



## Cairns Flying-fox dispersal

*This factsheet is intended as a plain English explanation of a particular area of law. Whilst all care has been taken in its preparation, it is not a substitute for legal advice as legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your particular circumstances you should contact your local EDO office or your solicitor.*

### Overview

The dispersal of Cairns CBD spectacled flying-fox colony by the Cairns Regional Council ('CRC') has been subject to intense public scrutiny and concern. EDO has produced this fact sheet to provide general information on the regulation of flying-foxes in Queensland and the application to the Cairns dispersal.

### State legislation

Spectacled flying-foxes are classified as endangered under the *Nature Conservation Act 1992*. Under section 61 of the recently amended *Nature Conservation (Animals) Regulations 2020*, local governments have an 'as of right authority' to manage flying-fox roosts within an urban flying-fox management area. This allows a local government to destroy a roost, drive away a flying-fox from a roost, and disturb a flying-fox in a roost as long as the action complies with the *Code of practice – Ecologically sustainable management of flying-fox roosts* ("the Code"). The *Flying-fox roost management guidelines* has been published by the Department of Environment and Science to assist Councils and individuals to meet the requirements of the Code.

The Code prohibits certain actions including destroying a roost tree while flying-foxes are nearby, driving away flying-foxes outside the 'fly-in, fly-out' period, continuing actions for longer than 3 hours each period, and the use of lethal measures. If a flying-fox is found killed, injured, or on the ground, all actions must cease until the flying-fox has been removed and the *person in charge* considers that the resuming of the action poses no risk to other flying-foxes on the advice of a knowledgeable person.

At 2.6, the Code notes that management actions may be taken at any time of the year, but the *person in charge* must consider avoiding management actions:

- during certain periods of the year, e.g. when females are in late stages of pregnancy or when there are dependant pups;
- during or immediately after extreme climate or weather events; and
- when actions may negatively impact the conservation of flying-fox species listed as threatened wildlife under the *Nature Conservation Act 1992*.

### Commonwealth legislation

Spectacled flying-foxes are also listed as endangered under the *Environmental Protection and Biodiversity Conservation Act 1999*. Where an action is likely to have a significant impact on the species, the Commonwealth Environment Minister may approve, not approve, or approve with conditions. Relating to endangered species, the *Matters of Environmental Significance – Significant impact guidelines 1.1* state that an action is likely have a significant impact if there is a real chance or possibility that it will:

- lead to a long-term decrease in the size of a population;
- reduce the area of occupancy of the species;
- fragment an existing population into two or more populations;
- adversely affect habitat critical to the survival of a species;
- disrupt the breeding cycle of a population;
- modify, destroy, remove, isolate or decrease the availability or quality of habitat to the extent that the species is likely to decline;
- result in invasive species that are harmful to a critically endangered or endangered species becoming established in the endangered or critically endangered species' habitat;
- introduce disease that may cause the species to decline; or
- interfere with the recovery of the species.

## **Cairns Regional Council action**

### EPBC 2019/8424

The Cairns Regional Council's action to disperse and deter the spectacled flying-foxes of the Cairns CBD roost was approved by Department of Agriculture, Water and Environment ("DAWE") on 15 May 2020. The approval contained various conditions which included a limited initial action period of 30 days, and that the action must cease if heavily pregnant females, dependant young, sick, injured or dead spectacled flying-foxes are detected.

The Council began dispersal activities on 4 July 2020. On 29 July 2020, DAWE varied the approval by extending the action period to 90 days.

On 10 August 2020, DAWE again varied the approval conditions to reduce the actions covered by the approval from dispersal and deterrence activities to only dispersal.

On 11 August 2020, CRC advised DAWE that the roost had been successfully relocated and dispersal activities are ceasing. Additionally, any further activities will be deterrence activities (no longer covered by the approval due to the second variation) regulated by state law.

It is our understanding that DAWE have accepted this notification and considers the ongoing activities post 11 August 2020 are not related to the EPBC approval.

### As of right authority

CRC has continued activities at the CBD roost well into the birthing and rearing season. The Code does not distinguish between dispersal and deterrence activities, with both falling within the 'drive away' activity in the Code. Further, the Code does not prohibit actions from occurring during the birthing and rearing season but requires the *person in charge* for the action to consider avoiding that period.

It is the lack of a prohibition in the Code which is allowing CRC to continue its actions through this sensitive period.

## **Legislative deficits**

The plight of the spectacled flying-foxes at the Cairns CBD roost highlights the legislative deficits of our environmental protection legislation. The significant impact requirement of the *EPBC Act* can exclude destructive actions from being appropriately conditioned due to the seemingly high threshold and ambiguity in its application. To be covered by the *EPBC Act* again, DAWE will need to be convinced that the ongoing actions are a direct continuation of the dispersal (i.e. that the dispersal was not successful and completed). Alternatively, that the continuing action is also

likely to have a significant impact. There is certainly an argument that the ongoing action fragments the population and disrupts the breeding cycle, among other impacts detailed in the MNES Guidelines.

Under Queensland legislation, the Code does not prohibit actions during periods where the action will have an increased detrimental impact on flying-foxes. Further, the Code requires actions to cease if a flying-fox is killed, injured, or found on the ground as a result of management actions. In the situation where the CBD roost has been under significant stress for a long period of time as a result of CRC decisions to systematically remove roost trees,<sup>1</sup> deaths and injuries may be considered 'normal' and not directly linked to the relocation activities.

---

1