# PLANNING & ENVIRONMENT COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Booth v Frippery Pty Ltd & Ors* [2007] QPEC 99 |
| PARTIES: | **CAROL JEANETTE BOOTH**<br>*Applicant*<br>**v**<br>**FRIPPERY PTY LTD (ACN 010 890 007)**<br>*First Respondent*<br>**and**<br>**MERVYN MEYER THOMAS**<br>*Second Respondent*<br>**and**<br>**PAMELA ANN THOMAS**<br>*Third Respondent* |
| FILE NO/S: | BD 4658 of 2004 |
| DIVISION: | Original jurisdiction |
| PROCEEDING: | Application for enforcement orders under *Nature Conservation Act* 1992 |
| ORIGINATING COURT: | Planning and Environment Court, Brisbane |
| DELIVERED ON: | 14 November 2007 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 12, 13, 14 September 2007, written submissions received 12 October 2007 (Respondents), 19 October 2007 (Applicant's reply) |
| JUDGE: | Robin QC DCJ |
| ORDER: | **Orders as per paragraphs 1 and 2 of application (amended)** |
| CATCHWORDS: | *Nature Conservation Act* 1992 s 88, s 162, s 173D, s 173F – application by private citizen for enforcement orders based on alleged offence(s) of taking a protected animal – taking includes "kill, injure or harm" – respondent company operated electrified grids developed by its director (second respondent) to protect its lychee crops from black flying foxes – original grids intended to be lethal, current versions contended to be non-lethal – finding that "taking" |

nevertheless occurs – whether defence that taking happened in the course of a lawful activity "not directed towards the taking" was made out – whether certain evidence was unlawfully obtained – if so, whether it should be excluded.

COUNSEL: C McGrath for Applicant
D Fitzgibbon for Respondents

SOLICITORS: Environmental Defender's Office (Qld) Inc for Applicant
Waters Timms for Respondents

[1] Dr Booth applied to the court on 20 December 2004 for the following orders:

> "1. That the First Respondent, Second Respondent and Third Respondent be restrained from the commission of offences against sections 88 and 162 of the *Nature Conservation Act 1992* by electrocuting and/or shooting Black Flying Foxes (*Pteropus alecto*) at 376 Volk Road, Mutarnee, being land described as Lot 85 on CWL 1576, County of Cardwell, Parish of Waterview, in the State of Queensland, unless authorised in accordance with section 88 of the *Nature Conservation Act 1992.*
> 2. That within 3 months of the date of this order, the First Respondent, Second Respondent and Third Respondent, and/or their employees or agents dismantle any electric grid system constructed for the purpose of electrocuting Black Flying Foxes (*Pteropus alecto*) at 376 Volk Road, Mutarnee, being land described as Lot 85 on CWL 1576, County of Cardwell, Parish of Waterview, in the State of Queensland unless the taking of Black Flying Foxes by electrocution using such an electric grid is specifically authorised under section 88 of the *Nature Conservation Act 1992.*
> 3. That the First Respondent, Second Respondent and Third Respondent remedy, as close as practicable, the commission of offences against sections 88 and 162 of the *Nature Conservation Act 1992* by electrocuting and/or shooting Black Flying Foxes (*Pteropus alecto*) on or about November and December 2004 at 376 Volk Road, Mutarnee, being land described as Lot 85 on CWL 1576, County of Cardwell, Parish of Waterview, in the State of Queensland, by donating $1,000.00, collectively, within 3 months of the date of this order to the Tolga Bat Hospital operated by the Tolga Bat Rescue & Research Inc, PO Box 685, Atherton Tablelands, Queensland, 4883 for the purpose of the care and rehabilitation of injured Black Flying Foxes."

[2] The application has since been sought to be amended so that after "electrocuting" in 1 and 3 there is added "delivering a non-lethal electric shock to", in 2 the same words ("preceded by 'or'") are added after "electrocuting" and after "electrocution",

also so that the period of time referred to in 3 becomes "between and including 19 December 1994 and December 2004".

[3] The individual respondents are brought in under s 162 of the Act:

> "**162 Executive officers must ensure corporation complies with Act**
>
> (1) The executive officers of a corporation must ensure that the corporation complies with this Act.
>
> (2) If a corporation commits an offence against a provision of this Act, each of the executive officers of the corporation also commit an offence, namely, the offence of failing to ensure that the corporation complies with this Act.
> Maximum penalty – the penalty for the contravention of the provision by an individual.
>
> (3) Evidence that the corporation has committed an offence against this Act is evidence that each of the executive officers committed the offence of failing to ensure that the corporation complies with this Act.
>
> (4) However, it is a defence for an executive officer to prove that –
>
> (a) the corporation's offence was committed without the officer's knowledge or consent; and
>
> (b) the officer took all reasonable steps to ensure that the corporation complied with this Act."

which appears to apply in the circumstances and under which no issues arose. Section 88 is:

> "**Restrictions on taking protected animal and keeping or use of unlawfully taken protected animal**
>
> (1) This section –
>
> (a) is subject to section 93; and
>
> (b) does not apply to the taking of protected animals in a protected area.
>
> (2) A person must not take a protected animal unless the person is an authorised person or the taking is authorised under this Act.
> Maximum penalty –
>
> (a) for a class 1 offence – 3000 penalty units or 2 years imprisonment; or
>
> (b) for a class 2 offence – 1000 penalty units or 1 year's imprisonment; or
>
> (c) for a class 3 offence – 225 penalty units; or
>
> (d) for a class 4 offence – 100 penalty units.
>
> (3) It is a defence to a charge of taking a protected animal in contravention of subsection (1) to prove that –
>
> (a) the taking happened in the course of a lawful activity that was not directed towards the taking; and
>
> (b) the taking could not have been reasonably avoided.

(4) Subsection (3) does not allow a person to keep or use the animal.

(5) A person must not keep or use an animal that is either of the following unless the person is an authorised person or the keeping or use is authorised under this Act –

(a) a protected animal if, at any time, it has been taken and the taking was not authorised under this Act or a law of another State;

(b) a descendant of an animal mentioned in paragraph (a).

Maximum penalty –

(a) for a class 1 offence – 3000 penalty units or 2 years imprisonment; or

(b) for a class 2 offence – 1000 penalty units or 1 year's imprisonment; or

(c) for a class 3 offence – 225 penalty units; or

(d) for a class 4 offence – 100 penalty units.

(6) In this section –

***Class 1 offence*** means an offence against this section that involves –

(a) 1 or more animals that are extinct in the wild or endangered wildlife; or

(b) 5 or more animals that are vulnerable or near threatened wildlife; or

(c) 10 or more animals that are rare wildlife; or

(d) 1 or more echidna, koala or platypus.

***Class 2 offence*** means an offence against this section that is not a class 1 offence and involves –

(a) 3 or 4 animals that are vulnerable or near threatened wildlife; or

(b) 4 or more, but no more than 9, animals that are rare wildlife; or

(c) 10 or more animals that are common wildlife.

***Class 3 offence*** means an offence against this section that is not a class 1 or class 2 offence and involves –

(a) 1 or 2 animals that are vulnerable or near threatened wildlife; or

(b) 2 or 3 animals that are rare wildlife; or

(c) 5 or more, but less than 10, animals that are common wildlife.

***Class 4 offence*** means an offence against this section other than a class 1, 2 or 3 offence."

The exceptions in subsection (1) have no application. Apropos (b), the respondents took the point based on s 14 which led Jerrard JA to dissent in *Phillips v Spencer* [2005] QCA 317 but which, since it was contrary to the views of the majority, this court would not be entitled to apply.

[4] Until 17 December 2004, as noted by the Court of Appeal in *Booth v Frippery Pty Ltd* [2006] QCA 74 at [17], s 88 provided as follows:

> "**88 Restriction on taking etc. protected animals**
> (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
> (b) a conservation officer, public service officer or other employee of the department acting under the chief executive's authority."

The changes have no impact in this matter. No change was made to subsection (3). Nothing suggests that (a), (b) or (c) of the former subsection (1) might apply.

[5] On that date, as it happens, Dr Booth was on the property described in the application without permission, that is, as a trespasser, as she had been on the previous day, gathering evidence in support of the application, with which was filed an interlocutory application (successful in the event) for an interim enforcement order under s 173E.

[6] The underlying application is for an enforcement order under s 173D:

> "**173D Proceeding for enforcement orders**
> (1) A person may bring a proceeding in the court—

(a) for an order to remedy or restrain the commission of a nominated offence (an ***enforcement order***); or
(b) if the person has brought a proceeding under this section for an enforcement order and the court has not decided the proceeding—for an order under section 173E (an ***interim enforcement order***); or
(c) for an order to cancel or change an enforcement order or interim enforcement order.

(2) The person may bring a proceeding for an enforcement order whether or not any right of the person has been, or may be, infringed by, or because of, the commission of the offence.
(3) If the chief executive is not a party to a proceeding for an enforcement order, the person must, within 7 days after the person starts the proceeding, give the chief executive written notice of the proceeding.
Maximum penalty—20 penalty units.
(4) The Minister or the chief executive may choose to be a party to the proceeding by filing in the court a notice of election in the form approved by the chief executive."

Section 173F is:

"**173F Making enforcement order**
(1) The court may make an enforcement order if the court is satisfied the nominated offence—
(a) is being or has been committed; or
(b) will be committed unless the enforcement order is made.
(2) If the court is satisfied the offence is being or has been committed, the court may make an enforcement order whether or not there has been a prosecution for the offence under this Act."

[7] A good deal of history has preceded the application's coming before the court on 12, 13 and 14 September 2007 for determination. After a three day hearing in Townsville on 5, 6 and 7 September 2005, in this court, the originating application was dismissed. See *Booth v Frippery Pty Ltd* [2005] QPEC 095. In the subsequent appeal adverted to above (in which the chief executive intervened for the first and only time), the Court of Appeal took a different view from the Planning & Environment Court judge of the proper interpretation of the defence provision in s 88(3). In a judgment concurred in by the other members of the court, McMurdo J explained why the holding at first instance "that the use of the grids was objectively directed to protecting the lychee crop" and that "the effect on some flying foxes was incidental to that purpose" was not supported:

"[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.

---

[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"

[8] His Honour's reasons went on:

> "[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."

This is the "re-hearing" required under para [38]. Although it might have been contended that no more is involved in the re-hearing (which the Court of Appeal directed should be before another judge) than making of the missing findings, Mr Grath, for Dr Booth, accepted that the entire application was to be heard anew. Additional evidence was adduced. By agreement of the parties, the transcript of Mr Thomas' evidence-in-chief, cross-examination and re-examination at first instance was made an exhibit, although he was cross-examined upon his affidavit and other subjects on 13 and 14 September 2007.

[9] The Mark VII referred to is the latest version of electrified grids (there are some 10 of them a couple of kilometres long in aggregate) on the property where the company has been engaged in lychee farming since the property was acquired from the original grower in 1987. Expansion to some 70 acres (3,500 trees) has occurred;

further expansion is envisaged. The property, known as Edenvale, is on the eastern fringe of the Great Dividing Range, and is surrounded to an extent by the Paluma National Park. From the perspective of lychee farmers, flying foxes threaten production, taking, in the respondents' experience, up to four fifths of the crop: they eat both the flowers (typically in the early Spring) and the fruit, which are at the stage of being ready for the market in November and December.

[10] When the company purchased Edenvale, there were already installed two electrified grids to protect the crop. These were a system called Fyrefox, which had been developed and marketed by someone in Ingham; they or equivalents were apparently common in the industry. They were intended to be lethal, as, indeed, they proved in practice.

[11] Changing community attitudes and new legislative regimes have introduced protection for species such as the Black Flying Fox. This came about on the coming into force of the *Nature Conservation Act* 1992 in the year 1994.

[12] For the purposes of s 88 of the Act, one finds in the schedule the definition:

> "***protected animal*** means an animal that is prescribed under this Act as threatened, rare, near threatened or least concern wildlife, but does not include a processed product that—
> (a) is made or derived from a protected animal; and
> (b) is declared under a regulation or conservation plan for the protected animal to be a processed product that is not included in this definition."

There have been some changes in terminology which do not affect this proceeding. Section 175 is the regulation making power and the regulation of principal concern is the *Nature Conservation (Wildlife) Regulation* 2006, s 31 of which provides that native wildlife mentioned in Sch 6 is least concern wildlife. Item 4 Mammals in that Schedule brings in:

"(1) a mammal that is indigenous to Australia [with irrelevant exceptions] is least concern wildlife".

In Mr Fitzgibbon's closing submissions, which were made in written form some weeks after the hearing, the respondents contend that the Black Flying Fox does not qualify as a protected animal.

[13] Other regulations to be noted are the *Nature Conservation (Administration) Regulation* 2006, which provides:

"**12 Permits for animals other than in a protected area**

The chief executive may grant the following permits for animals other than in a protected area—

(a) a damage mitigation permit;
(b) an educational purposes permit;
(c) a permit to keep protected wildlife;
(d) a rehabilitation permit;
(e) a scientific purposes permit;
(f) a wildlife movement permit."

and:

"**21 Maximum term for permits for wildlife**

(1) The maximum term for a permit for wildlife other than in a protected area is as follows—

(a) for a damage mitigation permit—

(i) if the applicant is operating under an approved property management plan for the land to which the permit relates—3 years; or

(ii) otherwise—6 months."

Section 25 lists factors which the Chief Executive must have regard to in considering an application for a "relevant authority". The *Nature Conservation (Wildlife Management) Regulation* 2006 provides:

"**Subdivision 1 Purpose**

**181 Purpose of permit**

The purpose of a damage mitigation permit for animals is to allow a person to take, keep and use a protected animal if the animal—

(a) is causing, or may cause, damage to property; or
(b) represents a threat to human health or wellbeing.

**Subdivision 2 Restrictions on grant of permit**

**182 General restriction about animals for which permit may be granted**

The chief executive may grant a damage mitigation permit only for a—

(a) a near threatened or least concern animal; or
(b) an endangered, vulnerable or rare animal if a conservation plan authorises the holder of a damage mitigation permit to take the animal under the permit."

[14] To complete the regulatory picture, there might be noted the *Nature Conservation (Wildlife) Regulation* 1994, as materially in force from 19 December 1994 to 25 June 2005 in which Sch 5 Common Wildlife served in the same way as (and to equivalent effect) the replacement provisions for "least concern wildlife" (see, again, Item 4) and the *Nature Conservation Regulation* 1994, as materially in force from 19 December 1994 to 1 March 2004. Section 107 provided relevantly for damage mitigation permits (as Reg 12 of the *Nature Conservation (Administration) Regulation* 2006 does now) and Reg 112 provided, inter alia:

"**112.(1)** The chief executive may grant a damage mitigation permit for protected wildlife only if the chief executive is satisfied –

(a) the land-holder has unsuccessfully taken action to prevent damage or loss caused by the wildlife and action is necessary to minimise –
  (i) damage to nature, crops, stock or other property; or
  (ii) significant economic loss to individuals; or
(b) the wildlife is a threat, or potential threat, to human wellbeing.

**(2)** The chief executive may grant a damage mitigation permit for damage caused, or likely to be caused, by protected wildlife only if the chief executive is satisfied –

(a) common wildlife is causing, or may cause the damage; and
(b) if the damage is unchecked –
  (i) individuals may suffer significant economic loss; or
  (ii) the ecological sustainability of nature is likely to be harmed; and
(c) action under a permit will not detrimentally affect the survival in the wild of the wildlife; and
(d) the taking of the wildlife is ecologically sustainable; and
(e) the proposed way of taking the wildlife is humane and not likely to cause unnecessary suffering to the wildlife."

[15] Mr Thomas, the respondents' protagonist, given his proper concern to protect the lychee crop, is opposed to the protection now given to the flying fox, particularly

given the wide definition of taking for purposes of s 88 which is found in the Schedule to the Act:

> "Take includes –
>
> (a) in relation to an animal –
>
> (i) 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; or
>
> (ii) attempt to do an act mentioned in subparagraph (i)."

His grudging acceptance of the new regime has been accompanied by the realisation he deposes he has come to that "decimation" (meaning large scale killing of flying foxes) is ineffective to deal with the menace which the animals present to crops. (They are not the only threat; in one recent year, drought resulted in a 100 per cent loss, in another rain had the same effect.) With the advantage of qualifications and long experience in electrical and electronics fields, he has the capacity to experiment to develop and implement electrified grids intended to be non-lethal. He has introduced various refinements, the latest of which had been developed before the hearing in September 2005 as an operating prototype. In the time since, all of the grids have been converted to Mark VII. Mr Thomas has retained the basic structure of the grids which consist of 15 or more horizontally strung wires in the same vertical plane, about 28 centimetres apart (Dr Booth estimates 20, but he is probably correct here). A circuit is completed, enabling an (alternating) current to flow if a connection is made between adjacent wires, something expected to happen by the bodies of flying foxes making the connection. An electrical shock is the outcome. The grids, which run between rows of lychee trees, extend far above the trees, with the bottom wire 5 metres or so above the ground. Mr Thomas has retained the established idea of a high voltage (380 volts or 400 volts, as opposed to the conventional domestic 240 volts), but has sought to reduce the current, and therefore the severity of the shock expected to be

administered, to keep that below lethal levels. An early refinement was the use of a light bulb (ballast) to consume energy in the system.

[16] Other refinements have been timers, such that the current can operate so many seconds on, so many seconds off. Systems have been developed which Mr Thomas (with the support of Mr Young, another person with electrical qualifications) says cut the current an appropriately short time after a flying fox has come in contact with the grid. One of the later refinements has been increasing the current somewhat, with a view to immobilising such a flying fox so that it falls from the grid immediately on contact because it is deprived of the ability to hang on and/or fight to get free. Mr Thomas describes the struggles of a flying fox in that predicament as "frapping", an activity likely to harm, maybe kill the animal, something Mr Thomas says (and I accept) he is trying to avoid.

[17] I do not consider is necessary to go into greater detail in respect of Mr Thomas' developing technology, which is described in his affidavit, and also in the Judge's reasons in 2005.

[18] Mr McGrath objected to Mr Thomas' giving opinion evidence on the basis that he lacked relevant expertise. The objection had less force in respect of what might be termed the electronics or electrical engineering field (if, indeed, this was part of the challenge) than in respect of the physiological effects, specifically the effects on flying foxes, of shocks expected to be administered by electrified grids. Those like Dr Spencer (Dr Hanger less so) with academic experience and qualifications in these matters (I would add, on the qualifications to locate, understand and expound for the court the effects of relevant scientific literature) may be in a favoured position; nevertheless I would accept Mr Thomas' expertise based on his actual experience in the field over several years. He is in a position to assist the court by

expressing opinions based on his experience which the court, unassisted, would not be qualified to reach. Compare *E v Australian Red Cross Society* (1991) 105 ALR 53, especially per Pincus J at 88.

[19] The written submissions for the respondents challenged Dr Spencer's entitlement to give expert evidence, contending that he lacked "requisite qualifications in either electrical engineering or electronics", further, that he made his claim that there must be injury or death to Black Flying Foxes without visiting the property and was "an individual, who has tried to manufacture a non-lethal grid but failed". Those submissions do not dissuade from receiving Dr Spencer's evidence as that of an expert.

[20] For purposes of the court's having jurisdiction to make an enforcement order under s 173F, it is clear to me that an offence under s 88 (subject to there being no defence under subsection (3)) "has been committed". The electrocution (in the sense of killing by electricity) of thousands of flying foxes over the years since the Act came into force is established by Mr Thomas' own evidence, which suggests that the observations of Dr Booth and her colleague Ms Thiriet at Edenvale on 16 and 17 December 2004 give counts of dead animals which would almost certainly have been replicated on many other days.

[21] I was not persuaded by the attempt presented by Mr McGrath to calculate a total body count from 1994 to date which nudges 100,000[5], by a process of multiplying various factors, although such a process commended itself to the court in what appears to have been the first of Dr Booth's curial triumphs in her campaigning in the interests of flying foxes (there the Spectacled Flying Fox), *Booth v Bosworth* [2001] FCA 1453, where a calculated count of 22,400 Spectacled Flying Foxes killed (based on an average of 400 based on observations limited to a few days) for one lychee season was discounted to 18,000 of which considerably more than half were taken to be females. Such a count involved considerable inroads into the estimated total Australian population of Spectacled Flying Foxes at the beginning of

---

5 The written reply submissions in Appendix 1 calculate 102,550 from 1984 to 2004

the season as not exceeding 100,000. In the result, by reference to Commonwealth legislation, the Federal Court of Australia issued a restraining or "prohibitory" injunction, but declined to make an order for demolition of the respondent Bosworths' electric grid.

[22] In thinking Mr McGrath's numbers too high, I rely, among other things, on Mr Thomas' assertions that the flying fox numbers visiting Edenvale might vary greatly from night to night.

[23] In my opinion, the total body count does not matter for the purposes of determining whether there was an offence, although it would matter (or what the numbers could be expected to be in the future would matter) as a discretionary factor in determining whether or not an enforcement order ought to be made.

[24] Given the test adumbrated by the Court of Appeal, the s 88(3) defence cannot be availed of. Although the point of the whole exercise was to protect the lychee crop (and there would have been no electrified grids otherwise), it was appreciated, even positively intended that flying foxes be killed. It is a question whether that intention persisted into the Mark VII era.

[25] At the time of the 2005 hearing, the incriminatory intention as referred to in [2006] QCA 74 at [31] (which refers to "the taking of a protected animal") existed. Mr Thomas told the Judge on 6 September 2005:

> "It was important during the actual construction and setting up of the mark 7 system to establish what we call parameters. These are current levels, times, quantities that would be used in any practical system. Now, this is where the true testing took place.
>
> All right. And – and tell us about that testing?-- Well typically, for example, I found there was no reason to actually have the contact time extending as long as two seconds, as I originally conceived and so subsequent tests in 2004 they were reduced to one second.

> All right. Well, in that first lot of testing then of the first version of the mark 7 did you have – what was the situation about fatalities?-- I don't think any record was kept – kept of those.
>
> Where-----?-- It was a bad – it was a bad year crop-wise for us, but there was insufficient bats to actually establish the parameters.
>
> Yes, but – but what about bats contacting the fence? Did you find that they contacted the fence and – and died immediately, that is, fall on the ground or – or not?-- No, we found no bats like that at all. The – initially we – we considered that a possibly, but our initial estimates were close enough where that didn't happen.
>
> All right. And – and in – in that first lot of testing did you keep any record of the numbers?-- Not really, because just – so few. There probably would have been less than – less than 20 or 30 deaths for that – for the whole year. Well, it was an indicator to – to indicate that it was heading in the right design direction."

[26] Dr Booth's evidence (which I accept – it is confirmed by a film she made) is that more deaths than that could be expected in a single night. At that time, the Mark VII was not employed throughout Edenvale. The evidence quoted must, in my opinion, be taken as acknowledgment that the Mark VII resulted in deaths observed by Mr Thomas. If his evidence that there are "no" fatalities caused by the Mark VII is intended to be taken literally, I am not prepared to accept that as a full, accurate account of Mr Thomas' experience over the years. I record my impression of him as a witness trying to be truthful, who did not set out positively to mislead the court (the same goes for Dr Booth and her witnesses); nonetheless, I think he has become so committed to his point of view that he is resistant to acknowledging (let alone searching out) evidence that might contradict it.

[27] Given that success for Dr Booth depends on establishing the commission of an offence, the standard of proof she must meet is the civil standard as described in *Briginshaw v Briginshaw* (1938) 60 CLR 336 and *Refjek v McElroy* (1965) 112 CLR 677. Applying that standard, I am comfortably satisfied that deaths of flying foxes at some level have occurred while grids (the Mark VII included) have been

operated and that this will continue while electric grids (even if restricted to the Mark VII) are operated. Deaths by electrocution on Edenvale itself are not the end of the matter. I accept the evidence of Dr Spencer and Dr Hanger (based necessarily on experience with 240 volt domestic power lines) that flying foxes which have suffered injury by electricity may not die then and there, but manage to fly off and then perish in various ways at some remove in time and place in outcomes that would not have happened but for the contact with the electrified grid. An associated phenomenon, to be expected in the fruiting season, is lethality for vulnerable fetuses of mothers which suffer electric shock. As well as the "momentary infliction of an electric shock … itself … harming or injuring" as referred by McMurdo J, consideration must, in my opinion, be given to consequences of such a shock that are not necessarily immediate. I am not prepared to accept Mr McGrath's argument that Mr Thomas' automated counts of "hits" of the order of 50,000 or 60,000 per year provide a reliable indication of the likely number of flying fox deaths, or even the likely number of flying foxes "taken" by being injured or harmed. However, I am satisfied the number would be substantial and that as of the present time, for purposes of s 173F(1), the proper finding is that the nominated offence –

(a) is being committed; and

(b) (on the assumption that the respondents continue operating as they have done – even using Mark VII exclusively) will be committed unless the enforcement order is made.

In this exercise of considering the present and the future (as opposed to what has happened in the past), the respondents are little closer to making out the statutory defence, even though it be acknowledged that the number of flying foxes taken may have been considerably reduced. For purposes of s 88(3)(a) there is no escaping the

conclusion that the respondents cannot show that their activity "was not directed towards the talking".

[28] Further, if regard is had to s 88(3)(b), the court has evidence of Mr Norling that the taking could have been reasonably avoided by resorting to netting. The initial capital cost of that for the whole of Edenvale would be substantial (some $800,000) and there would be problems of maintaining the netting. On the evidence, the netting envisaged would avoid harm or injury to the flying foxes; we are here not concerned with the less wildlife-friendly "do-it-yourself" netting defences resorted to at a domestic level. Mr Norling's approach has been to measure the accrued returns the company could expect (on Mr Thomas' own figures) if the depredations of flying foxes were effectively prevented by netting against the substantial capital cost of installing them. I understand Mr Thomas' objections to netting, which include not only the cost of installing it, but the cost of maintaining it and obtaining (if this is possible at all) insurance; there was also mentioned the deterioration in netting from contact with chemicals used to spray the trees, the need to prune trees to keep them clear of netting, the destruction cyclonic conditions might wreak and the reduction in light for the crop. Mr Thomas' views, which I am satisfied he genuinely espouses, are contraverted by other evidence before the court. On this aspect, by a somewhat narrow margin, I arrive at the same conclusion as did the court in *Booth v Yardley* [2006] QPEC 119, acknowledging the accounting/economic expertise of Mr Norling. The respondents have not established what they need to, on a bare preponderance of probabilities, under s 88(3)(b). This is something of a minor issue, as the defence is made out *only* if s 88(3)(a) is established in addition to (b).

[29] Needless to say, none of the respondents has obtained an authorisation of the kind referred to in s 88(2). In one year recently, Mr Thomas did apply for a permit; however, he withdrew the application some months later before any permit was granted, he says at request of the Environmental Protection Agency, which was the administering authority.

**Findings required by the Court of Appeal**

[30] It is for the respondents to establish the defence on the ordinary civil standard of proof, rather than the more difficult standard described in *Briginshaw* and *Refjek v McElroy*. In terms of Court of Appeal's reasons, they have not 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.

[31] While the momentary infliction of an electric shock may not of itself involve the harming or injuring of a flying fox any more than it would of a person, on evidence which I accept, in many cases the situation is much more complex and does not end with the momentary infliction of the shock. Mr Thomas' publication "A Fruit Bat Deterrent System Using Electric Fences-Type: Edenvale MK VII" dated February 2005 and exhibited to Dr Spencer's new affidavit indicates an appropriate concern for persons who may suffer shock. A section on safety (p 24) commences as follows:

> "This apparatus is designed to dispense near fatal electric shocks to mammals and it cannot discriminate between rodents or humans. There is no argument. – **it is a hazard** and there is a definite possibility that someone at sometime will receive a violent shock from it. Considerable effort has been made so that the system **does not** kill Bats and the design limit of 30 mA is regarded as non-fatal to humans **IN MOST CASES.**
>
> Since the system voltage is low (380V) and the contact resistance of humans is relatively high, it is likely that any current flow will be

> much less than the 30 mA current limit (cattle fences have voltages up to about 9000Volts which help to break down the contact resistance). In humans, muscle contraction is almost certain and this could extend to the chest, impairing breathing. The MKVII 4 second interrupt period is designed for human escape as well as the bats. If there is no escape, the contact is in effect continuous and the fence will be locked out after its sequence lasting one minute. This format considerably reduces the risk of suffocation.
>
> The system crow bar will shut the system down if any current flow exceeding the magnetizing current is for more than 2 seconds.
>
> There is absolutely no way we can build a system where the bats receive an electric shock and humans don't. While we can make a network with electrical protocols that are non lethal or harmful to both species, we have no way of reducing the secondary consequences of an electric shock. In this application, the secondary outcomes could result in **Death or very serious injury** because the fences are 5m above the ground!..."

That section goes on to emphasise that "any contact with an elevated fence will initiate secondary 'complications'". Of the impact on humans, particularly if earthed, it is said:

> "There is an odds-on chance that you will get a very nasty electric shock and while it is hoped that it won't kill you, **the secondary effects might**."

The summary (p 27) is:

> "Firearms and explosives that are part of every farm and orchard operation have well deserved respect and explicit safety protocols. This fence system is in the same category and its treatment should be no less. Like guns, the only risk reduction avenues are administrative controls – i.e. **Rules**
>
> Some of these can be:-
>
> 1) Don't touch it – with anything – unless its off (Test pole excepted).
> 2) Don't rely on automatic operation – use the key switch.
> 3) Don't turn it on until all staff are accounted for.
> 4) Don't let any picker start until the system is locked out.
> 5) Check the fence unit before you pick any row with a fence in it.
> 6) Do not use or move any ladders or climb trees at night.
>
> A laminated list like this, glued to the control unit, Bundy clock, toilets, pickers fridge, might save a life. We don't want to kill bats and we sure as hell don't want to kill humans or even give them the bat treatment. By Sod's Law it will always be your best picker and either way they won't come back!

> **ALL ELECTRIC FENCES FOR BATS ARE POTENTIALLY FATAL.**
> This chapter covers the safety aspects of the original concept and has been retained as a basis for discussion/orientation. A formal Safety Management Plan has been prepared for Edenvale MKVII system use on this farm. It may require slight alterations for use on other properties. Ref Page 4."

[32] There are more or less successful attempts at humour in the publication so that a question arises as to how seriously the foregoing should be taken throughout. In my opinion, it bespeaks a genuine and entirely proper concern with the health and safety of human beings, and acknowledges the risks posed by the grids to them. The relevant evidence is all one way; that the damage done by electric shock from a particular current is inversely proportional to the area of cross-section of living tissue traversed by the current. The evidence of Dr Spencer, Dr Hanger and lay witnesses establishes that bats can survive electric shock (typically from power lines) and fly off, but that in various ways, death may soon inevitably follow, including death to young which might not directly receive an electric shock themselves. Persisting injury short of death may obviously constitute injury or harm to a flying fox. All of such outcomes are foreseeable on the relevant tests. Indeed, I would say they are foreseen by Mr Thomas, and by extension the other respondent, notwithstanding their pride in the Mark VII, which may well have enormously reduced the incidence of immediate death by electrocution.

[33] Even if the momentary infliction of an electric shock does not result in the immediate or direct death of an animal, in my opinion, upon the evidence before the court, that does "of itself involve the harming or injuring of a flying fox". This has the consequences described in para [36] of the Court of Appeal reasons.

[34] It is convenient to note the evidence of Dr Hanger, a well-qualified veterinarian with "significant experience in the examination, treatment and diagnosis of disease

and injury in a wide variety of Australian and exotic fauna species, including flying foxes". In recent times he has been the senior veterinarian at the Australian Wildlife Hospital based at the Australia Zoo, which admitted some 140 flying foxes in the year to 13 February 2007, when his affidavit was sworn. He deposed:

> "7. Electrocution is a common cause of death or injury of flying foxes accounting for approximately 8% of flying fox admissions to our hospital of which 50% are euthanased, based on data collected over the past year.
> 8. It is not uncommon for electrocuted female flying foxes to be presented dead or injured with dependent young still clinging to them. Such young may or may not have also suffered electrocution injuries. My experience with electrocuted flying foxes is limited to those injured by contact with the domestic power grid. These animals are generally severely injured or burned, and are mostly found on the ground in close proximity to the site of injury.
> 9. In my experience, flying foxes suffering from electrocution injuries, (mainly burns), show signs of severe pain, for which potent pharmacological pain relieving medicines (including strong narcotic analgesics) are often required. I believe that it is a proper assumption that flying foxes affected by electrocution injury and burns suffer pain of a similar magnitude to that suffered by humans with similar injuries. The distribution of burns in electrocuted flying foxes is variable, but commonly includes severe burns and tissue damage to the wings and legs consistent with entry/exit wounds where the electrical current has been concentrated by the anatomy of the area on its pathway through the body.
> 10. In my experience, flying foxes that have survived severe electrocution events generally have two or more severe burns adjacent to which there are usually areas of severe acute inflammation and tissue swelling. Exhibit JJH-2 to this affidavit is a series of photographs of a dead flying fox showing a typical distribution of burns caused by electrocution. Flying foxes injured in this way have a poor prognosis and are generally euthanased.
> 11. I have read and agree with the report of Dr Hugh John Spencer, affirmed 31 August 2005 (to the extent that my limited knowledge of electrical physics allows). particularly paragraphs 14-18 that deal with the pathophysiology and mechanisms of tissue damage and death associated with electrocution. I am unable to comment on what current would represent a risk of harm to a flying fox. However, I agree with Dr Spencer, in that currents that are insufficient to cause overt burns or tissue damage may cause other physiological effects that result in harm or death, such as internal burns and tissue damage, cardiac arrhythmia, loss of consciousness, convulsions, tetanic muscle contraction and the like. Mechanical injury or trauma caused by falls or violent muscle spasms are common in electrocuted humans, and in my experience also occur in electrocuted flying foxes. Furthermore, sublethal electrocution events on pregnant flying foxes may cause abortion, and on females with dependent young may cause young to be dropped, or creched young to be neglected.

> 12. I am unable to comment on the likelihood of the most recent variation of the respondents' electric grid (the 'Mark VII') to cause burns or other physical or physiological lesions in flying foxes coming in contact with it. There are many variables that determine the degree and type of injury that occurs when a living organism is exposed to an electric current. However, it is my opinion that any level of current that is sufficient to cause significant muscle contraction (whether single or sustained) in a flying fox on contact, has the potential to cause harm or death to the flying fox, and or a dependent young. Furthermore, sublethal injuries that do not prevent the flying fox from escaping the immediate surrounds of the grid may cause death or significant morbidity later. Failure to account for this possibility may give a false impression of the safety of the so-called 'sub-lethal' grid."

[35] Seven months later, in the witness box he updated his figures:

> "… for now three and a half years perhaps the total number would be around about 300 or perhaps 100 per year.
> … there were 18 flying foxes admitted for electrocution injuries and that still is a percentage of around about 8 per cent or the high 7 per cent of admissions of flying foxes and … the euthanasia rate in those flying foxes is approximately 56 per cent.
> … to be exact, a 55.5 per cent euthanasia rate. I can add some further figures. Approximately 5 and a half per cent of those admissions die and approximately 22 per cent of flying foxes that are admitted with electrocution injuries are released back into the wild."

[36] Dr Spencer had provided an affidavit for the 2005 hearing. His evidence was expanded by a supplementary affidavit affirmed on 16 February 2007. The new affidavit expands on what had previously been presented, in particular by quotations from scientific papers establishing levels and duration of electric current which may be harmful to humans, the threshold for ventricular fibrillation being an important benchmark – with some particular focus on human foetuses. I accept his proposition that current density is an important consideration and that, speaking generally, flying foxes having about one-twelfth of the cross-sectional area of human beings, current density is effectively multiplied by 12 or thereabouts, "the currents flowing from head to abdomen in flying-foxes." It is convenient to set out Dr Spencer's conclusions, which I accept.

> "17. In summary, there is a very high likelihood that each of the different versions of electric grids operated by Mr Thomas kill,

> injure and harm flying foxes. My view on his Mark VII grid has not changed from my previous affidavit or Mr Thomas' evidence of observing no deaths on the Mark VII despite large numbers of contacts being recorded. If Mr Thomas' observations are correct they indicate that the Mark VII grid does not cause immediate death. However, his observations say nothing about whether the Mark VII grid causes delayed death or injury or harm to the flying-foxes that collide with the grid. In my opinion there is a high probability that the MK VII is lethal or causes morbidity and eventual death from wing bum, muscle damage and visceral damage.
> 18. From personal observation. Flying foxes can be seriously electrocuted and still fly off, only to die later. Serious wing burns, may not, on the short term, prevent flight, and these serious burns can also be anaesthetic - that is the nerve fibres that underly pain reception have been destroyed, something I can vouch for from personal experience."

[37] It has to be said that the evidence is not conclusive so far as the lethality (not necessarily immediate) of any version of the Mark VII is concerned. Against the background of the lethality indicated by Mr Thomas, and the longer history of his experimentation (a term *not* used to suggest that there has been any unlawful experimenting on animals taking place), the court would be expected to exercise appropriate caution rather than accept Mr Thomas' uncorroborated claims that he has now got his system perfected to the extent that confidence can be held that flying foxes will not be killed, injured or harmed by coming into contact with it, while it is operational.

**Did/do the respondents intend to "take" flying foxes?**

[38] The concepts of intention and motive adverted to by the Court of Appeal are dealt with in s 23 of the *Criminal Code*. Unless unequivocally excluded, the section applies to all offences in Queensland, including offences under s 88 of the *Nature Conservation Act*. It renders motive irrelevant, subject to exceptional cases, of which the Court of Appeal has determined s 88 is not one. Section 23 provides:

> (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for -

> (a) an act or omission that occurs independently of the exercise of the person's will; or
> (b) an event that occurs by accident.
> …
> (2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.
> (3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility."

[39] For what it is worth, I am satisfied that any putative s 23 defence may be regarded as excluded (indeed, excluded beyond reasonable doubt). The concepts in s 23 are difficult to apply in some contexts. It has seemed necessary to consider them, and in particular in light of Mr Thomas' insisting that in present conditions he has no desire to kill, injure or harm flying foxes.

[40] The Court of Appeal decision requires this court to determine whether the company, which must be taken to be represented by Mr Thomas, has intentionally "taken" flying foxes and will continue such behaviour unless restrained. The editors of *Carter's Criminal Law of Queensland* note the difficulty courts have experienced in defining intent, citing *He Kaw Teh* (1985) 157 CLR 523, 569-70:

> … Intent, in one form, connotes a decision to bring about a situation so far as it is possible to do so – to bring about an act of a particular kind or a particular result. Such a decision implies a desire or wish to do such an act or to bring about such a result. Thus when A strikes B (the act) having decided to or desiring or wishing to strike him, it can be said that he intends to strike B. Intent, in another form, connotes knowledge. This appears more clearly if we divide an action, somewhat artificially, into a mere movement and the circumstances that are an integral part of the action and which give it its character. When A strikes B, his action can be divided into A's movement of his fist and B's presence in the path of A's movement. Although A's movement may be voluntary, he is not said to strike B intentionally unless he knows that B (or someone else) is in the path of his moving fist. If mens rea were imported into an offence defined as striking another – a definition that does not include a result – two states of mind normally be involved: voluntariness of movement and an intention to strike another – and intention is, for all practical purposes, established by knowledge that another person is, or is likely to be, in the path of the movement. If the definition is extended

> to include a result – causing bodily harm – the statute may prescribe a further mental element: ordinarily a specific or special intent to cause bodily harm.
>
> … General intent and specific intent are also distinct mental states. General or basic intent relates to the doing of the act involved in an offence; special or specific intent relates to the results caused by the act done. In statutory offences, general or basic intent is an intent to do an act of the character prescribed by the statute creating the offence; special or specific intent is an intent to cause the results to which the intent is expressed to relate. Both general intent and specific intent may be established by knowledge: the former by knowledge of the circumstances which give the act its character, the latter by knowledge of the probability of the occurrence of the result to which the intent is expressed to relate. But existing circumstances can be known more certainly than the probability of the occurrence of a future result, and therefore specific intent is usually established by proof of a desire or wish to cause the prescribed result, whereas general intent is usually established by proof of knowledge of circumstances prescribed by the statute as defining the act involved in the commission of the offence. Of course, proof of an actual desire or wish to do an act of the prescribed character is proof of a general intent (cf. *Reg. v. Reynhoudt* (1962) 107 CLR 381, at pp 398-399); *Morgan* ([1976] AC at p 210), but for practical purposes knowledge of the circumstances which give the act its character when an act is voluntarily done is the ordinary form of an intent to do it. A specific intent to cause a prescribed result can be, but is not ordinarily, established by knowledge that such a result will probably (or is likely to) occur: *Reg. v. Crabbe* ((1985) 156 CLR 464)." (per Brennan J)

[41] In the present proceeding, on the assumption that the respondents (however they felt in the earlier years from 1987) may not any more desire to kill or "take" flying foxes, I cannot avoid concluding that a continuing intention to "take", even to kill, has been established, applying the tests which bind me.

[42] In *R v Willmot (No 2)* [1985] 2 Qd R 413, in the Court of Criminal Appeal, Connolly J said (in the course of a passage quoted and relied on when similar issues were helpfully discussed in the Court of Appeal in *Reid* [2006] QCA 202, (special leave refused at [2006] HCA Trans 666, 8 December 2006)) at 418-419:

> "… The ordinary and natural meaning of the word 'intends' is to mean, to have in mind. Relevant definitions in *The Shorter Oxford English Dictionary* show that what is involved is the directing of the mind, having a purpose or design. The notion of desire is not involved as the learned judge rightly held. A person may do

> something, fully intending to do it, although he does not in the least desire to do it.
> …
> … The common law formulation will be found, for Australia, in *The Queen v Crabbe* (1985) 59 A.L.J.R. 417. It is unlawful homicide with malice aforethought: and malice aforethought means intention to cause death or grievous bodily harm or knowledge that it is probable that death or grievous bodily harm will result. Knowledge of the probability of death or grievous bodily harm is not an element of s. 302(1), although, if established, it leads almost inevitably to the conclusion that death or grievous bodily harm was intended. In *Crabbe* at p. 419, the former state of mind was described as comparable with the relevant intention. It was doubtless this consideration which led certain of the law lords in *Hyam v. Director of Public Prosecutions* [1975] A.C. 55 to the view that the two states of mind are the same. In Queensland the mental element is intention to cause death or grievous bodily harm. It is what the High Court in *Crabbe* at p. 419, after stating Stephen's formulation, referred to as 'actual intent'.
>
> In charging the jury elaboration or paraphrase of what is meant by intent should be avoided: *Reg. v. Moloney* [1985] 2 W.L.R. 648 at p. 664. The jury should of course be told in appropriate cases that intention is not the same as motive or desire. They should also be told that they are to decide whether the intention is established on the whole of the evidence. Thus, in this case, the appellant denied having formed any intention to kill. But it was clearly open to the jury to conclude that the cruel death which this young woman suffered must have been and in fact was intended by him.
>
> Should there be direct evidence of the accused's awareness that death or grievous bodily harm was a probable result of his act, they may properly be directed that if they accept that evidence, it is open to them to infer from it that he intended to kill or do grievous bodily harm as the case may be."

[43] Reference was made to the case of *Vallance v The Queen* (1961) 108 CLR 56, not always appropriate to be relied on in Queensland, because it was decided upon a different "accident" provision, s 13 of the Tasmanian Code:

> "(1) No person shall be criminally responsible for an act unless it is voluntary and intentional, nor, except as hereinafter expressly provided, for an event which occurs by chance."

[44] I have found the judgments helpful in indicating the proper approach to the broad issue of intent, as contrasted with desire, and of the respondents' intending or not to take flying foxes. A youth was charged with unlawful wounding after he had fired a

pellet from an airgun in the general direction of young girl who was hit; he denied any intention to bring about that outcome. Locally, we are familiar with the separation of an accused person's acts from the outcome (or event) that ensues; typically it is in relation to the former that intention must be proved. In *Vallance*, three of the judges proceeded on the basis that intention to wound, rather than an intention to shoot only, had to be shown. Dixon J said at 61:

> "… The wounding is the crime, the punishable act, and it is the wounding which must be voluntary and intentional. I regret that I find myself unable to avoid this reading of the words of s. 13(1) because I find that there is such a weight of judicial opinion to the contrary. In its application to s. 172 it means that the wounding must be intentional. But in s. 13(1) I do not read the word 'intentional' as bearing a meaning which requires that the end must be positively desired. I take it in the sense explained by Sir *Courtney Kenny*, an explanation he gave when he published his book in 1902. He contrasts it with the more ordinary use of the word which excludes a result that a man does not desire but foresees as likely, one the risk of which he runs possibly with regret. The requirement of voluntariness I presume may be ignored : it relates to forms of actual or presumed coercion or duress and is not relevant. But the view I have expressed means that the direction by *Green* J. which is complained of was too favourable to Vallance because the jury were not informed that it was enough if in firing the air-gun he fired towards the girl foreseeing or adverting to the likelihood of the pellet wounding her but heedless of such a consequence. … "

[45] Kitto J at 63-64 said:

> "… The word 'intentionally' is one of variable meaning, and for that reason the dictionary does not solve the problem before us ; but the point which the definition brings out is that to 'wound' a person is not simply to do an act which causes an injury of a particular kind: it is to do an act which causes such an injury with a state of mind extending to the injury as well as to the act. Such a state of mind must include a foreseeing of the injury as a possible consequence of the act, and it must include an assent to the causing of the injury by means of the act. The notion which the word conveys is not satisfied, I think, by the causing of an injury by mere negligence falling short of recklessness. It requires such an assent that the injury was within the contemplation and choice of the doer of the act. But there is, I think, nothing in the word to confine the notion to the causing of the injury with an actual desire to cause it. To speak of a desire as forming a necessary element in an intention may be accurate enough; for even where the result is regretted it may be desired on a balance of considerations, and so may be intended. But I am not at the moment defining intention. What is in question is the meaning of 'unlawfully wounds' ; and in that expression, though I do find a

limitation relating to the mental attitude of the doer of a causative act, it is not a limitation which requires that the act must be done with an actual desire to cause an injury."

[46] Windeyer J said at 79:

"… The act is unlawfully wounding. There are no other ingredients in the crime charged. The question is : was this act intentional ? It would, I consider, be inconsistent with the scheme of s. 13(1) to regard the 'act' there referred to as something less than the act of wounding ; for it, and nothing less, is what would, if done intentionally, give rise to criminal responsibility. It is the *corpus delicti*, or the *actus reus* if one likes that inelegant phrase. I am unable to accept the argument that on a charge of unlawfully wounding the act to which s. 13(1) refers is some action, not of itself criminal, forming a part, as it were, of an act of wounding - …"

And at 82-83:

"The criminal law punishes wicked acts. It regards wickedness as, in general, depending upon the mind of the accused when he did the act charged. What a man does is often the best evidence of the purpose he had in mind. The probability that harm will result from a man's acts may be so great, and so apparent, that it compels an inference that he actually intended to do that harm. Nevertheless, intention is a state of mind. The circumstances and probable consequences of a man's act are no more than evidence of his intention. For this reason this Court has often said that it is misleading to speak of a man being presumed always to intend the natural and probable consequences of his acts. And this, I do not doubt, is so. Because intent is a state of mind, it becomes necessary to ask what is that state of mind ; what for the purposes of the criminal law is comprehended in the idea of an intentional act. Under the law apart from the Code, an accused would be guilty of unlawfully wounding if his actual purpose was to inflict a wound : he would also be guilty if, without any actual purpose to wound anyone, but foreseeing that what he was about to do was likely to cause a wound to someone, he yet went on to do it. The common law treats what was done recklessly, in that way, as if it had been done with actual intent. It says that a man, who actually realizes what must be, or very probably will be, the consequence of what he does, does it intending that consequence. The word 'intentional' in the Code carries, I think, these concepts of the common law. I therefore do not read s. 13 as altering these principles. It is, I may add, in my view undesirable to insist upon desire of consequence as an element in intention. There is a risk of introducing an emotional ingredient into an intellectual concept. A man may seek to produce a result while regretting the need to do so.

Before parting with the question of intent and recklessness, I would observe that the expressions 'subjective test' and 'objective test' that were used in the argument, and which have recently come somewhat into favour, are, I think, unfortunate. A man's own intention is for

> him a subjective state, just as are his sensations of pleasure or of pain. But the state of another man's mind, or his digestion, is an objective fact. When it has to be proved, it is to be proved in the same way as other objective facts are proved. A jury must consider the whole of the evidence relevant to it as a fact in issue. If an accused gives evidence of what his intentions were, the jury must weigh his testimony along with whatever inference as to his intentions can be drawn from his conduct or from other relevant facts. References to a 'subjective test' could lead to an idea that the evidence of an accused man as to his intent is more credible than his evidence of other matters. It is not : he may or may not be believed by the jury. Whatever he says, they may be able to conclude from the whole of the evidence that beyond doubt he had a guilty mind and a guilty purpose. But always the questions are what did *he* in fact know, foresee, expect, intend."

(Taylor J at 69[6] and Menzies J at 71-72[7] considered that intention to wound need not be shown.)

[47] Applying *Vallance* to the evidence here, a persisting intention to take flying foxes has been established to the requisite standard (I would say to the full criminal standard), whether the intention relates to immediate killing (in relatively modest

---

6 "In the present case a not dissimilar situation presents itself. We find that s. 172, upon its true construction, provides, *inter alia*, that a wounding caused by an act or acts performed with reckless or wanton indifference to their result foreseen as a not unlikely consequence is punishable as a crime. That is to say, the section purports to penalize as a crime an act which results in a wounding if, although there was no specific intent to wound, it be shown that it was performed with such reckless or wanton indifference. Now what has s. 13(1) to say with respect to such a crime ? Clearly enough, I should think, it does not, and was not intended to, exclude acts of this character from the scope of s. 172. To my mind it seems that in the circumstances of this case the only concern of that sub-section was with the character of the acts of the applicant which are said to have constituted the crime charged. That is to say, that it was necessary only to show that the wounding was the result of acts which were voluntary and intentional on the part of the applicant and which were done with reckless and wanton indifference to their result foreseen as a not unlikely consequence."

7 "... His Honour directed the jury that 'to be guilty of that offence' (i.e. wounding), 'he must also have intended to wound Pauline' and added 'I tell you that intention is the state of mind of a man who not only foresees but also desires the possible consequences of his conduct.' These directions were obviously based upon the view that the application of s. 13 (1) to the circumstances of the case made it necessary that the wounding should be voluntary and intentional i.e. that the 'act' there referred to was the act of wounding and not the act of shooting. The Court of Criminal Appeal took the other view and regarding the 'act' as the shooting i.e. the aiming and firing of the rifle, considered that the first part of s. 13(1) did not require the direction that the accused should not be convicted unless he intended to wound Pauline. I agree with the Court of Criminal Appeal. …
… the direction and the only direction that the first part of s. 13 (1) required in this case was that the accused could not be convicted unless the act of shooting was voluntary and intentional and the direction that was given, *viz.*, that the wounding must have been intentional cannot be supported by that provision.
There is, however, the second part of s. 13(1) to be considered, *viz.*, that no person shall be criminally responsible for an event which occurs by chance. The 'event' here for the purposes of this provision is clearly enough the wounding …"

numbers) or to harming or injuring which in some instances (perhaps not in others) would lead to early death. It is immaterial whether there the respondents' activities in operating the grids were motivated by, or directed to protecting the lychee crop, or whether the respondents' intentions included ones of protecting the crop.

[48] There is no occasion here to consider the intention with respect to particular animals on the principles adumbrated in the typical murder case (e g *Willmot*) or the "torture" context in *Ping* [2005] QCA 472 (where a subjective intention to cause the relevant result was required: [38]) – or as there would be if a shotgun were fired at a particular animal. Section 643 of the *Criminal Code*:

> "**643. Intention to defraud.** On the trial of a person charged with any offence of which an intent to injure or deceive or defraud, or an intention to enable another person to deceive or defraud, is an element, it is not necessary to prove an intent to injure or deceive or defraud any particular person, or an intent to enable any particular person to deceive or defraud any particular person"

has no application, but the idea embodied in it is relevant. The intention I have found established is a generalised one relating to those flying foxes that might visit Edenvale and come into contact with an electrified grid there.

[49] The respondents' situation, like that of any bona fide orchardist or farmer, would command the sympathy of many people. The community's interest in enhancing their productivity is as important as in other sectors of the economy. Protection of lawful crops is a legitimate exercise. The legislature has intervened to regulate such protection by forbidding and penalising measures that formerly might have been in common use. It envisages some balancing of nature conservation (to pick up the Act's title) and the requirements of existing and future agricultural (and other) enterprises.

[50] Although the court may find itself engaged in balancing as described by the Court of Appeal (at [33]), sole responsibility for striking the balance is not entrusted to the court; it is in no position to formulate in any situation an outcome which will somehow give reasonable protection both to the useful lychee crops and to the native animals whose depredations threaten to destroy the crops unless they are effectively deterred from gaining access. This court is limited to reaching conclusions about the commission of offences. McMurdo J in the Court of Appeal has made it clear that the legislative scheme is that the balance is to be struck administratively:

> "[30] … 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."

[51] If protected animals are to be taken by a grower, and the taker is not to be at risk of prosecution, he or she is expected to proceed in one of the ways listed in s 88(1)(a), (b) and (c). This was underlined in their additional observations by Williams JA at [2]:

> "… 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."

and Holmes JA at [8]-[10]:

> "[8] 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' 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 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."

**Evidence "illegally" obtained**

[52] Mr Fitzgibbon, for the respondents, urged the court to reject the evidence of flying fox fatalities on Edenvale collected by Dr Booth on 16 and 17 December 2004 when she (on at least one of the days with an accomplice, Ms Thiriet) went there without permission, that is, as a trespasser. Mr McGrath conceded, although there may be room for argument to the contrary, that the discretion to exclude admissible evidence recognised in *Bunning v Cross* (1978) 141 CLR 54 applies in "civil" proceedings such as the present and is not limited to criminal proceedings. Judge Rackemann took that approach in *Booth v Yardley* (BD2845 of 2006) in a six page ruling made in the hearing that day of *Booth v Yardley* [2006] QPEC 116, in reliance on Lander J's decision in *Southern Equities Corporation Ltd (In Liq) v Bond (No 2)* (2001) 78 SASR 554 in the context of warrants of uncertain validity, but did not reject the impugned evidence.

[53] The evidence now sought to be excluded (which attracted no serious challenge as to its correctness) was allowed in without objection in the hearing in Townsville in September 2005. It established that grids in operation in December 2004 had

caused relatively recent fatalities in significant numbers. At that hearing, Mr Thomas (who was accepted by the judge as a truthful witness) himself gave evidence of fatalities in the thousands over the years. His point was that the new Mark VII had brought about a huge reduction in fatalities, giving rise to a potent factor in the court's determination whether any enforcement order ought to be made. What he said was (by agreement) made part of the evidence before me. No doubt it could have been introduced even without the respondents' agreement. It establishes contravention of s 88 more generally than Dr Booth's evidence does, and I would say at equivalent levels, from the point of view of flying fox fatalities.

[54] Mr McGrath's submissions against any exercise of the court's discretion to exclude his client's evidence included the argument that the *Nature Conservation Act* invites (and one supposes should be construed to facilitate) enforcement proceedings by private citizens. The State, lacking the capacity or the will adequately to police compliance with the Act has taken the course of supplementing its efforts in that regard (which one may assume could call in aid procedures whereby officers might be given rights of access to private premises to gather evidence) by encouraging involvement of interested members of the public, vigilantes if you like, to become involved; their entitlement to bring proceedings like the present one on their own initiative is recognised by the Act. See s 173D. Nothing in the Act in terms, or by implication, authorises someone like Dr Booth to enter anyone else's property without appropriate consent. If she chooses to do so, she is at risk of proceedings for trespass. Indeed, after the commencement of s 13 of the *Summary Offences Act 2004* on 21 March 2005, she would be at risk of prosecution.

[55] It is a separate question whether evidence obtained at such risk to herself (concededly admissible) should be excluded in a discretionary exercise. Ms Thiriet

was able to obtain (photographic) evidence from outside Edenvale on her second visit, but it may be accepted that really useful evidence was only likely to be gathered by someone on the property. *Bunning v Cross* confirms that the public interest in having some types of conduct prosecuted is an important factor against exclusion of evidence improperly (even illegally) obtained. The argument for exclusion may be thought to gather potency as the evidence gatherer's conduct becomes more blatant. This could be said to have happened (a) as further unauthorised visits occurred, (b) when s 13 of the *Summary Offences Act* commenced, and (c) when Dr Booth's application to the court for authority to enter Edenvale, was adjourned by Judge Wall on 22 September 2006 in deference to the respondents' asserted determination to seek removal of the proceeding to the High Court of Australia under the (Commonwealth) *Judiciary Act 2003*. I rejected their application to have Dr Booth dealt with for contempt of court in respect of subsequent entries.[8] No doubt, the gathering of evidence by means constituting

---

[8] For reasons expressed as follows: "There is before the Court an application by the respondents to have the applicant, Dr Booth, dealt with for "contempt of Court constituted by failure to comply with orders of the Court" by an amendment to the application that was added afterwards, "or for any other contempt". Since I became aware of the application as mentions Judge, I have been intrigued by it. It emerged that there was no order of the Court. My understanding of the law in relation to contempt has been that there are two types of contempt. Criminal contempt, summarising things, involves scandalising the Court, it is usually perpetrated in the face of the Court. The other type of contempt is civil contempt, which involves disobedience to a Court order or breach of an undertaking to the Court.
As Atkinson J said in Bakir v. Doueihi [2001] QSC 414 at paragraph [7], civil contempt also has a public aspect of punishing disobedience to orders of the Court over and above securing the benefit of orders to the party who may benefit from them. The application has obviously been amended in acknowledgement of the lack of any Court order that can be pointed to, to bring in what I understand it to be criminal contempt. In recent times, the gravamen of that has been located "not in affronting the dignity of the Court, but in interfering with the due administration of law". See Lane v. Registrar of Supreme Court of New South Wales 148 CLR 245 at 257. Mr Fitzgibbon's written submissions collect for the Court the legislative framework which is relied on.
That is found in section 4.1.5 of the Integrated Planning Act 1997 and section 129 of the District Court of Queensland Act 1967.
It was the High Court decision in Re Collina (1999) 200 CLR 386 which involved scandalising the Court in circumstances where that had no effect whatever on any litigant.
The contempt here consists of acts which may, for present purposes, be taken to be established, of entry by Dr Booth to the respondents' property with a view to gaining or perhaps confirming evidence for use in this proceeding. No authority was obtained from the respondents who were the appropriate people to give it for that entry, nor any authority of the Court.
Mr Fitzgibbon, as I understand it, bases the charge of contempt on Dr Booth having invoked unsuccessfully the jurisdiction of Court to make an order under the Uniform Civil Procedure Rules authorising her to go on to the relevant property. The lack of success was not attributable to the refusal to make an order or indeed any determination by the Court that there should not be an order. The matter came before Judge Wall in Townsville on the 22nd of September 2006 in a rather confused hearing when the present respondents, who

contempt of court would be among the factors pointing to exclusion in the balancing exercise indicated by *Bunning v Cross*.

[56] I am not prepared in the circumstances, as they stand, to set a precedent for Dr Booth, or generally, by excluding evidence she gathered while (by way of assumption) she was trespassing – by which I mean a precedent that might be pointed to in future as an argument for excluding any evidence gathered during a

---

are the applicants in the contempt application, indicated by their agent on that day that they detected constitutional issues in the underlying controversy and proposed to rely on provisions of the Judiciary Act 1903 of the Commonwealth to have the matter removed to the High Court by adoption of the usual procedure such as notice being given to Federal and State Attorneys-General and the like.

The application under the UCPR was adjourned by Judge Wall in deference to the entitlement which he acknowledged Mr Fitzgibbon's clients had to take the matter forward under the Judiciary Act if any Attorney was interested, a development which he seemed confident would not ensue. Mr Fitzgibbon did not appear before his Honour; at the best for his clients, Judge Wall at page 6 of the transcript appeared to be critical of the application as "in the nature of a fishing expedition to gather evidence."

The contempt application involves no breach of a positive order of the Court because there is none. The Court made no determination that the application for access to the property should be refused. I can understand the revised basis of the application Mr Fitzgibbon is arguing as involving an attempt which some might condemn to enter the property anyway while the Court remains seized of an application to determine whether doing so should be authorised by the Court.

In my opinion had Judge Wall refused to make the order on the merits, there would have been no contempt of Court absent some indication in the face of the Court that Dr Booth would avail herself of access anyway – a fortiori when the Court has made no pronouncement or no final pronouncement on the merits of the application.

I do not see how there can be a civil contempt here and I'm not at all persuaded there might be a criminal contempt either.

Mr Fitzgibbon has claimed some support for the application today from comments made by Judge Griffin on the 24th of May 2007 when this present application came before him and apparently he was asked to strike it out. Mr Fitzgibbon's submissions quote from his Honour's reasons, as follows:

> "Even if no order was made by Judge Wall allowing (or indeed denying) the applicant's right to enter the first respondent's property nonetheless because such a right of entry was a live issue before the Planning and Environment Court and a matter upon which the applicant herself had made such an application. It being a live issue before the Court and no order having been made then to act contrary to the application by entering the premises, the applicant knowing of the requirement to request from the Court the right of entry, was a contempt of Court."

As Mr McGrath has pointed out, in context that passage from page 5 of his Honour's reasons was simply a statement of Mr Fitzgibbon's argument. After describing that argument in greater detail, his Honour went on:

> "I'm satisfied that according to the test in Salcedo, one could not say that the application for contempt would be one which would be lost by the respondent."

His Honour made it clear he was making no finding as to the ultimate merits of the application.

Earlier in his reasons, he had referred to "the very nebulous basis for the proceedings of contempt". He acknowledged the assistance he gained from the clarification provided by Mr Fitzgibbon, further articulation of the basis of the application, noting all sorts of things of adverse and more or less serious consequences from what she (Dr Booth)has done.

Mr McGrath has alluded to the possibility that the Court might refuse to receive it if she did gather any evidence by entries which appear to offend not only the common law in relation to trespass but also statutory provisions such as sections 11 and 13 of the Summary Offences Act 2005. In my opinion for the moment she is safe from contempt proceedings. I would think that those could only confidently be pursued by somebody who, in a Court of appropriate jurisdiction, obtained an injunction to prevent trespasses thereafter. This would lay a foundation for a fairly clear charge of civil contempt were the injunction breached. But the fate of the present application by Mr Fitzgibbon's clients is that it must be refused."

trespass to found a proceeding such as the present. I note that the *Summary Offences Act* treats trespass by entering a farm less seriously than trespass upon other premises (compare s 11).

[57] I took Mr Fitzgibbon to argue that the 2004 evidence as well as the 2006 evidence was vitiated by the special features argued to taint the latter. I would not be prepared to impose the sanction of excluding evidence by proceeding in a retrospective way to that extent. Nor am I persuaded that the allegations about Mr Booth trespassing on other properties (such as Bosworth's) in earlier years establish anything sufficiently definite to justify now acting in reliance on them.

[58] Oddly, Dr Booth's evidence obtained on Edenvale after she failed to obtain the court's authority to go there tends to support Mr Thomas' current assertions that the Mark VII does not cause electrocution (lethal); on her short visit(s) she did not find dead flying foxes. I accept her evidence that when she "tested" a grid on the second (and final) occasion, it was not electrified.

[59] In the circumstances, none of the evidence should be excluded. Neither Dr Booth nor anyone else should take from this that the discretion to exclude, assuming it exists, would not be resorted to in other circumstances.

**The respondents' legal arguments**

[60] Although willing to receive as "expert" Mr Thomas' opinions about the effect of electric shocks upon flying foxes, in the end, I prefer the competing expert views presented in the applicant's case. I agree with the respondents' submission that the applicant's argument based on the *Animal Care and Protection Act* 2001 to the effect that the respondents' work upon electrified grids amounts to impermissible

experimentation upon animals does not advance the present application, which depends on establishing an offence under s 88 of the *Nature Conservation Act*. The principal basis on which it is contended that the applicant fails relates to establishing that the Black Flying Fox is a "protected animal" at all. I detect no assertion that the Black Flying Fox is not an indigenous mammal. The contention is that specific mention of the Black Flying Fox, *Pteropus Alecto* should be made, by use of its name. As Mr Fitzgibbon put it:-

> "Prescribe in this context means the naming of an animal, using its scientific name and any other particulars necessary to describe it in a regulation. It is not sufficient to describe a class of animals and that becomes readily apparent from the naming of e.g. dugongs, koalas, macropods etc as prescribed in the Schedules 1 to 7 referred to above."

It is asserted that, by contrast with the Queensland situation, the New South Wales Parliament has prescribed "Black Flying Fox" specifically. Reference is made to all manner of local lists which might include (more typically, do not include) Black Flying Foxes, such as Environmental Protection Agency lists of "vulnerable animals" identifying by name various bat and flying fox species among "mammals (23)", Australian Wildlife Conservancy lists, a fauna species list prepared in connection with the Tugun bypass, a Wildlife Watch list, Dr Booth's list in her "Barbed Wire Action Plan, August 2006, updated January 2007", even a letter from the then Queensland Minister for Environment of 25 July 2005 to Dr Booth foreshadowing, following representations by her that "the status of Spectacled Flying Foxes (SFF) and Grey-Headed Flying Foxes (GHFF) should be changed to 'vulnerable' in accordance with the recommendation of my Scientific Advisory Committee". The letter goes on to note the contentious impacts the action would have on fruit growers.

[61] The fact is that Mr Fitzgibbon's "challenge to Mr McGrath to produce a regulation that prescribes 'Black Flying Foxes, Pteropus Alecto' or a copy of a regulation under the hand of the Governor-in-Council that prescribes" cannot be answered. It does not follow that "despite claims to the contrary, the Black Flying Fox is not a protected animal in Queensland and never has been". It is hardly surprising that more specificity might be encountered in the prescribing of animals that are threatened, rare or more threatened than in respect of those that are "least concern wildlife". In my opinion, resort to the generality of "indigenous mammal" is effective, as a matter of law.

[62] The respondents presented arguments of a constitutional kind. The proceeding before the court seeks "enforcement orders" premised on the court's satisfaction that a "nominated defence (a) is being or has been committed; or (b) will be committed unless the enforcement order is made", although s 173F(2) makes clear the irrelevance of "whether or not there has been a prosecution for the offence". This is said to be unfair on various bases:

- There is a "hypothetical criminal enterprise" to be established not beyond reasonable doubt, but on the balance of probabilities;
- Effectively, the "defendant" has an onus of proof thrust upon him, her or it to prove a defence;
- Evidence adduced by such a defendant intended to be exculpatory may be used against that "defendant" in subsequent criminal proceedings.

[63] The argument is that the first respondent is "in the light of the facts adduced and relied upon by the applicant, entitled as a right to trial by jury by virtue of s 80 of the *Australian Constitution Act* 1901". The "hypothetical criminal enterprise" would appear to be a Class 1 offence under s 88 and, having regard to the maximum

penalty of two years imprisonment, an indictable offence (a misdemeanour) by reason of s 164. The Constitution is brought in on the basis of the Commonwealth Corporations legislation (enacted because "in 2001 the States ceded to the Commonwealth certain powers") by virtue of s 5H of which "Frippery Pty Ltd as owner of the land, is 'deemed' to be a Commonwealth entity". It is drawing a rather long bow to identify some "offence against any law of the Commonwealth" for purposes of s 80 of the Constitution here. Even if that view were wrong, and Mr Fitzgibbon were correct that this matter "should be dealt with as a matter of criminal law", s 80 would confer no right to a trial by jury, unless the trial took place "on indictment". It is trite law that the legislature may avoid trial by jury by providing for prosecution of offences otherwise than on indictment: *R v Archdall* (1928) 41 CLR 128. Section 165 of the *Nature Conservation Act* permits indictable offences to be prosecuted summarily, although a defendant may ask or a Magistrate may decide that the prosecution be on indictment. I do not accept the submission that s 88 is ultra vires on this, or any other basis.

[64] That statement applies to the argument that the *Nature Conservation Act* 1992, if only for being enacted afterwards, cannot apply to the respondent company's fee simple title to its land, which was acquired in 1989; the respondents assert:

> "The *Nature Conservation Act* and Regulations was not the law as at the date of purchase."

The submission goes on to assert that as at that date no power existed in either the State or Federal Constitutions to validly enact legislation which would support the present application. The authority relied on, in the context of the defeat of referendum proposals in 1984 and 1987 is that:-

> "Despite the High Court decision in the Tasmanian Dam case in 1983 and its reliance on the foreign affairs power, the Constitutional Convention 1987 stated no power existed at State or Federal level over the environment. The statement of the Constitutional

> Convention was reinforced by the findings of the joint committee of the Australian Federal Parliament in a publication from 1988 called the 'Distribution of Powers'. The authors of that publication concluded that no power existed at State or Federal level over the environment."

[65] Reference is made to Quick & Garran's failure to list any new powers relating to alienated land accruing to the States after Federation in their list of exclusive powers, residuary powers and new legislative powers extant after Federation. Mr Fitzgibbon advises that *Burns v State of Queensland* [2004] QSC 434, in which he appeared, is currently the subject of application 44 of 2007 to the High Court of Australia seeking special leave to appeal. The Chief Justice's reasons make reference to the Court of Appeal decision in *Bone v Mothershaw* [2003] 2 Qd R 600 (an appeal from a decision of my own). The Sovereign power of the State legislature to regulate what may and may not be done in relation to freehold land is clearly established by such authorities.

[66] The submission that Dr Booth's evidence obtained as a trespasser ought to be excluded in the exercise of the court's discretion was bolstered by reference to s 138 of the *(Commonwealth) Evidence Act* 1995 which it was submitted applied to Frippery Pty Ltd, as a corporation, over and above s 98 of the *Queensland Evidence Act.* Reliance was also placed on Article 17 of the International Covenant on Civil and Political rights. The assertion was made that "the only way this court can preserve its authority is to exclude the evidence obtained by unlawful conduct that breached Australian law". I have gone into this aspect at some length elsewhere, and located nothing whatever to indicate any challenge by Dr Booth to this court's authority. Nor is there anything suggesting breach of any Australian law before the coming into operation of the *Summary Offences Act* 2005. While s 98 creates a discretion to reject admissible evidence in the interests of justice, s 138 (subject to a discretion to admit) mandates rejection of evidence obtained "improperly" or in

breach of an Australian law; a relevant consideration under (3)(h) is "the difficulty (if any) of obtaining the evidence without impropriety or contravention". In my opinion, the Commonwealth Act does not apply in this proceeding.

[67] It concerned me that Mr Fitzgibbon's submissions, which consisted of 18 pages, were accompanied by 160 pages or so of material, including correspondence and affidavit material that had not been put in evidence. Given that Mr McGrath, in his subsequent written submissions in reply, appeared to take no exception to this course, I have been prepared to consider that material. The same does not apply to Exhibit 6, voluminous material produced under subpoena by the Queensland Parks and Wildlife Service. When this was tendered, I indicated that I would refer only to those parts (if any) to which Mr Fitzgibbon drew my attention. Such material, and the Minister's letter in Mr Girle's affidavit were pointed to as indications that the State authorities, now effectively represented by the Environmental Protection Authority, were assiduous in carrying out their functions under the *Nature Conservation Act* and gave Dr Booth no proper cause for complaint; it was said to follow that her activities in relation to the present respondents (and others over the years) were officious and unnecessary, this being a factor counting in favour of excluding her evidence. There is room here for different views as to whether it might have been preferable had Dr Booth attended to other concerns. My reasons for admitting and accepting her evidence, which is hardly contentious, as things have turned out, appear elsewhere.

[68] The application succeeds. However, there are some issues regarding appropriate relief.

[69] I find the same difficulty in identifying any statutory basis for the ordering of the "donation" contemplated in para 3 of the application as did Judge Wilson in *Booth v*

*Yardley* [2006] QPEC 119 at [31]. I am not prepared to make an order in those terms. It is appropriate to make an order in terms of para 1 as amended and also, I have concluded, after anxious consideration, para 2, as amended, with a reduction of the period allowed for dismantling the grid system from three months to two. The reduction is on the basis of the two weeks allowed to (and the additional time taken by) Mr Fitzgibbon for preparing the respondents' closing submission. Warning was given that the court would take that approach, should the application be successful, so that further time was not let pass at the cost of the plaintiff or Black Flying Foxes. Judge Wilson made such an order against Yardley, after considering relevant factors, but Branson J declined to do so, although granting a restraining injunction in *Booth v Bosworth* (2001) 114 FCR 39. Liberty to apply ought to be provided for, against the possibility that circumstances change in a way making it appropriate that the court revisit Order 2, whose ramifications are considerable. In broadly analogous circumstances in *Crowther v State of Queensland* [2003] QPELR 346, it became appropriate to make some changes. See *Crowther v State of Queensland* [2003] QPEC 017, and subsequently [2005] QPEC 68 and 118.

[70] I am in general agreement with the conclusion in Mr McGrath's written reply (with the qualification the criticism of Mr Thomas is overstated):

> "39. The difficulties in bringing this case and the second respondent's evasive evidence also indicate that if the Court accepts Dr Spencer's opinion that the Mark VII is likely to kill, injure or harm flying foxes, the Court should order the grids be dismantled subject to gaining approval from the Environmental Protection Agency (EPA) under the Act. If the grids remain in place it will be impossible for the applicant to monitor compliance with the Court's orders without trespassing on the land – something that she does not wish to do and the Court would not condone. The fact that the Environmental Protection Act can approve future operation of the grids under the Act also tells strongly in favour of granting the relief sought, including the order to dismantle the grids. The respondents are free to seek approval from the EPA in the future should they wish to and be able to comply with the EPA's requirements."

It might be noted that the respondents now express some confidence in the EPA – which, as the Court of Appeal has emphasised, is clearly identified by the Act as the expert entity which ought to make many of the difficult judgments called for in contexts like the present.

[71] It is accepted that the design and effect of the respondents' grids have changed over the years and that lethality for flying foxes has been reduced, that the court should proceed on the basis that whether an enforcement order is appropriate depends on the evidence giving rise to an unavoidable apprehension that "taking" of flying foxes will happen in the future if no order is made. In this case, the court's order is made with a view to achieving suitable arrangements for the future (as compared with what the future would be without any order), rather than to penalise for what has happened in the past.

[72] There can be no absolute guarantee that the court's assessments are correct. It is a comfort to know that administrative means are available whereby the respondents might obtain authorisation for their activities, or for properly conducted "experiments" which would establish whether Mr Thomas' claims that the Mark VII do no harm are correct. One would expect any such experiments to be independently vetted, so that any concerns regarding lack of openness by the respondents are removed. Documents in evidence emanating from State authorities bespeak an understanding of the issues, of the legitimacy and importance of protecting crops. There is no justification for assuming that the respondents would receive less than a fair determination of any request in that quarter. Administrative remedies might be available, if needed.