DATE: 21 November 2006

JUDGE: **Alan Wilson SC, DCJ**

ORDER: **It is ordered that:**

- 1** unless and until the respondents have obtained an authority under the *Nature Conservation Act 1992* to take flying-foxes (Genus *Pteropus*) by the use of the electric grids on their property at Hosking Road, Mirriwinni (the land described as Lot 1 on RP 712412, County of Nares, Parish of Bellenden Ker) the respondents stop and/or not start electrocuting flying-foxes by use of the grid system on that property;
- 2** within three months of the date of this order the First Respondent and the Second Respondent dismantle or cause to be dismantled any electric grid system constructed for the purpose of

**electrocuting flying-foxes (Genus *Pteropus*) on that property unless the taking of flying-foxes by electrocution using such an electric grid is specifically authorised under s 88 of the *Nature Conservation Act 1992*.**

**CATCHWORDS: ENVIRONMENT - NATURE CONSERVATION - taking of protected animal - flying foxes – electric grid on property – prevention of damage to lychee crop - *Nature Conservation Act 1992*: ss88; 173D; 173F; 173G**

*Attorney-General (WA) v Marquet* [2003] HCA 67  
*Bone v Mothershaw* (2003) 2 QdR 600  
*Booth v Bosworth* (2001) 114 FCR 39  
*Booth v Frippery Pty Ltd* [2006] QCA 74  
*Burns v State of Queensland* (2004) QSC 434  
*Burns v State of Queensland* (2006) QCA 235  
*Caloundra City Council v Taper Pty Ltd* (2003) QPELR 558  
*Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 149  
*Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1  
*Coleman v Power* (2004) 220 CLR 1  
*Commonwealth v Queensland* (1975) 134 CLR 298  
*Dore v Penny* [2006] QSC 125  
*Dore v State of Queensland* [2004] QDC 364  
*Fardon v Attorney-General for the State of Queensland* (2004) 210 ALR 50  
*Horta v Commonwealth* (1994) 181 CLR 183  
*Humane Society International Inc v Kyodo Sempaku Kaisha Ltd* (2006) FCA 116  
*Kable v DPP* (1996) 189 CLR 51  
*Mudie v Gainriver Pty Ltd* (2002) 2 Qd R 53  
*Newcrest Mining (WA) Limited v Commonwealth of Australia* [1997] HCA 38  
*NRMCA (Qld) Ltd v Andrew* (1992) QdR 706  
*Phillips v Spencer* [2005] QSC 053  
*Phillips v Spencer* [2005] QCA 317  
*Plenty v Dillon* (1991) 171 CLR 635  
*Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473  
*Warringah Shire Council v Sedecic* (1987) 10 NSWLR 335  
*Wilson v Anderson* [2002] HCA 29  
*Woolworths Ltd v Caboolture Shire Council* (2004) QPELR 634

#### **Legislation cited**

*Acts Interpretation Act* 1901  
*Constitution of Australia*  
*Constitution of Queensland* 2001  
*Criminal Code* (Qld)

*Criminal Code Act 1995 (Cth)*  
*Environment Protection and Biodiversity Conservation Act 1999 (Cth)*  
*Environment Protection Act 1994*  
*Human Rights and Equal Opportunity Commission Act 1986*  
*Imperial Act 1842*  
*Integrated Planning Act 1997*  
*Judiciary Act 1903 (Cth)*  
*Land Title Act 1994*  
*Property Law Act 1974*  
*Nature Conservation Act 1992*  
*Nature Conservation and Wildlife Regulation 1994*  
*National Environment Protection Council Act 1994 (Cth)*  
*National Heritage Trust of Australia Act 1997 (Cth)*  
*Planning and Environment Court Rules 1999*  
*Uniform Civil Procedure Rules 1999*  
*Wet Tropics World Heritage Protection and Management Act*

COUNSEL: C McGrath for applicant

No appearance for respondents

SOLICITORS: Environmental Defenders Office (Qld) Inc for applicant

Mr David Walter prepared written submissions for the respondents

- [1] Mr and Mrs Yardley have an orchard at Mirriwinni in north Queensland, about 30 kms from Innisfail, where they grow lychees and other fruit. Dr Booth, who has been active as an advocate for the conservation of flying-foxes since 1999<sup>1</sup>, complains that the Yardleys have constructed electric grids above the orchard to protect their fruit from flying-foxes and thereby injured and killed some of those creatures. This, Dr Booth asserts in these proceedings, is illegal and the Yardleys should be restrained from using the grids and compelled to dismantle them.
- [2] The proceedings have followed a slightly unusual path. On 3 November 2006 Dr Booth obtained an interim order from Rackemann DCJ restraining the Yardleys from using the grids until further orders were made after a final hearing of the proceedings, which was conducted on 21 November 2006. Mr David Walter appeared in person as agent for the Yardleys at the earlier hearing. Judge Rackemann directed, at the end of the proceedings before him, that each party deliver points of contention and copies of experts' reports and the statements of lay witnesses according to a timetable. Dr Booth's representatives complied with those orders.
- [3] In various communications to the court and Dr Booth's representatives before the final hearing Mr Walter indicated that the Yardleys would rely, at the final hearing, upon written submissions they had given to Judge Rackemann and some further submissions to be prepared in writing, and they did not wish to cross-examine any of Dr Booth's witnesses or call evidence. Mr Yardley said at a review of the case on the morning of 17 November (which he attended by telephone) that neither he

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<sup>1</sup> Dr Booth's affidavit filed 26 September 2006, para 5

nor Mrs Yardley, nor Mr Walter, would be attending the final hearing but would be complying with Judge Rackemann's directions that day.

- [4] There are a number of documents which I have considered to be submissions from the respondents in this hearing. The court file contains a document filed by Mr Walter on the Yardleys' behalf<sup>2</sup> concerning an application to strike out Dr Booth's Originating Application; submissions attached to a notice to be sent to State and Commonwealth Attorneys-General, and a 31-page document headed "Outline of Argument" which does not appear to have been filed. On about 20 November a new 67-page document arrived. It appeared, on its face, to be an affidavit of Mr Walter's but is, in fact, legal submissions containing argument against the relief Dr Booth seeks. It does not comply with the directions order of 3 November but, in light of the history of the matter, I was satisfied Mr Walter and the Yardleys have said all they wish to.
- [5] Dr Booth's proceeding is for an enforcement order under s 173D of the *Nature Conservation Act 1992* (the Act). It provides, relevantly, that:

**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  
 ...  
 (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.  
 (3) If the Chief Executive is not a party to a proceedings for an enforcement order, the person must, within seven days after the person starts the proceeding, give the Chief Executive written notice of the proceeding.

- [6] Under s 173F the court may make an enforcement order if satisfied that the nominated offence is being or has been committed, or will be committed unless the order is made. Under s 173G the effect of an enforcement order may include a direction that a party stop an activity that constitutes a nominated offence, do anything required to stop the committal of that offence, and (under s173G(1)(d)):

... return anything to a condition as close as practicable to the condition it was in immediately before a nominated offence was committed.

- [7] Non-compliance with an enforcement order may attract a penalty (s 173I), and the circumstances in which relief may be granted under the Division are wide (s 173H). Section 173A defines "court", for the purpose of the Division, as the Planning and Environment Court. Mr Walter argued before Rackemann DCJ and again in his final submissions that this court is created under the *Integrated Planning Act 1997* (IPA) and has a primary, but limited jurisdiction referable to that Act. The submission overlooks the wider jurisdiction granted by s 4.1.2 – i.e., jurisdiction bestowed upon the Planning and Environment Court by other legislation.
- [8] The use of the word "may" in s 173F makes it clear the court has an overriding discretion to determine whether or not an enforcement order should be made. That

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<sup>2</sup> Document 19

discretion is to be exercised in accordance with principles discussed in other cases where forms of statutory injunction have been sought<sup>3</sup>.

- [9] The offence alleged to have been committed by the Yardleys is one against s 88 of the Act, which places restrictions on taking protected animals. In particular it is contended that an offence has been committed (and, without restraint, further offences will occur) by reason of the Yardleys' use of the grids to prevent flying-foxes from feeding on their lychee crop. Section 88 relevantly provides:

**88 Restrictions on taking protected animal and keeping for use of unlawfully taken protected animal**

- (1) This section –
- (a) is subject to s 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 years' imprisonment; or
  - (c) For a Class 3 offence – 225 penalty units; or
  - (d) For a Class 4 offence – 100 penalty units.
- (2) It is a defence to a charge of taking a protected animal in contravention of sub s 1 to prove that:
- (a) The taking happened in the course of a local activity that was not directed towards the taking; and
  - (b) The taking could not have been reasonably avoided.

...

- [10] Section 93 relates to Aborigines and Torres Strait Islanders and it was not contended the Yardleys may avail themselves of the statutory shield it provides. The expression “protected area” is defined in the Act and before Rackemann DCJ Mr Walter specifically relied upon the fact that this is *not* a protected area to support one of his contentions. There is, otherwise, evidence the land does not fall within an area of that kind.
- [11] Nor was it contended the Yardleys are “authorised persons” or that the “taking” was authorised under the legislation. The Yardleys had, in the past, a limited authority to destroy flying-foxes but it had lapsed. That permit, which was valid from 27 November 2003 to 4 February 2004, permitted the taking of 45 spectacled flying-foxes by means of shooting only and contained conditions which specifically prohibited the use of electric grids. At an even earlier time the Yardleys did have authority to use the grids to take 100 animals but the licensing conditions later changed. The words “take” is defined in Schedule 10 to include hunting, wounding or killing (or attempting to do so) by a variety of means including snares, traps and catches. The flying fox is a protected animal within the meaning of the section, albeit one classified at low risk of extinction.

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<sup>3</sup> *Warringah Shire Council v Sedecic* (1987) 10 NSWLR 335 at 339-34; *NRMCA (Qld) Ltd v Andrew* (1993) 2 QdR 706, at 711-13; *Booth v Bosworth* (2001) 114 FCR 39 at 66-68; *Mudie v Gainriver Pty Ltd* (2002) 2 QdR 53 at 58-9; *Caloundra City Council v Taper Pty Ltd* (2003) QPELR 558; *Woolworths Ltd v Caboolture Shire Council* (2004) QPELR 634

[12] The principal issues are, then, whether the evidence establishes that an offence against s 88 is being or has been committed, or will be committed unless the enforcement order is made; and, whether this is an appropriate case in which to exercise a discretion to grant the relief sought, or any relief.

[13] The evidence clearly shows the Yardleys own and operate a lychee, star fruit and pomelo farm at Mirriwinni on land described as Lot 1 on RP 712412; and, that there are three aerial electric grids on the land having no apparent purpose save the electrocution of flying-foxes (and, conceivably, any other flying or climbing creatures which come in contact with the electric wires). During an interview aired on ABC Radio on 10 January 2006 Mr Yardley admitted killing approximately 1,100 flying-foxes by the use of the electric grids since 2001. He also made similar admissions to a newspaper reporter for the Cairns Post, published in that newspaper on 14 January 2006. He said to the reporter:

We took out 700 bats not this last year but the year before using our electric grids ... before that we only used to kill about 100 a season.

[14] Since the commencement of the Act in 1994 indigenous flying-foxes have been classified as protected wildlife under the Regulations to the Act (*Nature Conservation and Wildlife Regulation* 1994). Dr Booth's evidence is persuasive that the species of flying-fox killed by the electric grids is the spectacled flying-fox, *Pteropus Conspicillatus*, which has been listed as vulnerable to extinction since 2002 under the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth).

[15] The defence available under s 88(3) does not provide a shield for Mr and Mrs Yardley. Its meaning and effect was discussed by the Court of Appeal in *Booth v Frippery Pty Ltd* [2006] QCA 74 in which McMurdo J said:

[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.

[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 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 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 unintentionally take wildlife while carrying out legitimate activities.

[33] This interpretation accords with the stated objects of the Act and the scheme which it employs. In particular it is consistent of 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.

- [16] The evidence establishes the Yardleys have installed and maintained, on their property, an electric grid system of a kind designed to be fatal to, or likely to injure flying-foxes. While it is apparent their motive was the protection of their crops the use of the electric grids was, on any view, *directed* (in the sense that word is used in s 88(3)(a)) towards the taking of flying-foxes. There is, the evidence shows, only one possible conclusion: that the killing of flying-foxes by the use of the grids was, at all times, intentional.
- [17] Dr Booth carries the burden of proof. No submissions were received on the respondents' behalf about the nature of that onus. The proceedings seek an order which, if imposed, attracts penalties in the breach. In *Warringah Shire Council v Sedecic* (1987) 10 NSWLR 335 Kirby P drew, at 341, a distinction between proceedings of this nature and criminal prosecutions for (in that case) enforcement of environmental laws in the public interest. That case, and not dissimilar provisions, were considered by Robertson DCJ in *Caloundra City Council v Taper Pty Ltd* (2003) QPELR 558 in which his Honour said, at para [14]:

In my opinion, the appropriate standard of proof is the civil standard subject to the *Briginshaw* sliding scale, and in my opinion having regard to the very significant consequences to the respondents of the making of the order sought in para (g) of Council's application, the standard should be at the top of the range of that sliding scale. My conclusion is supported by the observations of Judge Robin QC in *Crowther v State of Queensland* [2002] QPEC 079 in which His Honour was considering the same issue in the context of injunctive relief sought on the basis of alleged breaches of the *Environmental Protection Act*. In turn His Honour followed conclusion to the same effect as Judge Dobbs in *Caloundra City Council v McGreath* (1998) QPELR 178 at 182 and Judge Brabazon QC in *Hawkins & Izzard v Permarig Pty Ltd & Brisbane City Council* (No. 3) (2001) QPELR 423 at 429.

- [18] Written submissions proffered by Mr McGrath of Counsel, for Dr Booth, accepted the application of the civil standard at a high level. Evidence was presented orally and by affidavit. The affidavit evidence of Dr Booth, Dr Fox and Ms Waters and the oral evidence of Mr Devery, Mr Hudson, Mr Michael, and Dr Booth and Mr Joy (and other affidavit material previously filed in the matter including, in particular, that of Dr Spencer) establishes, I am satisfied, the necessary elements of and basis for an enforcement order, to the requisite standard.
- [19] Other cases concerning similar kinds of legislative provisions suggest that the discretion arising under 173F is wide and, in particular, the court is not compelled to grant relief even if the relevant offence is established on the evidence. In *Mudie v Gainriver Pty Ltd* (2002) 2 Qd R 53, the Court of Appeal (Davies and Thomas JJA, White J) said of a provision in the *Local Government (Planning and Environment) Act 1990* which gave this court power to order defendants to cease activities contravening planning schemes, at 58-59:

[13] The application of similar statutory powers in New South Wales when work has been performed without necessary planning approval has been considered in *Tynan v Meharg* and *Warringah Shire Council v Sedecic*.

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. It is a discretionary power. Indeed, one of the principal submissions of Mr Lyons QC who appeared for the Council and Gainriver in this matter, is that the discretion is a broad one and it cannot be shown that His Honour erred in law in arriving at the decision he did. Certain "guidelines for the exercise of discretion" were formulated by Kirby P in Sedecic's case and it is enough to refer to ps 339-441 of that case and to ps 259-260 of Tynan's case as useful checklists of points that will often need consideration in such matters. Among potentially relevant matters is the aspect of discouraging potential developers from thinking that planning requirements may lightly be disobeyed.

- [20] Mr McGrath's submissions raised a number of factors said to be relevant to the discretion arising here. The first is the public interest in the conservation of nature and the protection of the environment in which, the evidence establishes, flying-foxes play an important part<sup>4</sup>. The stated object of the *Nature Conservation Act*, set out in s 4, is the conservation of nature. Secondly, although relief is more readily granted when proceedings are brought by regulatory authorities or the Attorney-General<sup>5</sup>, Dr Booth's interest appears to be entirely altruistic and she has no financial interest in the outcome.
- [21] Third, Dr Booth's case is properly described as strong. Mr Yardley's public admissions to the radio and press reporters were not involuntary, inadvertent or casual. Even without them the applicant's case would, in the absence of any contradicting evidence from either of the respondents, be a strong one - there being no other logical inference to be drawn from the presence of the grids than that they had the purpose alleged by the applicant. The admissions mean the applicant's case has been proved at or close to the criminal standard.
- [22] Another material element is that this is not merely a technical breach or one committed because of an honest, but mistaken belief. Mr Yardley's admissions plainly establish that he knew of the requirement to obtain permits and chose not to apply when he concluded (not, it must be said, unreasonably) that the use of electric grids would not be authorised. In the circumstances the respondents' actions are not unfairly described as calculated and deliberate, and they occurred over some time.
- [23] The question of deterrence or, at least, the potential educative function of an order containing sanctions for breaches of the Act may, in some circumstances, also be material to the court's discretion.<sup>6</sup> Robertson DCJ saw the value of sending "...a very strong message that contravention of approvals will not be tolerated" in *Caloundra City Council v Taper Pty Ltd*<sup>7</sup>.
- [24] The orders sought do not, moreover, purport to exclude the Yardleys from operating the electric grids if they are able to obtain appropriate permission under the Regulations from the Environmental Protection Agency (which administers the

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<sup>4</sup> *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 477-482 per Barwick CJ and 486-487 per Jacobs J; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 149 at 145 per Mason ACJ

<sup>5</sup> *NRMCA (Qld) Ltd v Andrew* (1992) QdR 706 at 711-713

<sup>6</sup> *Humane Society International Inc v Kyodo Sempaku Kaisha Ltd* (2006) FCA 116 (FC) per Black CJ and Finkelstein J at [22]-[27]

<sup>7</sup> *Supra*, at [100] - [101]

Act). That consolation is not an overwhelming one: Dr Booth's evidence shows the EPA's express policy is not to issue permits of that kind for electric grids<sup>8</sup>, but the fact the enforcement order does not close every door is a matter touching the discretion.

- [25] So, too, is Dr Booth's evidence that non-lethal methods of crop protection have been available for many years, eg by full exclusion netting which is a non-lethal means of protecting fruit crops from flying-foxes. Some statements by the Yardleys are critical of the efficacy of those methods, suggest they are very expensive and detrimental to other wildlife. The use of non-legal electric grids was discussed, inconclusively, in *Booth v Frippery Pty Ltd*<sup>9</sup>.
- [26] It is also relevant that (as may readily be inferred from Mr Yardley's own statements) the respondents will not voluntarily comply with the legislation and, unless restrained, are highly likely to continue using the electric grids. He told both the radio and press reporters that the legislation did not effectively prohibit their use, and that the Environment Protection Agency had no statutory basis for a claim to that effect. The use of the grids only came to light because of these public admissions, which are unlikely to occur again. Without them, the evidence shows, the use of the grids would have been difficult to discover; and their use would remain difficult to monitor because they operate at night, on private property.
- [27] The only countervailing factor which might be said to weigh against the grant of an order is the potential for financial loss to the Yardleys. They did not disclose any evidence about that risk at the hearing for interim relief before Rackemann DCJ, although it would plainly have been relevant to the discretion he was called upon to exercise. All that has now been received is a two-line affidavit from the Yardleys to the effect that "...our Loss of Income from our 2006 Lychee Season is valued at \$298,456.98 Gross and \$250,975.26 Nett (GST Exclusive)" (sic). No detail or supporting material was supplied.
- [28] Even if the risk of loss is, for present purposes, accepted it has to be considered in the light of some other matters: first, the Environmental Protection Agency may take financial matters into account in considering whether or not to issue a Damage Mitigation Permit; and secondly and more significantly the fact that the species most likely to be killed by the grids has a recognised value as an important element of the wet tropics World Heritage Area. As Branson J said in *Booth v Bosworth*<sup>10</sup>:

[115] In weighing the factors which support an exercise of the court's discretion in favour of the grant of an injunction under sub s 475(2) of the Act against those factors which tell against the grant of such an injunction, it seems to me that it would be a rare case in which a court could be satisfied that the financial interests of private individuals, or even the interests of a local community, should prevail over interests recognised by the international community and the Parliament of Australia as being of international importance.

- [29] Where the evidence advanced about this aspect of the discretion is, as here, cursory it cannot carry a great deal of weight in the balancing exercise which is part of the

<sup>8</sup> Dr Booth's affidavit of 22 September 2006, Exhibit CJB-8

<sup>9</sup> *Supra*, at [18]

<sup>10</sup> (2001) 114 FCR 39, at 67-68

statutory discretion. Even if that evidence was stronger it would be unlikely, as the passage set out above shows, to be determinative. Although the flying fox is at little present risk of extinction it is a protected species under legislation which has, here, been flouted. While it is impossible not to feel a measure of sympathy for the Yardleys it cannot be said that the prospect of economic loss is a matter which tells significantly in their favour.

- [30] Subject, then, to the wide variety of legal arguments advanced by Mr Walter, to which I will now turn, I am satisfied the applicant is entitled to the relief sought in paragraphs 1 and 2 of the amended Originating Application filed by leave on 17 November 2006, and the elements touching the discretion to grant appropriate orders weigh heavily in her favour. The orders sought by her require the Yardleys to stop using the grid system, and not to start it up, unless or until they have obtained the necessary permit; and, to dismantle the system within three months. There was no evidence to suggest that is an insufficient period for any relevant purposes including, in particular, the opportunity to seek a permit or authority to continue using the grids, and the necessary time to do so.
- [31] The third head of relief seeks a donation from the Yardleys to the Tolga Bat Hospital in an amount the court considers reasonable. When pressed, Mr McGrath submitted an order of this kind was open under s 173G(1)(d), a provision to the effect that an enforcement order may direct a party “...to return anything to a condition as close as practicable to the condition it was in immediately before a nominated offence was committed”. The relief was sought on the basis that the Tolga Bat Hospital is one which provides treatment for injured flying-foxes (and there was evidence to establish that). There is, however, no evidence to suggest any of the present patients of the hospital were injured by the Yardleys’ grids, and the relief sought seems to me to be outside the intended parameters of the subsection.
- [32] The respondents’ various submissions, mentioned earlier and apparently prepared by Mr Walter, are not unfairly described as diffuse and confusing. They do not directly or logically address proceedings of the present kind for an enforcement order under Part 10, Division 2, Subdivision 3 of the *Nature Conservation Act 1992*. Their form, appearing as they do in four documents, means it is difficult to be certain that every point the respondents wish to raise can be identified and addressed.
- [33] A number appear to involve an attack upon this court’s jurisdiction, and the lawfulness of both the proceeding, and the legislation from which it springs. No comprehensible, persuasive logical or legal ground is advanced, however, for thinking Dr Booth’s application is outside the power of this court, or that the Act is outside or beyond the legislative bailiwick of the Queensland Parliament. The Act clearly provides the court with jurisdiction over the subject matter, and the power to grant relief. Parliament had power to enact legislation regulating activities such as the operation of the electric grids, and no restriction on the power of the Queensland Parliament arising (as, for example, is asserted) under the Commonwealth Constitution can be identified. The complaint that the application breaches the common law is misconceived, when the application is plainly brought under a statutory right<sup>11</sup>.

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<sup>11</sup> *Bone v Mothershaw* (2003) 2 QdR 600, at 609-10

- [34] The contention that the application breaches international treaties and protocols to which Australia is a signatory is also unpersuasive. Even if it were not, the Act is more likely than not valid as a matter of Australian domestic law: *Horta v Commonwealth* (1994) 181 CLR 183 at 195 (a case which involves the Commonwealth Constitution, but establishes principles which undoubtedly applies to State law). Nor do the submissions identify any ambiguity in domestic laws which should be interpreted as inconsistent with Australia's international obligations<sup>12</sup>.
- [35] It is also contended, as I understand the submission, that it would be *ultra vires* for the court to hear this Originating Application because s 164 of the Act declares some of the classes of offences referred to in s 88 to be summary offences. These proceedings are, however, civil and not criminal in nature and are plainly presented under s 173D; and, "a nominated offence" is defined in s 173A to include those referred to in s 88. While the latter contains criminal sanctions, they are not available for proceedings of the present kind.
- [36] The same conclusion applies to the submission – again, as I understand it - that the court cannot hear this application because an offence against s 88 involves a criminal offence but this court is not properly established under Chapter III of the Commonwealth Constitution and its procedures do not encompass necessary safeguards, including trial by jury. But, again, s 173D involves civil proceedings.
- [37] This is a State court established under Queensland law, although it is vested with Federal jurisdiction under s 39 of the *Judiciary Act* 1903 (Cth). Arguably the court is exercising Federal jurisdiction when it addresses issues raised by the respondents in relation to the Commonwealth Constitution, an activity touched upon by the decision of the High Court in *Kable v DPP* (1996) 189 CLR 51 – a decision which now, and in the present instance, must be read in light of that court's later decision in *Fardon v Attorney-General for the State of Queensland* (2004) 210 ALR 50 in which Callinan and Heydon JJ said at [234]:

The Act does not offend against the principal for which *Kable* stands. It is designed to achieve a legitimate, preventative, non-punitive purpose in the public interest and to achieve it with due regard to a full and conventional judicial process, including unfettered appellate review.

Similar conclusions apply to the Act and the procedures for enforcement which the applicant seeks to use, and have applied.

- [38] It was then contended that the procedure is an abuse of process because it is brought under the *Uniform Civil Procedure Rules* 1999, but involves criminal sanctions. Again, the point is that this proceeding stops short of sanctions of that kind and involves a civil remedy; and the UCPR, and the *Planning and Environment Court Rules* 1999, simply provide a mechanism.
- [39] It is also argued that the legislative competence of the Queensland Parliament is restricted to the wastelands of the Crown and neither the Act nor IPA can apply, or restrict the use of the Yardleys freehold land. It is a submission without merit, and one which has been rejected in relation to this and other legislation on a number of

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<sup>12</sup> *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 38; *Coleman v Power* (2004) 220 CLR 1

occasions in recent years. There is no basis for concluding either the Act or IPA are invalid, or do not apply to freehold land in Queensland<sup>13</sup>.

- [40] A number of other submissions of a similar kind are helpfully traversed, and rebutted, in Mr McGrath's written submissions in reply, filed in the court on 1 November 2006<sup>14</sup>. Some relate to procedural aspects of the proceedings, and are without substance. Others touch upon the meaning and effect of phrases in the Act, and have already been addressed. Some factual assertions are either irrelevant, or are overwhelmed by contrary evidence: for example, the Yardleys contend that their orchard is not the natural habitat of flying-foxes, but the matter is both irrelevant, and quite exploded by things Mr Yardley has said himself.
- [41] An attack is mounted on evidence obtained under search warrants issued under both State and Commonwealth law but no basis is shown for concluding that the warrants were invalid. Much is made, throughout the submissions, of the Yardleys' rights as the holders of freehold title on the lines (intending no disrespect) of the old adage about an Englishman's home being his castle<sup>15</sup>. Section 88 is not, however, addressed to landholders but to any person; and, there is no question the Act applies to freehold land<sup>16</sup>.
- [42] Mr Walter's submissions do not shirk an issue, however far-fetched or nebulous. He argues, for example that flying-foxes become the Yardleys' property when the creatures enter their land; but s 83 makes all protected animals the property of the State unless taken under a licence, permit or other authority, appropriately issued. The regulations provide for permits of the kind discussed earlier, which allow for taking of protected wildlife which is damaging crops. All of this is well known to the respondents who have in the past held a Damage Mitigation Permit allowing them to take flying-foxes and birds, for the purpose of protecting emblems. Those circumstances make the submission particularly adventurous.
- [43] The long, 67-page document received from Mr Walter (and headed "Affidavit") contains headings indicating it purports to advance ten grounds. The first appears to relate, again, to the search warrants and cites the Commonwealth *Human Rights and Equal Opportunity Commission Act 1986*, *Plenty v Dillon* (1991) 171 CLR 635, the *Natural Heritage Trust of Australia Act 1997*, the *Queensland Criminal Code*, *Newcrest Mining (WA) Limited v Commonwealth of Australia* [1997] HCA 38, *Wilson v Anderson* [2002] HCA 29, *Attorney-General (WA) v Marquet* [2003] HCA 67, and a paper delivered by Biscoe J to the Australasian Conference of Planning and Environment Courts and Tribunals in September 2006. It is not easy to be confident about the point intended to be made but, doing the best I can and relying on the fact that it first mentions a schedule to the *Human Rights and Equal Opportunity Commission Act 1986*, suspect it contains an assertion that there have been breaches of Articles 17 and 26 of an international covenant on civil and political rights, as a consequence of a number of aspects of these proceedings.

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<sup>13</sup> *Bone v Mothershaw* (supra); *Dore v State of Queensland* [2004] QDC 364; *Burns v State of Queensland* (2004) QSC 434; *Phillips v Spencer* [2005] QSC 053; *Phillips v Spencer* [2005] QCA 317; *Dore v Penny* [2006] QSC 125; and *Burns v State of Queensland* [2006] QCA 235

<sup>14</sup> Court document No. 24, pps 26-29, paras 24 and 25

<sup>15</sup> It is impossible to avoid the conclusion that the popular Australian film *The Castle* has a lot to answer for

<sup>16</sup> *Phillips v Spencer* (Supra), both at first instance and in the Court of Appeal

- [44] The first Article protects citizens against arbitrary or unlawful interference of their privacy and homes, and the second against discrimination, with a guarantee of equal protection under the law. If relevant, neither has been breached here. They are relied upon, I think, as grounds for what seems to be another attack upon the search warrants. A similar objection was taken before Rackemann DCJ who ruled against it. The primary objection seems to be based upon a misreading of s 160 of the Act, which simply facilitates the production of evidence of this kind in the proceeding, and does not affect the warrants.
- [45] Ground 2 purports to raise a defence based upon s 392 of the Criminal Code and to involve a claim that the Yardleys, as freehold owners, are permitted to take wild animals to protect their produce. The submission involves both a misreading, and a mistaken application, of the section and Chapter 36 of the Code generally. Ground 3 refers to the Commonwealth *Criminal Code Act 1995* and appears to raise a claim that under s 130.1 the Yardleys have a right to take flying-foxes to protect their income and livelihood but this, again, appears to involve an identical error.
- [46] Ground 4 contains references to the *Land Title Act 1994*, the *Property Law Act 1974*, a number of decisions of the High Court, the Letters Patent which established the Colony of Queensland in 1859, the *Imperial Act 1842* and the *Universal Declaration of Human Rights*. The gist of the submission seems to be that the Yardleys, as freehold owners, have rights traceable into antiquity which cannot be taken from them without clear and unambiguous language in Statutes, and compensation. There is no basis for thinking these principles or other common law or statutory rights have been offended here. Ground 5 regurgitates international treaties mentioned earlier, which do not override the Act. The same conclusion can be said to apply to Ground 6, which refers to partnership agreements signed under the *National Heritage Trust of Australia Act 1997 (Cth)*.
- [47] Ground 7 refers to the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, *National Environment Protection Council Act 1994 (Cth)*, *National Heritage Trust of Australia Act 1997 (Cth)* and, of Queensland legislation, the *Nature Conservation Act 1992*, *Wet Tropics World Heritage Protection and Management Act*, *Environment Protection Act 1994*, and *National Environment Protection Council (Queensland) 1994* together with, again, decisions of the High Court and the Federal Court, all of which are mentioned in the context of a submission that the procedures used here involve some contravention of other legislation. In particular, it seems to be argued that the Commonwealth legislation requires a consultative process involving the respondents before any orders of the kind sought by the applicant could be made. Once again, no dominant relationship is established between these pieces of legislation and this proceeding, and there is no basis for concluding they create some impediment to it.
- [48] A similar submission appears to arise in Ground 8, which refers to the National Strategy for Ecologically Sustainable Development signed and adopted by various levels of government in Australia in 1992. Reference is made, again, to consultative processes in the *National Environment Protection Council (Queensland) Act 1994* and, it is said, processes of that kind involving the Yardleys should have been carried out before proceedings began. The argument relies, however, upon unrelated and optional procedures which were neither applicable, nor compulsory here.

[49] Ground 9 is particularly difficult to grasp but appears to reiterate an earlier submission that the *Integrated Planning Act 1997* (IPA) only gives this court jurisdiction over land held in fee simple in respect of reconfigurations, and material changes of use, and there is no additional power to entertain proceedings of this kind. The provisions of the *Nature Conservation Act 1992*, mentioned earlier, and s 4.1.2 of IPA negate that submission. Ground 10 refers to the *Constitution of Queensland 2001*, the *Constitution of Australia*, the *Acts Interpretation Act 1901* and the decision of the High Court in *Commonwealth v Queensland* (1975) 134 CLR 298 and contains references to the residual powers of Her Majesty Queen Elizabeth II. It seems to reiterate arguments that the relevant legislation, the relief sought and the powers reposed in this court are all *ultra vires* – all contentions which have previously been advanced and, if I understand them, previously addressed. None appear to have any substance.

[50] The applicant has established a basis for orders that:

- (a) unless and until the respondents have obtained an authority under the *Nature Conservation Act 1992* to take flying-foxes (Genus *Pteropus*) by the use of the electric grids on their property at Hosking Road, Mirriwinni (the land described as Lot 1 on RP 712412, County of Nares, Parish of Bellenden Ker) the respondents stop and/or not start electrocuting flying-foxes by use of the grid system on that property;
- (b) within three months of the date of this order the First Respondent and the Second Respondent dismantle or cause to be dismantled any electric grid system constructed for the purpose of electrocuting flying-foxes (Genus *Pteropus*) on that property unless the taking of flying-foxes by electrocution using such an electric grid is specifically authorised under s 88 of the *Nature Conservation Act 1992*.