



SPECIAL BULLETIN

7 November 2005



ENVIRONMENTAL DEFENDERS OFFICE (QLD) INC.
ENVIRONMENTAL DEFENDER'S OFFICE OF NORTHERN QUEENSLAND INC.

What's in this Special Bulletin?

An outline of both the decision in Booth v Thomas and Frippery Pty Ltd made by Judge Pack DCJ on 22 September 2005, and of the reasons why on 3 November 2005 Dr Carol Booth sought leave to appeal that decision to the Queensland Court of Appeal. In short, this is an important test case for when protected wildlife may be lawfully killed or harmed. EDO Qld is assisting as solicitors with Barrister Chris McGrath. Stephen Keim SC will join Dr Booth's team in the Court of Appeal. Please write to the EPA asking them to join in the appeal. We are also seeking donations to assist Dr Booth to run this crucial appeal.

Background and decision by Judge Pack DCJ

After the Queensland Environmental Protection Agency ("EPA") failed to properly investigate Black Flying Fox deaths at a lychee farm near Townsville in 2003, and with evidence of further deaths in 2004, Dr Booth decided reluctantly to launch court action under new community enforcement rights under the *Nature Conservation Act 1992* ("the Act").

The farmers are Mr Mervyn Thomas, Mrs Pamela Thomas and their company Frippery Pty Ltd. They operate a 28 ha lychee orchard on a property about 65 km north of Townsville. The orchard has 6 electric grids, totalling about 2km in length. They had no permit under s88 of the Act to kill flying foxes. Dr Booth and a companion videoed about 30 dead flying foxes on or under electric grids, which was the main visual evidence for the court action.

The orders sought from the Planning and Environment Court were:

- (a) an injunction to stop the growers committing offences against the Act by killing or injuring flying foxes;
- (b) an order that the electric grid system be dismantled; and
- (c) an order that money be paid towards the rehabilitation of flying foxes.

Judge Pack DCJ of the Planning and Environment Court heard the case and delivered a judgment on 22 September 2005 in *Booth v Frippery Pty Ltd and Thomas* [2005] QPEC 095. He dismissed Dr Booth's application. No order as to costs was made.

Evidence at the Trial and Legal Issues

During the court case Mr Thomas admitted killing tens of thousands of flying foxes (we totalled his admissions) since 1989, but said that he had now developed an electric grid which shocked but did not kill them. The Court accepted his evidence that the new grid was non lethal, and did not believe bat expert Dr Spencer that the current applied through the grid was highly likely to kill, injure or harm flying foxes.

The Court did not comment on the extent of deaths of flying foxes admitted by Mr Thomas. It was established that Mr Thomas had never held a damage mitigation permit to kill or harm flying foxes, a requirement since late 1994, except in circumstances defined in the Act.

The Court examined s88 of the Act, which creates an offence of taking (this includes killing) protected wildlife, unless you are an authorised person or a defence has been made out.

Section 88(3) of the *Nature Conservation Act 1992* provides:

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**.*

The Judge decided that the farmers satisfied (3)(a) of the defence on the basis that (i) the activity of crop protection was lawful (rejecting Dr Booth's argument that they needed authorisation under the *Animal Care and Protection Act 2001* to trial their electric grids) and (ii) in protecting their crop the farmers' use of the electric grids were not directed to the taking of flying foxes (rejecting our arguments that it was directed to the taking, even if the motive was crop protection).

The Judge also decided that the farmers satisfied (3)(b) of the defence. He looked at the capital costs of netting the property and compared it to the capital cost of electric grids, then found that netting was not a reasonable option so taking could not have been reasonably avoided. The Judge did not take account of evidence by a netting expert about the benefits of netting in stopping the extensive loss of fruit that the farmer told the court he suffered from flying foxes (\$1,130,000 in the last 5 years alone assuming the crop could have been sold for at least \$5.00/kg). Furthermore, the Judge chose not to take into account the pro-nature conservation purpose of the Act in deciding what was reasonable.

In sum, Judge Pack DCJ concluded that the deaths of flying foxes on the electric grids in 2004 and previous years was lawful under s88 of the Act because:

- (a) they occurred in the course of a lawful activity, which was crop protection, and the "effect on some flying foxes was incidental to that purpose";
- (b) the activity was directed to crop protection (and not 'taking' of flying foxes); and
- (c) the taking could not have been reasonably avoided because netting was too expensive.

Next Step: the Court of Appeal

Chris McGrath and Stephen Keim SC consider that Judge Pack DCJ made legal errors in his Judgment, particularly in the interpretation of s88(3) of the Act. Therefore an application for leave to appeal to the Court of Appeal has been lodged by Dr Booth. While we consider that Dr Booth has good prospects of success, if she loses there is a risk that she will have to pay the court costs of the other side, which might be a very large amount.

Dr Booth has decided appealing is worth that risk because of the beneficial legal precedents that could be set by a clear and comprehensive interpretation of s88 which achieves the purpose of nature conservation. This could set out the limits to the s88(3) defence and therefore improve the application of the Act. Needless to say, the appeal is also important to prevent a converse weakening of the Act.

What you can do

- Write to the Director General of the State EPA at PO Box 155 Brisbane Albert Street Qld 4000. Ask the EPA to join in the Appeal, given that the decision has major implications for their administration of the *Nature Conservation Act 1992*.
- Assist Dr Booth with finances to run the appeal. You can donate to the EDO, note on the donation form that you "prefer the donation to be spent for the bat case". If there are any donated funds left over they will be used for other EDO cases. A donation form can be obtained from the EDO website.

For more information contact Jo Bragg or Larissa Waters.

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