SUPREME COURT OF QUEENSLAND

CITATION:	*Candy v McPhail & Anor* [2013] QCA 138
PARTIES:	**COLIN CANDY** (appellant) **v** **DR IAN McPHAIL** (first respondent) **STATE OF QUEENSLAND** (second respondent)
FILE NO/S:	Appeal No 11847 of 2012 SC No 6 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Maryborough
DELIVERED ON:	31 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	26 April 2013
JUDGES:	Holmes and White JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Dismiss the appeal with costs.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – review of decision to refuse rescue permit and permit to keep a red kangaroo – whether permit was required – whether red kangaroo is a protected animal *Animals Protection Act* 1925 (Qld), s 7(1)(c) *Criminal Code* 1899 (Qld), s 1 *Fauna Conservation Act* 1974 (Qld), s 7(1) *Meat Industry Act* 1993 (Qld), s 3, s 4 *Native Title (Queensland) Act* 1993 (Qld), s 17(1) *Nature Conservation Act* 1992 (Qld), s 85 *Nature Conservation Regulation* 1994 (Qld), s 5, s 107, s 114, s 117 *Nature Conservation (Wildlife) Regulation* 1994 (Qld), sch 5 *Rural Lands Protection Act* 1985 (Qld), s 69(1), s 70(4)(g) *Candy v Christensen* [2007] QCA 114, cited *Candy v Thompson and Ors* [2005] QSC 111, cited *Candy v Thompson and Ors* [2005] Aust Torts Reports 81-809; [2005] QCA 382, cited

Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589; [1981] HCA 45, cited
State Bank of New South Wales Ltd v Stenhouse Ltd [1997] Aust Torts Reports 81-423, cited
Walton v Gardiner (1993) 177 CLR 378; [1993] HCA 77, cited

COUNSEL: The appellant appeared on his own behalf
D D Keane for the respondent

SOLICITORS: The appellant appeared on his own behalf
Crown Law for the respondent

[1] **HOLMES JA:** I agree with the reasons of Philippides J and the order she proposes.

[2] **WHITE JA:** I have read the reasons for judgment of Philippides J. I agree with her Honour's reasons that the appeal should be dismissed with costs.

[3] **PHILIPPIDES J**: The appellant, Colin Candy, appeals against the dismissal of his application for judicial review made under the *Judicial Review Act* 1991 seeking review of the first respondent's decisions made under the *Nature Conservation Regulation* 1994 to refuse him permits sought in respect of a red kangaroo.

Background

[4] In 2000, the appellant found a red kangaroo joey in its dead mother's pouch on the side of the road near the town of Mitchell in Western Queensland. He took it to his home in Hervey Bay where it was raised and cared for as a family pet named 'Mitchell'. The appellant was granted a rescue permit for the kangaroo for the period 30 September 2000 to 30 October 2000.

[5] By letter dated 20 February 2001, the appellant was notified that the rescue permit had expired. On 8 March 2001, the kangaroo was removed from the appellant's home by Queensland Parks and Wildlife Service (QPWS) officers and taken to an animal refuge.

[6] The appellant applied under the *Nature Conservation Regulation* 1994 for a further rescue permit and a permit to keep the kangaroo.

[7] Chapter 3 of the *Nature Conservation Regulation* as it stood in 2001 made provision for wildlife and habitat conservation. By s 92 of the Regulation, Ch 3 applied to protected wildlife outside protected areas. Section 107 of the Regulation allowed the chief executive to grant various permits, including a rescue permit and a permit to keep protected or prohibited wildlife. Section 117 of the Regulation provided restrictions on the granting of a rescue permit. Section 114 of the Regulation provided restrictions on the granting of permits to keep protected or prohibited wildlife.

[8] By notices dated 28 March 2001 issued pursuant to s 5 of the *Nature Conservation Regulation*, the first respondent advised the appellant of his decision to refuse the appellant a rescue permit and to refuse the appellant a permit to keep the red kangaroo.

[9] The reasons given for the refusal of a rescue permit were that the kangaroo in question was "currently settling in well with other kangaroos at a property run by a specialised macropod carer" and "did not need rescuing by any other person". It was "interacting with other kangaroos and would eventually be released into the wild". Reference was made to s 117(1) of the Regulation which provided that the chief executive must not grant such a permit unless satisfied that the person intended to rehabilitate the protected animal and return it to an appropriate natural habitat. The first respondent stated that he was not satisfied that the appellant intended to rehabilitate the animal and return it to an appropriate natural habitat.

[10] In refusing to issue a permit to keep the kangaroo, the first respondent referred to s 114(1) of the Regulation which provided that the chief executive may grant a permit to keep an injured protected animal taken under a rescue permit only if satisfied the animal could not be returned to the wild because of the nature of the injury to the animal or for another reason. The first respondent stated that he was not satisfied that the kangaroo could not be returned to the wild because of injury or any other reason, reiterating that the animal was currently settling in well at a property run by a specialised macropod carer and would eventually be released into the wild. Additionally, s 5(2) of the Regulation required that a licence be refused if it related to premises that were unfit for use under the licence. The first respondent stated that he considered the appellant's premises to be unfit for the keeping of a red kangaroo. Given that red kangaroos could become highly aggressive and recorded instances of attacks on people causing serious injury, the animal posed a danger to the residents of the premises and to neighbours.

The applications under the Judicial Review Act

[11] On 12 November 2012, the appellant's application for judicial review of the first respondent's decisions was heard together with the respondents' cross-application for dismissal filed on 22 October 2012 and the appellant's further application filed on 2 November 2012.

[12] An *ex tempore* judgment was given by the judge at first instance dismissing the application for judicial review from which the appellant now appeals.

Other Proceedings

[13] In addition to the judicial review proceedings, the appellant had earlier brought proceedings under s 17 of the *Nature Conservation Regulation* 1994 to appeal the decision to the Magistrates Court. During those proceedings, QPWS informed the appellant that the kangaroo had been found dead and the proceedings were not determined.

[14] The appellant also commenced proceedings in the Supreme Court for trespass in respect of the events of 8 March 2001. These proceedings were dismissed by Douglas J: see *Candy v Thompson and Ors* [2005] QSC 111. An appeal from that decision was unsuccessful: see *Candy v Thompson and Ors* [2005] Aust Torts Reports 81-809; [2005] QCA 382.[1] An issue for determination in those proceedings was whether the red kangaroo was a "protected animal" under the *Nature Conservation Act* 1992 (Qld) and property of the State, so that keeping it without a licence was unlawful.

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[1] Special leave to appeal was refused by the High Court: see *Candy v Thompson & Ors* [2006] HCATrans 220 (10 May 2006).

The judicial review application

[15] The application for judicial review sought review as follows:

> "**A Review of decisions and actions**
>
> 1. Application to review the decision of the 28th March by the 1st Respondent that a Permit to Keep was required in this State to keep and care for a red kangaroo (*Macropus rufus*) but upon application the Respondent refused to grant the Applicant such a Permit when in truth and reality no such Permit was required under the laws of the State to keep or care for red kangaroos;
> 2. Application to review the decision of the 28th March 2001 by the 1st Respondent that a Rescue Permit was required to rescue an orphaned red kangaroo (*Macropus rufus*) but upon application, the Respondent refused to grant such Rescue Permit to the Applicant when in truth and reality no such Rescue Permit was required under the laws of the State to keep or care for a red kangaroo;
> 3. Application to review the conduct of the 1st Respondent and 2nd Respondent claiming the red kangaroo to be (injured) protected' wildlife and property of the State, when in truth and reality the Respondents were estopped from making such claim pursuant to the *Nature Conservation (Macropod Harvest Period) Notice 2000* which came into force on 1 January 2001 declaring 'open day' on red kangaroos from 1 January to 31 December 2001, that is to say that red kangaroos may be freely killed or taken without permit on every day of the year;
> 4. Application to review the conduct of the 1st Respondent and 2nd Respondent in allowing three Queensland Parks and Wildlife Service Rangers that traumatized the Applicant's daughters when forcefully entering the Applicant's private family dwelling without invitation or lawful excuse, and then forcefully removed the family rescued and [now] domesticated pet red kangaroo on the 8th March 2001 in contravention of Sections 7(1)(4), 418(1), 419(1)(4) *Criminal Code Act 1899*, Reprint No 3D and common law.
> 5. Application to review the failure of the 2nd Respondent in the Decision of *Candy v Thompson & Ors* QSC-111 9th May 2005 to uphold the laws of the State of Queensland and to decide that the red kangaroo in Queensland remains as 'open season' 'non-protected fauna' pursuant to section 17(1) *example 3*, *Native Title Act 1993* (Q). Reprint No 1C by virtue of section 7(1) *Fauna Conservation Act 1974*, No 44. To decide, and declare that the subject red kangaroo was at all times in the lawful possession and was at all times the property, of the Applicant.
>
> **B. Particulars of Bad Faith**
>
> The applicant is aggrieved by the forced removal of the red kangaroo because –

The Applicant contends that the Respondents knew or had reason to know that;

1. By the failure of the 1st Respondent to maintain a Register of protected wildlife as per section 133(1)(c), and ensure that the Corporation complied with the Act section 162(1)(2), of the *Nature Conservation Act 1992*. Reprint No3. The non-protected status of the red kangaroo provided lawful reason and excuse to the Applicant to take, rescue, keep, and or maintain any red kangaroo;
2. The Applicant contends that the Respondents knew or had reasons to know that they entered the private dwelling of the Applicant without invitation or lawful excuse and in so doing caused the Applicant and his family injury at common law;
3. The Applicant contends that the Respondents knew or had reasons to know that they took and converted the Applicant's domesticated red kangaroo without lawful excuse and caused the Applicant and his family injury at common law;
4. The Applicant contends that the Respondents knew or had reasons to know that the Respondents by their actions and decisions suspended and or dispensed with the laws of Queensland and in so doing caused the Applicant and his family injury at common law.
5. The Applicant contends that the Respondents misled the court when failing to declare and disclose to the court that the *Nature Conservation Act 1992* did not apply to the Applicant's red kangaroo, being; 'native wildlife other than protected wildlife', section 97(1) *Nature Conservation Act 1992* Reprint No 3. or to the Applicant's premises, being private property and without prior written conservation agreement with the Respondents, sections 45(1) and 175(1)(2) of the *Nature Conservation Act 1992* Reprint No3. 'Property' of the Applicant, being the first person to reduce a wild and orphaned animal into possession, tame and confine it as supported by Definitions: 1. In this Code – "property" includes – (e) an animal that is – (i) a tame animal, whether or not naturally tame; or (ii) an untamed animal of a type that, if kept, is usually kept confined; *Criminal Code Act 1899*, Reprint No 3D.
6. The Applicant contends that the Respondents misled the court when failing to declare and disclose to the court that the non-protected open season status of the red kangaroo, which had provided the Applicant with lawful excuse to take, rescue, keep, and or maintain the red kangaroo, and that as at the 8th March 2001 in Queensland, the red kangaroo; was a 'marsupial not being protected under any law', section 7(1)(c) *Animals Protection Act 1925*, Reprint 1A, the red kangaroo was 'wild game', *Meat Industry Act 1993*, Reprint No 2D, the red kangaroo was a 'declared animal' 'category A7' section 70(1)(2)(4)(g)

Rural Lands Protection Act 1985, Reprint No 1E, the red kangaroo was 'non-protected fauna', sections 26(1)(3), 27(1), and 'fauna as has been taken for meat or skins' section 62(1), *Fauna Conservation Act 1974-1989* as Amended by *Fauna Conservation and Another Amendment Act, No 12 of 1989*. had created an estoppel to hold or declare that the red kangaroo was a 'protected' species in the State of Queensland.

C. Orders sought:

1. That an extension of time be granted pursuant to section 38(1) *Limitations of Actions Act 1974*, Reprint No 2E to allow for a re-trial;
2. That the Court upholds the view that the non-protected, open season status of the red kangaroo provided for *prima facie* evidence and created an estoppel that would prevent the Respondents from taking the view that the red kangaroo (*Macropus rufus*) was a protected species and property of the State under the laws of Queensland;
3. That the Court order a re-trial before a jury of the matter *Candy v Thompson & Ors* QSC-111 9th May 2005;
4. That the Court upholds the view that the 2nd Respondent is and remains at all times responsible for the actions and decisions of the 1st Respondent;
5. That the Court Orders that each Party bear their own costs in this Application;
6. And any other orders that the Court might consider appropriate."

[16] The appellant's application filed 2 November 2012 raised, *inter alia,* the following:

"(a) The Applicant was at all times denied natural justice.

(b) The red kangaroo remains as non-protected open season fauna in Qld.

(c) The Applicant was induced by fraud, to apply for an unrequired Permit to Keep an alleged 'protected' animal, by servants of the First Respondent.

(d) The First Respondent did not have the jurisdiction to make the Decision.

(e) The First Respondent's Decision of the 28th March 2001, was an abuse of power and affected by irrelevant considerations, as in personal bias, fitness of the Applicant's place, and a likelihood of survival, of the red kangaroo.

(f) The First Respondent made the Decision after the Applicant's home was unlawfully invaded by three servants of the First and Second Respondent, and the red kangaroo was forcefully removed from the Applicant's family and converted to the possession of a third party on the 8th March 2001.

(g) The Applicant currently possesses three pet red kangaroos and is presently breeding red kangaroos (two carrying pouch young), without any licence, permit or other authority from the Second Respondent as none are required by law.

> Although, the Applicant has suffered the loss of his family, home, reputation and his special pet red kangaroo named 'Mitchell'."

Decision at first instance

[17] The judge at first instance noted[2] the appellant's primary submission that the kangaroo in question was not a "protected animal" within the meaning of the *Nature Conservation (Wildlife) Regulation* and that a permit was therefore not necessary. In addressing that submission, her Honour observed that in the trespass proceedings, "the Court of Appeal held that Mitchell was a protected animal" and as such "that he was the property of the State and that keeping him without a licence was unlawful." Her Honour summarised the Court of Appeal's reasoning in determining that the kangaroo was a "protected animal" as follows. Under the *Nature Conservation Act*, a "protected animal" was an animal that was prescribed under the Act as threatened, rare or common wildlife. Under the *Nature Conservation (Wildlife) Regulation* 1994, made under the Act, sch 5 which dealt with "common wildlife" included a mammal indigenous to Australia. The red kangaroo met that definition and therefore was a protected animal.

[18] Her Honour noted the appellant's contention that the Court of Appeal's decision in *Candy v Thompson and Ors* was wrong in law and dealt with it as follows:

> "Mr Candy submits that it was wrong. He says that the Court of Appeal was not referred to other legislation and the absence of a relevant proclamation. In his submission, the red kangaroo was 'non-protected fauna' within the *Fauna Conservation Regulations* under the *Fauna Conservation Act* 1974, the keeping and taking of which did not constitute an offence.
>
> Whether or not this has bearing on the true meaning of 'protected animal' in the *Nature Conservation Act* and Regulation cannot alter my position, in that I am bound by the decision of the Court of Appeal as to what it means.
>
> I am bound to conclude that Mitchell was a protected animal and, accordingly, the substantive application for judicial review is bound to fail."

[19] Her Honour also considered that there were other reasons why the application could not succeed. The principal relief sought in the application was a retrial before a jury of the matter that had come before Douglas J, but her Honour observed that "Even if that matter had been determined by a Judge and jury in the first instance, questions of law including the meaning of 'protected animal' would have been determined by the judge, and not the jury." Further, her Honour held there was no power to order a retrial of that proceeding, stating:

> "When he was not satisfied with the decision, the appropriate course for Mr Candy was to appeal to the Court of Appeal, which he did. The Court of Appeal dismissed his appeal. He informed the Court this afternoon that he had applied for special leave to appeal to the High Court, and that that had been refused."

[20] Her Honour continued:

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[2] Reasons refer to the rescue permit only but the reasoning is apt to encompass both.

> "If what he is really seeking is a reconsideration of the meaning of 'protected animal', as I have said, I cannot undertake such a reconsideration.
>
> If Mitchell is indeed dead, there would be no point in ordering a redetermination of the application for a rescue permit according to law.
>
> Mr Candy has raised an allegation of fraud which, as I understood him, related to QPWS's informing the Magistrate that the animal was dead. There are only Mr Candy's assertions from the Bar table this afternoon that the animal is alive. There is no evidence before the Court to that effect.
>
> Assuming he could muster such evidence, there may be some way in which he could re-enliven the proceedings before the Magistrates Court, but that is not for me to determine.
>
> Finally, there is the question of delay. More than 11 years have passed since the decision sought to be reviewed and no satisfactory explanation for the delay in making the application has been put before the Court.
>
> In all of the circumstances, I am satisfied that the application for judicial review cannot succeed and, accordingly, it should be dismissed at this stage."

[21] The primary judge made orders that the statutory order of review and the appellant's cross-application filed on 2 November 2012 be dismissed and the appellant pay the respondents' costs on the standard basis.

Appellant's submissions

[22] Before this Court, the appellant sought leave to put fresh evidence going to issues of trespass and the death of Mitchell and the allegedly perjured testimony of the second respondent's witnesses in the trial before Douglas J, which was refused.

[23] The crux of the appellant's submissions concerned an issue of law as to the correctness of whether the red kangaroo was a "protected animal" under the Act. The appellant argued that the Court of Appeal decision in *Candy v Thompson* and in *Candy v Christensen* [2007] QCA 114 which endorsed it (and concerned a swamp wallaby in respect of which the appellant had separately applied for a permit) were wrong at law.

[24] The appellant submitted that the red kangaroo was at the relevant time and remains "non-protected open season fauna to which the State holds no property". In that regard, the Notice of Appeal stated:

> "**2(a).** A point of law; The red kangaroo in Queensland has remained as non protected open season fauna, to which the State has never held any property in the species, section 7(1) *Fauna Conservation Act 1974*, remaining in force by section 17(1) *Native Title Act (Q) 1993*, Reprint No 1, (current Reprint 1C). The red kangaroo remains as *non protected fauna*, sections 6(1)(c), 26(1)(2)(3)(a)(b), 27(1), 54(1)(b)(ii), 62(1)(c) *Fauna Conservation Act 1974.* The red kangaroo is prescribed and specified as non protected fauna, as is

> taken for meat or skins, Sch 1, f 19 *Fauna Conservation Regulation 1974.* The red kangaroo has never been Declared by Order in Council to be *'fauna'* (as defined in legal terms) for the purpose of the Act, sections 5 & 11(a) *Fauna Conservation Act 1974,* and was not subject to the *Nature Conservation Act 1992,* Reprint No 3, section 85(1) and remains as *'native wildlife other than protected wildlife',* section 97(1) *NCA '92.* The red kangaroo remains as *wild game* section 4 *Meat Industry Act 1993,* Reprint No 2D, continued in the *Food Act 2006,* Reprint 2C.
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> **2(b)** As at the 8th and 28th March 2001, the red kangaroo was also a *'marsupial not being protected under any law*', section 7(1)(c) *Animals Protection Act 1925,* Reprint 1A. The red kangaroo was defined as a 'Marsupial' and as 'Vermin' section 5, *Stock Routes and Rural Lands Protection Act 1944.* The red kangaroo was a *'declared animal' 'category A7'* section 70(1)(2)(4)(g) *Rural Lands Protection Act 1985,* Reprint No 1E. Estopping the Respondents, from presuming any protection status."

[25] The appellant also contended in submissions that the first respondent did not maintain a Register of Protected Wildlife as mandated in 2001 by s 133(1)(c) of the *Nature Conservation Act* 1992, "which may have clarified the First Respondent's position at law, and protected the Appellant's kangaroos from theft". He further submitted it was never the intention of the Queensland Legislature to protect the red kangaroo beyond the borders of protected areas. This, it was said, was apparent from an analysis of Queensland Parliamentary Hansards and various other legislation.

Respondents' submissions

[26] The respondents submitted that there was no basis for allowing the relief sought by the appellant as no error in the decision of the primary judge had been identified by the appellant.

[27] To the extent that the appellant sought to revisit the construction of "protected animal", it was an abuse of process as it sought to re-litigate an issue conclusively determined: see *Walton v Gardiner* (1993) 177 CLR 378 at 392-396 and *State Bank of New South Wales Ltd v Stenhouse Ltd* [1997] Aust Torts Reports 81-423 at 64,089. That is, the application for review raised the identical issues for determination as were decided by the court in *Candy v Thompson and Ors* [2005] QSC 111 and *Candy v Thompson and Ors* [2005] Aust Torts Reports 81-809; [2005] QCA 382. Those proceedings concerned the present parties and also dealt with who was the lawful owner of the red kangaroo named Mitchell, whether the appellant had lawful possession of the animal and the construction of the *Nature Conservation Act* 1992. To the extent that any new or different point of construction of law was now raised that was not dealt with in *Candy v Thompson and Ors* [2005] QSC 111 or *Candy v Thompson and Ors* [2005] Aust Torts Reports 81-809; [2005] QCA 382, it was governed by the principles in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589. The nature of the relief sought by the appellant confirmed that it was an abuse of process rather than an attempt to obtain the licence that the decision refused.

[28] In any event, the construction proposed by the appellant was not maintainable, along with his attempt to construe the terms of the *Nature Conservation Act* and *Regulations* by reference to provisions of other irrelevant legislation.

[29] Nor was the application for review made in time and the refusal to extend time was a correct exercise of discretion.

Court of Appeal decision in *Candy v Thompson*

[30] It is convenient to now turn to the decision of the Court of Appeal in *Candy v Thompson & Ors* where the question of whether the red kangaroo was a "protected animal" under the *Nature Conservation Act* 1992 was considered. Keane JA (with whom Jerrard JA and Jones J agreed) said:

> "[35] In *Yanner v Eaton,*[3] the majority of the High Court described the *Fauna Act* 1974 (Qld), the statutory predecessor of the [*Nature Conservation Act* 1992], as establishing a regime 'forbidding the taking or keeping of fauna except pursuant to licence granted by or under the Act'. In the same way, the lawful keeping of what are now defined by the Act as 'protected animals' is also regulated by the Act. The arguments advanced by the appellant failed to appreciate that whether or not the kangaroo was lawfully in his possession did not depend upon the common law, but upon the statutory provisions regulating the keeping of the animal.
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> [36] When the events which are now the subject of this dispute transpired in February 2001, s 83 of the Act provided that, subject to presently immaterial exceptions, 'all protected animals are the property of the State', and 'a protected animal ceases to be the property of the State if … the animal is taken under the licence, permit or other authority issued or given under a regulation …', in which case the protected animal 'becomes the property of the holder of the authority …'.
>
> [37] The dictionary to the Act defined 'protected animal' as 'an animal that is prescribed under this Act as threatened, rare or common wildlife …'. Section 8 of the *Nature Conservation (Wildlife) Regulation* 1994 (Qld) ('the Regulation') stated that the wildlife listed in the fifth schedule to the Regulation were 'common wildlife'. That prescription was made pursuant to s 80(1) and s 175(1) of the Act.[4] The fifth schedule identified a mammal that was 'indigenous to Australia' as 'common wildlife'. The appellant accepted that a red kangaroo was indeed a mammal indigenous to Australia. It follows that, in February 2001, an indigenous

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3 [1999] HCA 53 at [30]; (1999) 201 CLR 351 at 370.

4 The Act required the Governor-in-Council to have an opinion about certain matters before prescribing an animal as 'common wildlife'. In the absence of evidence to the contrary, of which there was none, it may be assumed this opinion was properly formed: *Statutory Instruments Act* 1992 (Qld) s 7(3), s 20. There is thus no reason to doubt the validity of the Regulation.

mammal such as the red kangaroo was a 'protected animal' for the purposes of the Act.[5]

[38] In 2001, the Act provided, by way of s 88(1)(b), that, subject to presently immaterial exceptions, 'a person … must not … keep a protected animal, other than under - … a licence, permit or other authority issued or given under a regulation …'.

[39] The effect of these provisions was that the kangaroo, at the time of its removal, was not lawfully in the possession of the appellant. Whatever might have been the position so far as ownership of the animal was concerned, the appellant was prohibited by the Act from keeping it. The resolution of the second issue against him was, therefore, inevitable as a matter of law."

[31] In his additional reasons agreeing with the judgment of Keane JA, Jerrard JA stated:

"[6] More relevant to Mr Candy's claim and appeal is whether the kangaroo was a protected animal as defined in the Act, not whether it was wildlife as defined in the Act. The Schedule to the Act defined a protected animal as an animal 'prescribed under this Act as threatened, rare, or common wildlife', subject to some irrelevant exceptions. The respondents' argument was that kangaroos were animals prescribed under the Act as common wildlife.

[7] Section 80 of the Act, as in force at the relevant time, provided that:

'(1) If the Governor in Council is of the opinion that -

(a) native wildlife is common or abundant; and

(b) the wildlife is likely to survive in the wild;

the wildlife may be prescribed as common wildlife.'

No method of prescription is described in the Act. On the appeal counsel for the respondents referred the court to s 8(1) of the *Nature Conservation (Wildlife) Regulation* 1994 ('the wildlife regulation') which declares that:

'Native wildlife specified in schedule 5, parts 1 and 2 is common wildlife.'

[8] Native wildlife was defined in the Act to mean any taxon or species of wildlife indigenous to Australia. Schedule 5 of the wildlife regulation is headed 'Common Wildlife',[6] and refers to s 8; it provides in Clause 4 therein, under a heading 'Part 1 – Common Animals' that common mammals are

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5 The term 'common wildlife' has since been removed from the Act in favour of the term "least threatened wildlife": *Nature Conservation Amendment Act* 2004 (Qld), s 13. This subsequent change to the terms of the applicable legislation is irrelevant to the disposition of this appeal.

6 The effect of sections 2, 7, 14, and 36 of the *Acts Interpretation Act* 1954 (Qld) is that the headings in the Schedule are part of the wildlife regulation.

> mammals indigenous to Australia, other than presumed extinct, endangered, vulnerable or rare mammals; or a dingo. The effect of that schedule and s 8(1) of the wildlife regulation is that kangaroos, which Mr Candy agreed at the trial were mammals indigenous to Australia, fell within the definition of common wildlife in the wildlife regulation. This is because common animals were specified, albeit in an inarticulate and clumsy way, as common wildlife."

Discussion

[32] None of the matters raised by the appellant by way of other legislation or other matters are of any substance whatsoever and no basis has been demonstrated for departing from the above decision as wrong in law.

Hansard

[33] The appellant contended that he was able to establish "that it has never been the intention of the Queensland Legislation to protect the red kangaroo" beyond the borders of protected areas in part by relying on various passages in Hansard. In that regard, reference was made to the debates concerning the following bills: the Stock Routes and Rural Lands Protection Bill 1944; the Fauna Conservation Bill 1952; the Fauna Conservation Bill 1974; the Nature Conservation Bill 1992; the Meat Industry Bill 1993 and the Rural Lands Protection Bill 1985. No material assistance can be gained from the portions of Hansard referred to by the appellant in determining the legislation and regulations pertinent to this case, namely the *Nature Conservation Act* and regulations thereunder.

Legislation

[34] A large body of legislation was referred to by the appellant. None of it advanced his contention that the decision in *Candy v Thompson & Ors* was wrongly decided. However, none of that legislation assists the appellant. The main pieces of legislation raised are dealt with below.

Native Title (Queensland) Act 1993 and Fauna Conservation Act 1974

[35] In written submissions the appellant argued that "the red kangaroo in Queensland is currently a non-protected pest animal, which is utilized as a renewable natural resource." Reliance was placed on s 17(1) of the *Native Title (Queensland) Act* 1993 which confirms the State's ownership of all natural resources and the third example provided in the section. Example 3 of this section states:

> "With limited exceptions, the State owns all indigenous fauna in Queensland — see s 7 *Fauna Conservation Act 1974*. This ownership is confirmed by subsection (1)."

[36] Section 7(1) of the *Fauna Conservation Act* 1974 provided that:

> "All fauna, save fauna taken or kept during an open season with respect to that fauna, is the property of the Crown and under the control of the Fauna Authority."

[37] The conclusion urged was that "open season fauna" was an exception to the State's ownership of all natural resources and that the State had no property in open season fauna. Section 17(1) of the *Native Title (Queensland) Act* 1993, it was said in oral

submissions, "brings the *Fauna Conservation Act* 1974 alive" and such that the red kangaroo was "non-protected fauna" under the *Fauna Conservation Act* 1974. It is a submission without merit. Section 158 and sch 1 of the *Nature Conservation Act* 1992 repealed the *Fauna Conservation Act* 1974. These provisions came into effect on 19 December 1994. Section 7 of the *Fauna Conservation Act* 1974 did not have effect after that date. The appellant's reliance on s 17(1) of the *Native Title (Queensland) Act* 1993 is therefore misplaced.

[38] The appellant sought to derive some comfort for his contention that the red kangaroo was not protected under the *Nature Conservation Act* by referring to a further provision of the *Nature Conservation Act* 1992, that is, s 85 which concerned "property in newly protected animals." It provides:

> "**Property in newly protected animals**
>
> (1) In this section—
> ***commencing day*** means the day on which this division commences.
> ***declaration day*** for an animal means the day on which the animal becomes a newly protected animal.
> ***newly protected animal*** means a protected animal that, immediately before the commencing day, was not fauna under the *Fauna Conservation Act 1974*.
>
> (2) If a person is keeping a newly protected animal at the beginning of the declaration day, the animal and its progeny do not become the property of the State merely because of the animal becoming a protected animal."

[39] This transitional provision does not assist the appellant as it is abundantly clear that at the relevant time the red kangaroo was by virtue of the provisions discussed in *Candy v Thompson & Ors* a "protected animal."

[40] The appellant also referred to the *Nature Conservation (Macropod Harvest Period) Notice* 2000 made pursuant to the *Nature Conservation Act* 1992 which prescribed the "harvest period" for certain macropods, including the red kangaroo. The submission appeared to be that "the non-protected, open season status of the red kangaroo provided *prima facie* evidence and created an estoppel that would prevent the respondents from taking the view that the red kangaroo (Macropus rufus) was a protected species and property of the State under the laws of Queensland." There is no merit in that argument. The *Nature Conservation (Macropod Harvest Period) Notice* 2000 is not concerned with the requirement that a permit be obtained for the keeping of the red kangaroo as a protected animal under the *Nature Conservation Act* 1992.

Animals Protection Act 1925

[41] The appellant relied on s 7(1)(c) of the *Animals Protection Act* 1925 (reprint no 1A) which although subsequently repealed was in force at the relevant time.[7] It provided that, "Except in any case of ill-treatment, nothing in this Act shall render unlawful" the extermination of, *inter alia*, "marsupials (not being protected under any law)".

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[7] It was repealed on 1 March 2002 by the *Animal Care and Protection Act* 2001.

[42] The appellant submitted that the only legislation which defined marsupials was the *Stock Routes and Rural Lands Protection Act* 1944, s 5(1) of which defined "marsupial" as "A wallaby, kangaroo, wallaroo, paddamelon, bandicoot or kangaroo rat". The *Stock Routes and Rural Lands Protection Acts* 1944-1967 was repealed by the *Rural Lands Protection Act* 1985 on 1 July 1986 and is therefore not of relevance for present purposes and the reliance placed on definitions of marsupial (and for that matter the term vermin) in that Act are misguided.

[43] Furthermore, s 7(1)(c) of the *Animals Protection Act* 1925 is concerned with "marsupials (not being protected under any law)". And in any event, the red kangaroo was a marsupial protected under a law, that is, the *Nature Conservation Act* for the reasons explained in *Candy v Thompson & Ors*.

Rural Lands Protection Act 1985

[44] The appellant also relied on the *Rural Lands Protection Act* 1985 (reprint no 1E) which was in force at the relevant time, although later repealed.[8] Specific reference was made to the term "declared animal" in s 70(4)(g) of that Act. It provides that for the purposes of that Act, a class of "declared animals" may be assigned to "category A7 fauna in respect of an area if those animals are native to that area and are animals for which a management program should, in the opinion of the Minister, be approved and published by the Minister and implemented in that area."

[45] The provision is of no assistance to the appellant. Section 70(1) makes it clear that s 70 is concerned with a class of declared animals so declared by regulation under s 69 of the Act. Section 69(1) states that "A regulation may declare animals of a class specified in the regulation (other than protected animals within the meaning of the *Nature Conservation Act 1992*) to be declared animals". While the appellant sought to argue that the red kangaroo is a declared animal, it is clear from s 69 that an animal that is a protected animal within the meaning of the *Nature Conservation Act* 1992 (as the red kangaroo was) cannot be declared to be a "declared animal". Nothing in the *Rural Lands Protection Act* 1985 detracts from the requirement for a permit in respect of a protected animal under the *Nature Conservation Act* 1992.

Meat Industry Act 1993

[46] The appellant also relied on s 4 of the *Meat Industry Act* 1993 which was in force at the relevant time.[9] It defines "wild game" as:

> "an animal –
>
> (a) prescribed by standard as wild game; and
>
> (b) living in a wild state and not under any artificial confinement".

[47] The appellant submitted that the kangaroo came within this definition as it was "named explicitly or prescribed and specified". The appellant further submitted that "protected wildlife" cannot be prescribed as "wild game". The appellant submitted that the reference to "native wildlife (other than protected wildlife)" in s 97(1) of the *Nature Conservation Act* 1992 meant that not all native wildlife is protected.

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8 It was repealed on 1 July 2003 by the *Land Protection (Pest and Stock Route Management) Act* 2002.

9 It was subsequently repealed by the *Primary Industries Legislation Amendment Act* 2002 on 24 September 2002.

[48] The appellant conflates a number of issues. Firstly, the *Meat Industry Act* 1993 is concerned to "ensure the wholesomeness and integrity of meat": s 3. It is not concerned with restrictions on activities relating to protected wildlife under Division 4 of Part 5 of the *Nature Conservation Act* 1992. Nor do the definitions of "native wildlife" and "protected wildlife" in the *Nature Conservation Act* 1992 present difficulties. "Native wildlife" is defined in that Act to mean "any taxon or species of wildlife indigenous to Australia". Under the Act "protected wildlife" is defined to mean "native wildlife that is prescribed under this Act" including "common wildlife". It is irrelevant for present purposes whether or not "protected wildlife" can or cannot be prescribed as "wild game" under the *Meat Industry Act*.

[49] The appellant referred to the definition of "owner" in the *Meat Industry Act* as being in relation to "an animal or meat – the person in possession or control of the animal or meat". That does not advance matters; as already stated, the *Meat Industry Act* is not concerned with restrictions on activities relating to protected wildlife under Division 4 of Part 5 of the *Nature Conservation Act* 1992.

Criminal Code 1899

[50] In submitting that the kangaroo was his property so that no permit was required, the appellant relied on the definition of "property" in s 1 of the *Criminal Code* 1899 which defines as "property" an animal that is "a tame animal, whether or not naturally tame", or "an untamed animal of a type that, if kept, is usually kept confined" or "an untamed animal in a person's possession or being pursued for return to possession after escape." This is of no assistance other than for the purposes of the *Criminal Code* and does not advance the appellant's case.

[51] A review of the material put forward by the appellant indicates that there is no basis to question the correctness of the decision in *Candy v Thompson & Ors*.

Other matters

[52] In so far as the primary judge only referred in her *ex tempore* reasons to the decision refusing a permit to rescue and not the decision refusing a permit to keep the kangaroo, it may be said that there was a failure to consider the matters raised by the appellant in respect of the latter decision and exercise the discretion as to whether to dismiss the judicial review application regarding that decision. To the extent that this Court would be required to consider the latter matter, for the reasons set out above, the approach taken by the primary judge in discussing the appellant's judicial review application applied equally to the complaint concerning the decision refusing a permit to keep the kangaroo and warranted a dismissal of the judicial review application.

Orders

[53] The order I would make is to dismiss the appeal with costs.