

CAROL JEANETTE BOOTH

Applicant

ROHAN BRIEN BOSWORTH

Respondent

**APPLICANT'S OUTLINE OF SUBMISSIONS
FOR AN INTERIM INJUNCTION**

INTRODUCTION

1. There are three principal issues relevant to the determination of this application for an interim injunction pursuant to s475 of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* ("EPBC Act"):
 - (a) Whether the Applicant has standing to bring the action;
 - (b) Whether there is a serious question to be tried; and
 - (c) Whether the balance of convenience favours that an interim injunction be granted.
2. The cause of action and facts of the case are set out in the application, statement of claim and affidavits of Carol Booth, Jeremy Tager, Vern Veitch, Greg Richards, Les Hall and Peter Valentine. These are incorporated into the submissions that follow.

STANDING

3. Section 475(5) of the EPBC Act widens standing to seek an injunction to remedy or restrain an offence or other contravention of the Act.¹ The powers it confers are in addition to (and do not limit) any other powers of the Court (s480). As relevant here, s475 provides:

¹ For the common law position see generally: *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493 but note *Australian Conservation Foundation Inc v Minister for Resources* (1989) 19 ALD 70 (Davies J), *North Coast Environment Council v Minister for Resources* (1995) 127 ALR 617 (FCA) (Sackville J) and *North Queensland Conservation Council Inc v The Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172 (Chesterman J).

APPLICANT'S OUTLINE OF
SUBMISSIONS FOR AN INTERIM
INJUNCTION
Filed on behalf of the Applicant

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“475 Injunctions for contravention of the Act

Applications for injunctions

- (1) If a person has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of this Act or the regulations:
 - (a) the Minister; or
 - (b) an interested person (other than an unincorporated organisation); or
 - (c) a person acting on behalf of an unincorporated organisation that is an interested person;may apply to the Federal Court for an injunction.

Prohibitory injunctions

- (2) If a person has engaged, is engaging or is proposing to engage in conduct constituting an offence or other contravention of this Act or the regulations, the Court may grant an injunction restraining the person from engaging in the conduct.
...
 - (5) Before deciding an application for an injunction under this section, the Court may grant an interim injunction:
 - (a) restraining a person from engaging in conduct; or
 - (b) requiring a person to do an act.
 - (6) For the purposes of an application for an injunction relating to conduct or proposed conduct, an individual is an **interested person** if the individual is an Australian citizen or ordinarily resident in Australia or an external Territory, and:
 - (a) the individual’s interests have been, are or would be affected by the conduct or proposed conduct; or
 - (b) the individual engaged in a series of activities for protection or conservation of, or research into, the environment, at any time in the 2 years immediately before:
 - (i) the conduct; or
 - (ii) in the case of proposed conduct – making the application for the injunction. ...”
4. As evidenced in her affidavit of 7 December 2000, the Applicant is an Australian citizen who has engaged in a series of activities for the protection or conservation, or research into, the environment during the previous 2 years. These activities include her current employment as Gulf Regional Policy Officer for the World Wide Fund for Nature Australia. In addition she does voluntary work for the North Queensland Conservation Council and is the secretary of the Magnetic Island Nature Care Association. She also cares for young flying foxes that have been orphaned until they can be returned to the wild. On this basis, the Applicant clearly fulfils the requirements of s475(6) and has standing to bring the action.

SERIOUS QUESTION TO BE TRIED

5. The Applicant bears an onus to establish for the Court that there is a serious question to be tried in the principal proceedings.²
6. The Spectacled Flying Fox (*Pteropus conspicillatus*) is not listed as a threatened species under the EPBC Act and therefore the civil penalty provision provided in ss18 and criminal offence provided in 18A of the Act are not relevant.

² *American Cyanamide v Ethicon Ltd* [1975] AC 396; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153 per Mason ACJ; *Re Minister for Immigration and Multicultural Affairs; Ex parte Fejzullahu* [2000] HCA 23; (2000) 171 ALR 341 at 343 per Gleeson CJ.

7. The serious question to be tried arises from an apparent contravention of s12 of the EPBC Act. Section 12 and the associated provision of s13 provide:

“12 Requirement for approval of activities with a significant impact on a declared World Heritage property

- (1) A person must not take an action that:
- (a) has or will have a significant impact on the world heritage values of a declared World Heritage property; or
 - (b) is likely to have a significant impact on the world heritage values of a declared World Heritage property.

Civil Penalty:

- (a) for an individual – 5,000 penalty units;
- (b) for a body corporate- 50,000 penalty units.

- (2) Subsection (1) does not apply to an action if:
- (a) an approval of the taking of the action by the person is in operation under Part 9 for the purposes of this section; or
 - (b) Part 4 lets the person take the action without approval under Part 9 for the purposes of this section; or
 - (c) there is in force a decision of the Minister under Division 2 of Part 7 that this section is not a controlling provision for the action and, if the decision was made because the Minister believed the action would be taken in a manner specified in the notice of the decision under section 77, the action is taken in that manner; or
 - (d) the action is an action described in subsection 160(2) (which describes actions whose authorisation is subject to a special environmental assessment process).
- (3) A property has *world heritage values* only if it contains natural heritage or cultural heritage. The *world heritage values* of the property are the natural heritage and cultural heritage contained in the property.
- (4) In this Act:
- cultural heritage* has the meaning given by the World Heritage Convention.
 - natural heritage* has the meaning given by the World Heritage Convention.

13 What is a declared World Heritage property?

Properties on the World Heritage List

- (1) A property included in the World Heritage List is a **declared World Heritage property** as long as the property is included in the List.

Properties not yet included on World Heritage List

- (2) A property specified in a declaration made under section 14 (with any amendments made under section 15) is a **declared World Heritage property** for the period for which the declaration is in force.”

8. There are six elements to the cause of action contained in s12:

- (a) a person;
- (b) takes an “action”;
- (c) that has, will have or is likely to have;
- (d) a “significant impact”;
- (e) on the world heritage values;
- (f) of a declared World Heritage property.

(a) a person

9. In relation to the first element of s12, the Respondent is a natural person.

(b) takes an “action”

10. In relation to the second element of s12, the EPBC Act does not define “action” although ss553-524A qualifies its meaning. The primary rule of statutory interpretation is the plain meaning rule, ie. words must be given their plain and ordinary meaning having regard to their context and any special scientific, technical or legal meaning attributed to them.³ However where there is ambiguity an interpretation that achieves the purpose of the Act is to be preferred.⁴
11. In the context of the EPBC Act, the plain meaning of “action” is the process or state of acting or of being active; something done; an act; or deed.⁵ The plain meaning of “act” is anything done or performed; a doing; deed; the process of doing.⁶
12. Sections 523-524A of the EPBC Act, qualify the plain meaning of “action”. These sections provide:⁷

523 Actions

- (1) Subject to this Subdivision, **action** includes:
 - (a) a project; and
 - (b) a development; and
 - (c) an undertaking; and
 - (d) an activity or series of activities; and
 - (e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d).
- (2) However, a lawful continuation of a use of land, sea or seabed that was occurring immediately before the commencement of this Act is not an **action**. For this purpose, an enlargement, expansion or intensification of use is not a **continuation** of a use.

524 Things that are not actions

- (1) This section applies to a decision by each of the following kinds of person (**government body**):
 - (a) the Commonwealth;
 - (b) a Commonwealth agency;
 - (c) a State;
 - (d) a self-governing Territory;
 - (e) an agency of a State or self-governing Territory;
 - (f) an authority established by a law applying in a Territory that is not a self-governing Territory.
- (2) A decision by a government body to grant a governmental authorisation (however described) for another person to take an action is not an **action**. ...

524A Provision of grant funding is not an action

Provision of funding by way of a grant by one of the following is not an action:

- (a) the Commonwealth;
- (b) a Commonwealth agency;
- (c) a State;

³ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161-2 per Higgins J.

⁴ Section 15AA *Acts Interpretation Act 1901 (Cth)*.

⁵ *The Macquarie Dictionary*, 3rd ed, 1997, p20.

⁶ *Ibid*, p19.

⁷ Note also that although s523 expressly uses the conjunctive term “and”, this would appear to be simply poor drafting and the items should be read as if the disjunctive “or” were used (ie one item, or combination of them, is sufficient to come within the definition of an “action”). The non-exclusive, “includes”, definition allows this interpretation.

- (d) a self-governing Territory;
- (e) an agency of a State or self-governing Territory;
- (f) an authority established by a law applying in a Territory that is not a self-governing Territory.

13. Based on the plain meaning of “action” and the qualifications given to it in ss523-524A, the meaning that can be attributed to it in the EPBC Act is, “a physical activity or series of activities not being a government decision or grant of funding”.⁸ The physical activity or series of activities of the Respondent in constructing and operating a series of electric grids for the purpose of killing flying foxes that approach, move between or depart from his fruit trees comes within this definition and therefore is an action for the purpose of the EPBC Act.

14. Transitional provisions of the EPBC Act provide a final qualification to the application of the Act to actions. Section 522B provides:⁹

522B This Act does not apply to certain actions with prior approval

- (1) This Act does not apply to an action that:
 - (a) consists of a use of land, sea or seabed; and
 - (b) was specifically authorised under a law of the Commonwealth, a State or a self-governing Territory before the commencement of this Act.
- (2) However, this Act does not apply to an action described in subsection (1) if, immediately before the commencement of this Act, a further authorisation (however described) under a law of the Commonwealth, a State or a self-governing Territory was necessary to allow the action to be taken lawfully.

15. The action of the Respondent in constructing and operating an electric grid system for the purpose of electrocuting flying foxes was not specifically authorised under any law of the Commonwealth or the State of Queensland before the commencement of the EPBC Act on 16 July 2000. The affidavits of Ms Carol Booth and Mr Jeremy Tager, together with the attached “Damage Mitigation Permit” dated 28 November 2000 issued by the Queensland Parks and Wildlife Service, evidence that it was not until 28 November 2000 that the Respondent had obtained a damage mitigation permit under s112 of the *Nature Conservation Regulations 1994 (Qld)*. In addition it is arguable, but unnecessary to analyse here, that the damage mitigation permit purportedly issued on 28 November 2000 was invalid. The transitional provisions contained in s522B therefore do not apply. The Respondent’s action in operating a system of electric grids to electrocute flying foxes is subject to the provisions of the EPBC Act.

⁸ A similar interpretation, although in a different legislative scheme, was given to “proposed action” by Sackville J in *Tasmanian Conservation Trust Inc v Minister for Resources and Anor* (1995) 55 FCR 516 at 532-536. At 536 his Honour found the term “more naturally refers ... to the physical undertaking, rather than any licence authorising the undertaking.”

⁹ Note that *Environmental Legislation Amendment Bill (No.1) 2000 (Cth)* has received its second reading in the Senate to (*inter alia*) insert a new s43A (Actions with prior authorisation) and s43B (Actions which are lawful continuations of use of land, etc) into the EPBC Act while deleting ss522B and 523(2). These amendments confirm that impacts on matters of national environmental significance which were approved by Commonwealth or State/Territory environmental approvals prior to 16 July 2000 are authorised under the EPBC Act and therefore do not constitute offences against the Act or require further approval. The Bill has since been deferred.

(c) that has, will have or is likely to have

16. In relation to the third element of s12, “has, will have or is likely to have” involves the question of whether the action of the Respondent has caused any significant impact on the world heritage values of a declared World Heritage property. As this application is a civil action, causation, as all of the elements of the cause of action, must be proven on the balance of probabilities.¹⁰

(d) a “significant impact”

17. In relation to the fourth element of s12, the term “significant impact” is not defined in the EPBC Act and the Commonwealth has not passed regulations under s524B prescribing the matters to be taken into account in determining whether an impact that an action has, will have or is likely to have is significant. While the Commonwealth has created Administrative Guidelines¹¹ to determine whether a significant impact has, will have or is likely to occur, it is submitted that these guidelines should be disregarded by the court. Particularly as the term creates the threshold for criminal offences, the Court should give a plain meaning to the term “significant impact”. There has been considerable case law on this issue under other legislation.

18. It was noted above that the primary rule of statutory interpretation is the plain meaning rule, subject where ambiguity exists to an interpretation that will best achieve the object of the Act. The plain meaning of the term “significant” is “important; of consequence.”¹² This was applied (as dicta) in *Jarasius v Forestry Commission (NSW)* (1988) 71 LGRA 79 (NSW(LEC)) by Hemmings J. That case involved an anti-logging action in the NSW Land and Environment Court. In relation to the interpretation of “likely to significantly affect the environment” within s112 of the *Environmental Planning and Assessment Act 1979 (NSW)*, Hemmings J stated (at 93-4):¹³

“The respondent submits that because ‘significantly’ is not defined in the E P & A Act, the meaning in the *Macquarie Dictionary* should be applied, that is, ‘important’, and that word means ‘more than ordinary’. Without deciding it, I am prepared in this case to assume that that is the appropriate test.”

19. In *Drummoyne Municipal Council v Roads and Traffic Authority of New South Wales* (1989) 67 LGRA 155 (NSW(LEC)), a case involving a rather adventurous claim that new traffic signs represented a significant effect to the environment, Stein J stated (at 163):

¹⁰ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

¹¹ Environment Australia, *Administrative guidelines for determining whether an action has, will have, or is likely to have a significant impact on a matter of national environmental significance under the Environmental Protection and Biodiversity Conservation Act 1999*, Environment Australia, Canberra, 2000.

¹² *The Macquarie Dictionary*, 3rd Ed, The Macquarie Library Pty Ltd, Sydney, 1997, p1974. A useful analysis of the term “significantly affect” and the manner in which it had been interpreted by the courts was given by Preston (Preston BJ, ‘The Environmental Impact Statement Threshold Test: When is an Activity Likely to Significantly Affect the Environment?’ (1990) EPLJ 147).

¹³ This test was followed by Hemmings J in *Bailey v Forestry Commission of New South Wales* (1989) 67 LGRA 200 (LEC(NSW)) at 211-212 and by Bignold J in *Rundle v Tweed Shire Council & Anor* (1989) 68 LGRA 308 (LEC(NSW)) at 331. Hemmings J’s reasoning in *Jarasius* (at 94) also provides a useful and clear example of a factual situation of a “significant effect” in the context of logging.

“I am prepared to suggest that a significant effect must be an important or notable effect on the environment, as compared with an effect which is something less than that, that is, non-significant or non-notable. But I must stress that the assessment of the significance must depend upon an assessment of the facts constituting the environment and the activity and its likely effect on that environment.”

20. The reasoning of Stein J in *Drummoyne* was adopted in the current leading case for the definition of “significant”, *Tasmanian Conservation Trust Inc v Minister for Resources & Gunns Ltd* (1995) 55 FCR 516 (“*Gunns No.1*”). That decision is particularly relevant to the EPBC Act and to the decision of the Court in this case because it was a Federal Court decision.¹⁴ The case involved judicial review of a decision to grant a woodchip export licence. In finding that the relevant Commonwealth Minister had failed to consider whether the proposed action “affected or was likely to affect the environment to a significant extent” and nullifying the purported decision, Sackville J held (at 541):

“In considering whether the proposed action would have a significant effect on the environment, it is appropriate, in my view, in the words of Cripps J in *Kivi v Forestry Commission of New South Wales* (1982) 47 LGRA 38 at 47 to:

‘... look to the whole undertaking of which the relevant activity forms a part to understand the cumulative and continuing effect of the activity on the environment’.

However, this does not mean that the significance of a particular activity can only be assessed by reference to its impact upon the whole area in which some aspect of the activity is to take place ... site specific impacts can be significant, depending on the circumstances. ...

Despite the deficiencies of the evidence, I think it sufficiently established that Gunns’ proposed action ... would have had a significant effect on the environment. If the word ‘significant’ needs elaboration in this context, I use it in the sense of ‘an important or notable effect on the environment’: *Drummoyne Municipal Council v Roads and Traffic Authority of New South Wales* (1989) 67 LGRA (LEC(NSW), Stein J) at 163. In my view this is so whether one considers the proposed action as an entire undertaking or in terms of its effects on particular sites.”

21. While Stien J and Sackville J used a definition of “important or notable”, it is submitted that the preferable interpretation of the term “significant” for the purposes of the EPBC Act, is “important or of consequence having regard to the context and intensity of the impact”. The reason for this is that analysis of Stein J’s judgement indicates it was based on a definition of “significant” drawn from the case law in the early 1980s and the Oxford Dictionary. Since that time the *Macquarie Dictionary* has become established as the official Australian dictionary. As definitions and meanings can change over time, the *Macquarie Dictionary* definition should be used for the EPBC Act rather than a slavish limitation to case law. Applying this test, each case will be a question of fact.
22. A simple example of a factual situation of a significant impact is found in *Environment Protection Authority v Mobil Oil Australia Ltd and Anor* [2000] NSWLEC 43. In that case Talbot J found that 5000 litres of aviation fuel which

¹⁴ Followed (on the point of “significant”) in *Re Truswell and Minister for Communication and the Arts* (1996) 42 ALD 275 (AAT decision) which (at 294-5) analyses cases which have considered the term “significant” including *McVeigh & Anor v Willarra Pty Ltd & Ors* (1984) 54 ALR 65 at 108 (McGregor J); 57 ALR 344 at 352 (Full Ct Fed Ct per Toohey, Wilcox and Spender JJ) which held (as obiter in the Full Ct) that the ordinary meaning of “significant” was “important; notable; of consequence”.

had been spilt on the ground caused “a significant impact on the ground water and the soil, giving rise to heightened levels well beyond accepted guidelines”.

23. A more complicated factual example of a significant impact on endangered species is found in *Byron Shire Businesses for the Future Inc v Byron Council* [1994] NSWLEC 159, a case involving an application to construct a coastal resort at Byron Bay. The case is also an example of the information requirements which arise and the dangers for decision makers and developers who do not seek to address them properly. In quashing the development approval given by the Council, Pearlman J held:

“In my opinion, a fair reading of the material which the council had before it leads to the following conclusions: 33 species of endangered fauna were predicted to occur within or in the vicinity of the site. This in itself was not enough to draw a conclusion as to the likelihood of significant effect on their environment, because it was prediction only. But it was sufficient to alert the council to the necessity to gather further information about those 33 species and their environment so as to be able to make an informed decision as to the likelihood of significant effect. ... In respect of the comb-crested jacana, the only reasonable conclusion was that its environment was likely to be significantly affected. As to other species of endangered fauna, the council was required to make a determination one way or the other as to significant effect on environment. Because the material before it in relation to these species pointed to the likelihood of significant effect, but was insufficient, it was not reasonably open to the council to conclude that there was no likelihood of significant effect on their environment. ... In that context, the council's determination of the threshold question in a manner not reasonably open to it invalidates the very foundation of the development consent process.”

24. The affidavit of Carol Booth sworn on 8 December 2000 evidences that the Respondent's action in operating the electric grid system on his property is causing the death of approximately 300-450 Spectacled Flying Foxes per night. This equates to approximately 2100-3150 deaths per week and, assuming the local population of Spectacled Flying Foxes is large enough to maintain this death rate, approximately 25,200-37,800 over a 3 month (12 week) lychee season. It is unknown whether other Spectacled Flying Foxes receive electrical burns which do not kill them outright but later cause their death or disrupt their behaviour patterns such as their ability to reproduce.
25. The affidavits of Greg Richards and Les Hall, leading experts in the biology and ecology of the Spectacled Flying Fox, evidence that the species migrates seasonally according to food availability but is generally a rainforest specialist that plays an important role in, amongst other matters, seed dispersal, particularly for rainforest plant species bearing white fruit. As such, the Spectacled Flying Fox would make an important contribution to the biodiversity, ecological function and ongoing evolutionary processes of rainforest areas surrounding the Respondent's farm, the vast majority of which lie within the Wet Tropics World Heritage Area.
26. Mr Hall's affidavit refers to a recent survey of the Spectacled Flying Fox which estimates the total number of the species, of which the Kennedy area is the extreme southern range, to be approximately 74,400 (\pm 8650). The death of 2100-3150 Spectacled Flying Foxes per week, and 25,200-37,800 over a 12 week lychee season, is clearly an impact that is important or of consequence for the species having regard to its context and intensity. Whether this significant impact

on the Spectacled Flying Fox species contravenes s12 of the EPBC Act however, will depend upon the relationship of the Spectacled Flying Fox to the world heritage values of the surrounding Wet Tropics World Heritage Area.

(e) on the world heritage values

27. The term “world heritage values” is defined in ss12 and 13 of the EPBC Act. These were set out above but may be repeated here for convenience:

12 Requirements for approval of activities with a significant impact on a declared World Heritage property

...

- (3) A property has *world heritage values* only if it contains natural heritage or cultural heritage. The *world heritage values* of the property are the natural heritage and cultural heritage contained in the property.
- (4) In this Act:
cultural heritage has the meaning given by the World Heritage Convention.
natural heritage has the meaning given by the World Heritage Convention.

13 What is a declared World Heritage property?

Properties on the World Heritage List

- (1) A property included in the World Heritage List is a **declared World Heritage property** as long as the property is included in the List.

Properties not yet included on World Heritage List

- (2) A property specified in a declaration made under section 14 (with any amendments made under section 15) is a **declared World Heritage property** for the period for which the declaration is in force.

28. The terms “World Heritage Convention” and “World Heritage List” are themselves defined in s528 of the EPBC Act:

World Heritage Convention means the Convention for the Protection of the World Cultural and Natural Heritage done at Paris on 23 November 1972, as in force for Australia immediately before the commencement of this Act.

Note: The English text of the Convention is set out in Australian Treaty Series 1975 No.47.

World Heritage List means the list kept under that title under Article 11 of the World Heritage Convention.

29. Cultural Heritage is not relevant to this case, in relation to Natural Heritage, Article 2 of the *Convention for the Protection of the World Cultural and Natural Heritage* ATS 1975 No. 47 (“the Convention”) provides (emphasis added):

ARTICLE 2

For the purpose of this Convention, the following shall be considered as “natural heritage”;

natural features consisting of physical and **biological** formations or **groups of such formations**, which are **of outstanding universal value** from the **aesthetic or scientific** point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

30. A World Heritage Committee is established under Article 8 of the Convention and Article 11 provides:

ARTICLE 11

1. Every State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list provided for in paragraph 2 of this Article. This inventory, which shall not be considered exhaustive, shall include documentation about the location of the property in question and its significance.

2. On the basis of the inventories submitted by States in accordance with paragraph 1, the Committee shall establish, keep up to date and publish, under the title of "World Heritage List", a list of properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of this Convention, which it considers as having outstanding universal values in terms of such criteria as it shall have established. An updated list shall be distributed at least every two years. ...

31. One view of s12 is that the world heritage values of a declared World Heritage property must be ascertained objectively and independently by the Court based on the definition given in Article 2 of the Convention and evidence tendered in a trial. Such a result would no doubt prove difficult for the Court to undertake and would be an expensive and time-consuming task. It is a task for which the Court is ill-equipped.

32. However the better view of s12 is that the Court should look to the nomination and listing of the Wet Tropics World Heritage Area as evidence of its world heritage values. Authority for such an approach is found in *Queensland v The Commonwealth* (1989) 167 CLR 232 ("the *Wet Tropics Case*") at 240-1 where the joint judgement of Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ stated (emphasis added):

"In one sense, the status of a particular property as one of outstanding universal value forming part of the cultural heritage or natural heritage is an objective fact, ascertainable by reference to its qualities; but, as evaluation involves matters of judgment and degree, an evaluation of the property made by competent authorities under the Convention is the best evidence of its status available to the international community. The competent authorities to make an evaluation for the purposes of the Convention are, in the first place, the State Party on whose territory a property is situated and, if the State Party submits a property in an inventory under Art. 11 par. 1, the Committee under Art. 11, par. 2. ...

Although the status of a property as part of the cultural heritage or natural heritage follows from its qualities rather than from their evaluation either by the relevant State Party or by the World Heritage Committee (As Gaudron J recognized in *Richardson v Forestry Commission*,¹⁵ a State Party which evaluates a property as part of the cultural heritage or natural heritage and submits it to the Committee for listing thereby furnishes the international community with evidence of that status ...

From the viewpoint of the international community, the submission by a State Party of a property for inclusion in the World Heritage List and inclusion of the property in the List by the Committee are the means by which the status of a property is ascertained and the duties attaching to that status are established. **The State Party's submission of a property is some evidence of its status but the Committee's listing of a property is conclusive.**"

¹⁵ (1988) 164 CLR 261 at 341.

33. The status of the Wet Tropics World Heritage Area as truly forming World Heritage under the Convention had been directly challenged by the State of Queensland and formed part of the decision in the *Wet Tropics Case*. It is therefore submitted that the case is binding authority for the proposition that the status and world heritage values of declared World Heritage property are to be determined from the nomination and listing of the property.
34. The nomination and listing process for the Wet Tropics World Heritage Area was summarised by Gaudron J in the case stated for consideration by the Full Court in the *Wet Tropics Case* as follows:¹⁶

“In December 1987 the [Commonwealth] submitted to the World Heritage Committee as suitable for inclusion in the World Heritage List provided for in par. 2 of Art. 11 of the Convention for the Protection of the World Cultural and Natural Heritage (‘the Convention’), a property consisting of a number of areas of land situated in the north-east of the State of Queensland, described as ‘Wet Tropical Rainforests of North-East Australia (‘the property’). In June 1988 the International Union for the Conservation of Nature and Natural Resources (‘the IUCN’) made a report and recommendation to the Bureau of the World Heritage Committee in respect of the property. This was followed by a recommendation by the Bureau to the World Heritage Committee and a request to the [Commonwealth] for clarification and further information. On 30 September 1988 the [Commonwealth] provided to the World Heritage Committee clarification and further information respecting the submission, including revisions to the boundary of the property and a change in the description of the property to ‘Wet Tropics of Queensland’. In October 1988 the IUCN provided to the World Heritage Committee a technical evaluation of the property. In December 1988, on the basis of the clarification and further information provided by the [Commonwealth] and the IUCN technical evaluation, the Bureau recommended to the World Heritage Committee that the property be inscribed on the World Heritage List. On 9 December 1988 the World Heritage Committee, in accordance with par. 2 of Art. 11 of the Convention, considered the property to have outstanding universal value in terms of certain Operational Guidelines promulgated by it pursuant to par. 5 of Art. 11 of the Convention by which it defined the criteria on the basis of which a property may be included in the World Heritage List.”

35. The “technical evaluation” of the IUCN referred to by Gaudron J, summarised the Commonwealth of Australia’s nomination and justification of inclusion of the Wet Tropics on the World Heritage List as follows (emphasis added):¹⁷

“The Wet Tropical Rainforest nomination, as presented by the Government of Australia, provides the following justification for designation as a World Heritage property:

- a) Cultural property
 - (iv) Extant Aboriginal rainforest culture. Aboriginal occupation dates back at least 40,000 years.
- b) Natural property
 - (i) Earth’s evolutionary history. Contains one of the most complete and diverse living records of the major states in the evolution of land plants, from the very first land plants to higher plants (Gymnosperms and Angiosperms), as well as one of the most important records of the history of marsupials and songbirds.

¹⁶ Reproduced at (1989) 167 CLR 233-4.

¹⁷ IUCN, *Documentation on World Heritage Properties (Natural) – Wet Tropical Rainforests (486) Australia*, IUCN, Gland, October 1988, pp4-5.

- (ii) Ongoing geological processes. **Levels of species diversity and endemism are exceptionally high, reflecting long-isolated ancient biota of the Australian wet tropics.**
- (iii) Exceptional natural beauty. One of the most significant regional ecosystems in the world, with outstanding features of natural beauty and magnificent sweeping landscapes. Exceptional is the coastal scenery, which combines tropical rainforest, white sandy beaches and fringing reefs just offshore.
- (iv) **Habitat of rare and threatened species. Provides the only habitat for numerous rare or threatened species of plants and animals.**

36. The biodiversity of bat species (of which the Spectacled Flying Fox is a member) and endemism (which includes the Spectacled Flying Fox) was cited directly:¹⁸

“Fauna diversity is the highest in Australia, with 30% of marsupial species, 60% of bat species, 18% of frog species, 23% of reptile species and 62% of butterfly species present. Some 54 species of vertebrates are unique to the area.”

37. The biodiversity of bat species in the Wet Tropics also drew particular comment in the IUCN evaluation report of the nomination:¹⁹

“... Within Australia, the [Wet Tropics] contains the majority of the continent’s bat and butterfly species as well as many other plant and animal species restricted to this one area. All there are indicators of the biological uniqueness of the area which sets it apart within the Australian biogeographic realm.”

38. The IUCN recommended (in terms that were adopted by the Bureau of the World Heritage Committee and accepted by the World Heritage Committee in listing the property) that the Wet Tropics be listed on World Heritage list in the following terms (emphasis added):

“The property in general terms therefore merits inscription on the World Heritage list on the basis of the following criteria:

- i) Earth’s evolutionary history. The site contains a diverse living record of the major stages of earth’ evolution, particularly within its Gondwana context.
- ii) **On-going biological evolution. As a centre for endemism for the region, the wet tropics provide fundamental insights into evolutionary patterns both in isolation from and in interaction with other rainforests.**
- iii) Exceptional natural beauty. Within the boundaries of the site are some superlative scenic features highlighted by extensive sweeping forest vistas, wild rivers, waterfalls, rugged gorges and coastal scenery. The site also provides a terrestrial continuum with the Great Barrier Reef.
- iv) Habitat for threatened species. **These wet tropical forests hold a largely intact flora and fauna with hundreds of species restricted within its boundaries.**

39. The four aspects of the nomination by the Commonwealth of Australia and recommendation of the IUCN reflect the criteria for the inclusion of natural properties on the World Heritage List contained in the *Operational Guidelines for the Implementation of the World Heritage Convention* adopted by the World

¹⁸ Ibid, p4.

¹⁹ Ibid, p8.

Heritage Committee under Article 11, paragraph 2 of the Convention.²⁰ These criteria are adopted in the actual inscription of a property on the World Heritage List. The Wet Tropics World Heritage Area is inscribed on the World Heritage List for all four criteria, ie:²¹

- (i) be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features; or
- (ii) be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals; or
- (iii) contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance; or
- (iv) contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation.

40. These criteria are the basis for the affidavit evidence of Peter Valentine, an expert in World Heritage properties, that the death and injury of large numbers of Spectacled Flying Foxes due to the Respondent's electric grid system "poses a serious threat to the world heritage values of the Wet Tropics World Heritage Area". Mr Valentine emphasises criteria 2 and 4 together with the ecological role fulfilled by the Spectacled Flying Fox in seed dispersal of plants making them "keystone species – in other words, species which provide a critical role in holding communities together and whose loss precipitates serious collapse in the ecological processes and composition of the community." Mr Valentine also notes that the Spectacled Flying Fox species itself forms part of the biodiversity which is identified as of outstanding universal value. Based on these matters, Mr Valentine comments:

"Any significant loss of flying foxes within the World Heritage Area (or sufficiently [sic] adjacent to it so that the population is part of the plant reproductive ecology) gives rise to serious concern for the possible destruction of world heritage attributes with form the outstanding universal value for which the site is listed and which Australia is committed to protect."

41. It is therefore submitted that the Respondent's action in constructing and operating an electric grid system on his property, thereby killing or injuring 300-450 Spectacled Flying Foxes per night, is clearly having or is likely to have a significant impact on the world heritage values of the Wet Tropics World Heritage Area.

²⁰ The latest version of these guideline maintains these four criteria together with an assessment of integrity, as the basis for the assessment of World Heritage. See UNESCO (Secretariat for the World Heritage Committee), *Operational Guidelines for the Implementation of the World Heritage Convention*, UNESCO World Heritage Centre, Paris, March 1999.

²¹ UNESCO (Secretariat for the World Heritage Committee), *Properties Inscribed on the World Heritage List*, UNESCO World Heritage Centre, Paris, 2000.

(f) of a declared World Heritage property

42. As referred to above, the Wet Tropics of Queensland World Heritage Area was inscribed on the World Heritage List in 1988. It remains on the list.²²

BALANCE OF CONVENIENCE

43. In relation to whether the balance of convenience favours that the interlocutory application be granted, the following factors weigh in favour that an interim injunction is granted:

(a) **Undertaking as to damages:** Section 478 removes the common law requirement for an undertaking as to damages. Together with the widened standing provided by s475, this section displays a clear policy intent to facilitate meritorious claims to be brought by members of the public to protect the matters of national environmental significance such as the world heritage values of a declared World Heritage property and other matters protected under the EPBC Act.

(b) **The public interest:** It is undoubtedly a matter of great public interest that the world heritage values of the Wet Tropics World Heritage Area, and biodiversity generally, are protected. In *Castlemaine Tooheys Ltd v South Australia*, in refusing to grant an application for an interlocutory injunction on the balance of convenience, Mason ACJ stated the principal as follows:²³

“It [the balance of convenience] is a different matter where it is suggested that the proposed restraint on enforcement of the statute would occasion a significant detriment to the public interest by preventing the defendant from enforcing a legislative scheme which is designed to protect the environment from pollution by litter. Then the need to protect the private interests of the plaintiff must be weighed against the public interest in avoiding injury to the environment.”

(c) **Irreparable injury for which damages will not be adequate compensation:** In granting an interlocutory injunction in similar circumstances to the present case in *Richardson v Forestry Commissioner* (1988) 164 CLR 261 at 275-6 Mason CJ stated:

“Despite statements that the plaintiff must show that it is probable that the plaintiff will suffer irreparable injury if no injunction is granted (*Clements and Marshall Pty Ltd v Field Peas Marketing Board (Tas)*),²⁴ in a case such as the present it is enough for the plaintiff to show that irreparable injury is a possibility in the sense stated. The object of the Act being to preserve intact that which may be a unique heritage, the possibility of injury is enough to sustain an interlocutory injunction by way of protecting the area in question, thereby preserving the subject-matter of the inquiry pending its completion at least. ... Notwithstanding evidence that the defendants and the interveners will suffer substantial loss by reason of the grant of the relief sought and that the injunctions will cause substantial consequential loss to persons engaged in the forestry industry, the timber industry and related activities in Tasmania, the possible loss of, or injury to, what may be a unique heritage must be regarded as the paramount factor.”

²² Ibid.

²³ (1986) 161 CLR 148 at 155.

²⁴ (1947) 76 CLR 401 at p407.

It is submitted that the affidavits of Ms Booth, Mr Richards, Mr Hall and Mr Valentine establish clearly, and in excess of, a possibility of irreparable injury if the interim injunction is not granted. Due to the uniqueness of the subject matter lost, damages would not provide compensation.

(d) **The availability of alternative mechanisms to protect the Respondent's lychee crop:** The affidavit of Mr Veitch indicates that neighbouring lychee farms can and do utilise alternative mechanisms, such as netting or orchards, to protect their lychee crops from frugivores that do not involve lethal means. In addition the affidavit of Mr Richards (at paragraph 21) indicates, "non-destructive options include full enclosure netting, drape netting and three different types of sonic deterrent systems, all of which are commonly used by orchids." No doubt these mechanisms would involve some expense on behalf of the Respondent and require some time to install. However, when weighed against the loss of biodiversity and ecological function of the Wet Tropics World Heritage Area, they are reasonable and practicable.

44. Against the grant of the interim injunction it can be acknowledged that the Respondent will suffer some loss of his lychee crop due to the electric grids ceasing to operate. However, the willingness of the Respondent to destroy fauna protected under Queensland law²⁵ without seeking any legal authorisation until challenged would not encourage the Court to place great weight on this aspect. His later reckless disregard for the law by exceeding the permit issued on 28 November 2000 to take 500 Spectacled Flying Foxes over a two month period (the remaining lychee season) every second night, would further discourage the Court from placing weight on this aspect.

CONCLUSION

45. The Applicant clearly has standing under the Act to seek an injunction to restrain a breach or other contravention of the Act. Together with the statutory removal of the requirement to give an undertaking as to damages, this displays a clear policy intent on behalf of the Federal Parliament to facilitate the protection of the environment and conservation of biodiversity that is the purpose of the EPBC Act. There is a serious question to be tried and, it is submitted, the balance of convenience, in particular due to the irreparable injury that is likely to occur, clearly favours that the interim injunction be granted. On this basis the Court should grant the application for an interim injunction.

**Stephen Keim and Chris McGrath
Counsel for the Applicant
12 December 2000**

²⁵ Section 88 *Nature Conservation Act 1992 (Qld)* makes it an offence to take a protected animal (including wildlife listed as common) without a licence, permit or other authority issued or given under a regulation. The Respondent did not hold a "Damage Mitigation Permit" under s112 of the *Nature Conservation Regulation 1994 (Qld)* until 28 November 2000.