SUPREME COURT OF QUEENSLAND

CITATION:	*Candy v Thompson & Ors* [2005] QCA 382
PARTIES:	**COLIN RAYMOND CANDY** (plaintiff/appellant) **v** **BRUCE THOMPSON** (first defendant/first respondent) **MARY STARKY** (second defendant/second respondent) **JOHN KLEKAR** (third defendant/third respondent) **KAY KELLY** (fourth defendant/fourth respondent) **SONJA GOURLEY** (fifth defendant/fifth respondent) **DR IAN McPHAIL** (sixth defendant/sixth respondent) **THE HONOURABLE DEAN WELLS MP** (seventh defendant/seventh respondent) **STATE OF QUEENSLAND** (eighth defendant/eighth respondent)
FILE NO/S:	Appeal No 4579 of 2005 SC No 10684 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 October 2005
DELIVERED AT:	Brisbane
HEARING DATE:	14 September 2005
JUDGES:	Jerrard and Keane JJA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. Appellant to pay the respondents' costs of the appeal to be assessed on the standard basis**
CATCHWORDS:	TORTS - TRESPASS - TRESSPASS TO LAND AND RIGHTS OF REAL PROPERTY - WHAT CONSTITUTES TRESPASS AND DEFENCES THERETO - DEFENCES - LEAVE AND LICENCE - where appellant had sued the respondents for damages alleged to have been suffered as a

result of the removal from the appellant's home of a red kangaroo by officers of the Queensland Parks and Wildlife Service ("QPWS") - where the appellant alleged that this removal had occurred in the course of what amounted to a trespass on his property by members of the QPWS - where the appellant did not have a permit to keep the kangaroo - where the QPWS officers gave evidence that the appellant had invited them onto his land and into his house - where the appellant gave evidence he had told the QPWS officers that they were not welcome in his house on a number of occasions - where the statements claimed to have been made by the appellant were not recorded on the tape recorder used by the QPWS officers to tape the proceedings nor on the video recorded by the appellant's son - whether the evidence supported the findings made by the trial judge that there had been no trespass because the appellant had given his consent to the QPWS officers entering upon his land to remove the kangaroo - whether this consent had ever been revoked

TORTS - TROVER AND DETINUE - POSSESSION OR RIGHT TO POSSESSION - RIGHT TO POSSESSION - PARTICULAR RIGHTS - where appellant submitted that the kangaroo should be rightfully regarded as his property which had been unlawfully taken from him - where provisions of the *Nature Conservation Act* 1992 (Qld), read in conjunction with the *Nature Conservation (Wildlife) Regulation* 1994 (Qld), operated to deem the kangaroo, as a native animal, to be the property of the State - whether the appellant could lay claim to the ownership of an animal deemed by statute to be the property of the State

DAMAGES - MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT - REMOTENESS AND CAUSATION - PROOF OF CAUSATION - where the appellant alleged he had suffered loss and damage including economic loss as a result of the removal of the kangaroo - whether a sufficient causal nexus could be demonstrated between the removal of the kangaroo and the damages claimed

DAMAGES - GENERAL PRINCIPLES - EXEMPLARY, PUNITIVE AND AGGRAVATED DAMAGES - where appellant also sought exemplary damages for the actions taken by the QPWS officers in the course of removing the kangaroo from the appellant's property - whether the evidence showed that the QPWS officers had acted in a manner giving rise to a right to exemplary damages

Environmental Protection and Other Legislation Amendment Act 2004 (Qld)
Nature Conservation Amendment Act 2004 (Qld), s 13
Nature Conservation Act 1992 (Qld), s 80, s 83, s 88, s 175
Nature Conservation (Wildlife) Regulation 1994 (Qld), s 8,

Sch 5
Statutory Instruments Act 1992 (Qld), s 7(3), s 13, s 20

Devries v Australian National Railways Commission (1993) 177 CLR 472, cited
Fox v Percy [2003] HCA 22; (2003) 214 CLR 118, cited
Halliday v Nevill (1984) 155 CLR 1, applied
Jones v Hyde (1989) 63 ALJR 349, cited
Plenty v Dillon (1990) 171 CLR 635, cited
Yanner v Eaton [1999] HCA 53; (1999) 201 CLR 351, cited

COUNSEL: The appellant appeared on his own behalf
G D Sheahan for the respondents

SOLICITORS: The appellant appeared on his own behalf
C W Lohe, Crown Solicitor for the respondents

[1] **JERRARD JA:** In this appeal I have read the reasons for judgment of Keane JA, and I agree with those reasons and with the orders His Honour proposes.

[2] The appeal, as argued, ultimately turned on the narrow point of whether or not the kangaroo Mr Candy had had in his possession, and been caring for ever since he found it as a joey inside its dead mother's pouch by the roadside, was a "protected animal" under the *Nature Conservation Act* 1992 (Qld) ("the Act"). If it was, s 88 of that Act prohibited Mr Candy from keeping it, other than under the authority of (relevantly) a permit given under a regulation. The *Nature Conservation Regulation* 1994 (Qld) ("the Regulation"), as in force at all relevant times, empowered the Chief Executive to grant a permit to keep protected wildlife. Mr Candy did not have one at the time the kangaroo was taken from his possession.

[3] On the appeal, Mr Candy made an argument which should be understood as being that a hiatus, between the provisions of s 175 of the Act – the Regulation making power given by it – and the Regulation, meant that it was impossible for a person such as himself to conform with the proscription in s 88(1)(b) of the Act against keeping a protected animal other than under a permit given under a regulation; because there was no valid regulation authorising the giving of such permit. I note that while Mr Candy had earlier been given a permit to keep the kangaroo for a limited period, that permit had expired before the kangaroo was removed from his possession, and his applications for another permit had not been granted. Accordingly, whether or not the Regulation authorising the granting of a permit was validly made, Mr Candy did not have one.

[4] Regarding its validity, Mr Candy's argument that the Regulation was invalidly made relied on the provisions of the *Environmental Protection and Other Legislation Amendment Act* 2004 (Qld). That amending Act amended s 175(2) of the Act, by adding to the topics on which the Governor-in-Council might make regulations under the Act. The words inserted by the amending Act of 2004 specifically provided that regulations could be made with respect to:

> "(p) authorising the taking, keeping or use of a protected animal."

[5] The addition of that regulation making power certainly implies that power to make regulations on that topic may not have existed before; but s 175(2)(j), in force at the relevant time, authorised the making of regulations with respect to:

> "(j) the taking or keeping of wildlife, the moving of wildlife into, in and out of the State and the dealing with, use or release of wildlife into the wild."

The definition of "wildlife" in the Schedule to the Act was sufficiently wide to include kangaroos. Accordingly, the Regulation could validly provide for permits to keep kangaroos.

[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 -
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> (a) native wildlife is common or abundant; and
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> (b) the wildlife is likely to survive in the wild;
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> 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",[1] and refers to s 8; it provides in Clause 4 therein, under a heading "Part 1 – Common Animals" that common mammals are 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.

[9] The narrow issue on the appeal, relevant to the applicability of s 88 of the Act, was the source of the authority to make that wildlife regulation, and what links the regulation had, if any, to the power given by s 80 to the Governor-in-Council to prescribe common or abundant native wildlife as common wildlife. Counsel for the respondents principally argued that authority for making that regulation was found in s 175(2) of the Act, relying on the power given by s 175(2)(j) to make regulations with respect to the "taking or keeping of wildlife". But the power to make regulations with respect to that matter is hardly broad enough to authorise making regulations which specify that some native wildlife is common wildlife, some is vulnerable wildlife, some is international wildlife, some is prohibited wildlife, some is rare wildlife, some is endangered wildlife, and some is presumed extinct wildlife, which is what the wildlife regulation does. If s 175(2)(j) was the only source of power for the Governor-in-Council to specify by regulation that wildlife was one or

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[1] 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.

other of those classes of wildlife, then those parts of the wildlife regulations would very likely be ultra vires.

[10] However, it is unnecessary to decide whether s 175(2)(j) would suffice, because that regulation making power is not the only source of that power. Sections 76-82 of the Act specifically empower the Governor-in-Council to prescribe native wildlife as extinct wildlife, endangered wildlife, vulnerable wildlife, rare wildlife, common wildlife, international wildlife, and prohibited wildlife. If the wildlife regulation, in its classification of wildlife as described, is valid, that validity derives from those sections of the Act.

[11] I am satisfied that they do authorise the making of the wildlife regulation, and specifically that s 80 of the Act authorises the Governor-in-Council to make that part of the wildlife regulation that specifies what native wildlife is common wildlife. This is because of the provisions of the *Statutory Instruments Act* 1992 (Qld), which relevantly provides in s 13 that if an Act authorises a matter to be done, and the matter is capable of being done by instrument, the authorising law authorises the matter to be done by instrument. Instrument should be understood as meaning "statutory instrument", which in that Act means any document made under an Act, and which is any of the types listed in s 7(3) of that Act. The first variety listed is a regulation. It follows that the authority given to the Governor-in-Council by s 80 of the Act, which did not specify how the Governor-in-Council might prescribe native wildlife as common wildlife, when read with the provisions of the *Statutory Instruments Act* 1992, was an authority to prescribe native wildlife as common wildlife by a regulation. That is what was done. I add that s 20 of the *Statutory Instruments Act* 1992 provides that "All conditions and preliminary steps required for the making of a statutory instrument are presumed to have been satisfied and performed in the absence of evidence to the contrary." That section requires this Court to presume that the Governor-in-Council was satisfied of the necessary matters when specifying which native wildlife was common wildlife.

[12] It follows that the kangaroo was common wildlife, and despite the illogicality of the proposition in law and in fact, it was a protected animal. Accordingly, s 88 of the Act applied to prohibit Mr Candy from keeping it, even though it had survived only because of his care, and died soon after it was removed from it. It also follows that for the reasons given by Keane JA the appeal must be dismissed.

[13] **KEANE JA:** The appellant brought an action for damages arising out of the removal on 8 March 2001 from his home at Torquay of a red kangaroo called "Mitchell" by officers of the Queensland Parks and Wildlife Service (the "QPWS"). In April 2000, the appellant had taken the kangaroo as a joey from the pouch of its dead mother which the appellant had come upon on the side of the road near the town of Mitchell in Western Queensland. He took it back to Hervey Bay where it was raised as a family pet and cared for by the appellant and his daughter Emma. The appellant claimed to recover $1.5 million for loss and damage said to have been caused to him as a result of the removal of the kangaroo.

[14] The appellant was unrepresented at trial, as he was on appeal. Prior to trial, he had apparently experienced difficulty in formulating his claim in conformity with the usual rules of procedure. This apparent difficulty prompted a judge of the Supreme Court, somewhat unusually, and no doubt in an attempt to assist the appellant in his prosecution of his claim, to set the appellant's action down for hearing on the basis

that six issues were to be tried between the parties. At that hearing, these issues were all resolved against the appellant.[2]

[15] Some further statement of the factual background is necessary to assist in the consideration of those issues and their proper disposition on appeal.

Factual background

[16] On 15 September 2000, the appellant lodged an application to the QPWS for a rescue permit under the *Nature Conservation Act* 1992 (Qld) ("the Act") and regulations made thereunder in respect of the kangaroo. On 26 September 2000, a rescue permit was issued to the appellant for the period 30 September to 30 October 2000.

[17] On 20 February 2001, the QPWS sent the appellant a letter informing him that the rescue permit had expired. On 22 February 2001, during a visit by two officers of the QPWS, the appellant was told that the kangaroo had to be returned to a qualified carer in the area from which the kangaroo had been taken, and that they would return in two weeks to organize the kangaroo's return. At this time, the kangaroo was noted by the QPWS rangers to be displaying some signs of aggression.

[18] The appellant subsequently lodged an application for a further rescue permit on 26 February 2001. This permit was not issued and, on 5 March 2001, the appellant lodged an application with the QPWS for a "permit to keep" the kangaroo. This permit was not issued.

[19] On 8 March 2001, QPWS rangers attended at the appellant's home to remove the kangaroo. These officers are the first to third respondents to the appeal. They were accompanied by Dr McKay, a local veterinarian. The kangaroo was removed and placed in the care of the fifth respondent, a wildlife carer permitted to keep kangaroos. The kangaroo was found dead by the fifth respondent in late April 2001 after having apparently run into a tree by accident.

[20] The first, second and third respondents gave evidence about the circumstances in which they entered upon the appellant's land. The evidence of the third respondent was that there was no front fence or gate and that they walked to the stairs which led from the ground to the front door. The second respondent said that there was a pathway to the stairs to the appellant's house. This divergence between the evidence of the second and third respondents is of little moment. That is because the appellant said in cross-examination that there was no fence to his front yard, and that he allowed the QPWS officers to stand on his front lawn and to go to his front door. On the hearing of the appeal the appellant seemed to assert that he did not allow the QPWS officers onto his land. The transcript of the appellant's cross-examination shows that any such assertion would be quite wrong. The appellant said: "I allowed them to go to the front door. I've got no dispute there. I let them stand on the front lawn".

[21] Before the QPWS officers entered the appellant's house to remove the kangaroo, there were conversations outside the front door of the house between the appellant and the QPWS officers, some of which were tape-recorded by the first respondent. These conversations included an indication by the appellant that he wanted to ring the fourth respondent to see where he stood legally. He went on to say: "If I need a

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[2] *Candy v Thompson & Ors* [2005] QSC 111; SC No 10684 of 2004, 9 May 2005.

court order and you just come and take him away and then I'll give him to you alright?".

[22] There is a factual dispute between the parties relating to the entry of the QPWS officers into the appellant's house from which the kangaroo was actually removed. According to the appellant, he told the QPWS officers on about three occasions that he did not want them in his house. No such statement appears from the tape kept by the first respondent. The appellant's son video-taped some of what occurred while the QPWS officers were inside the house. No such statement appears on that video-tape. The evidence of Dr McKay, who was, as the learned trial judge noted, a disinterested witness, was that the appellant said to the group consisting of himself and the QPWS officers who were then standing at the front door of the appellant's house "you better come in" or words to that effect.

[23] The evidence of the first, second and third respondents was to the effect that the appellant opened the door of his house to let them in, and did not at any stage tell them to leave his house. The same witnesses also gave evidence that the appellant assisted them in putting the kangaroo into a hessian bag to facilitate its removal from his house. The appellant himself also said that he assisted the rangers to bag the kangaroo. There was evidence that the appellant's daughter Emma objected to the presence of the QPWS officers in her house and to the removal of the kangaroo.

[24] The learned primary judge found that the QPWS officers were invited by the appellant into his house, that he actually assisted them to remove the kangaroo and that he did not ask them to leave.[3] His Honour concluded that the kangaroo was removed with Mr Candy's consent.[4]

[25] At this point, it is necessary to note that it is well-established by decisions of the High Court that a finding of fact based upon the acceptance by a trial judge of the credibility of the witnesses called at trial can be set aside on appeal only if it can be demonstrated that incontrovertible evidence points decisively to error on the part of the trial judge in acting upon his or her impressions of the witnesses.[5]

[26] In the present case, the findings of the learned trial judge cannot be assailed. There is simply no incontrovertible evidence which casts any doubt on the findings of the learned trial judge. Neither the tape recordings made by the first respondent nor the video recording made by the appellant's son offered support for the version of events put forward by the appellant. The weight of oral evidence given at the trial was also in favour of the respondents. It is on that basis that one must consider the appellant's challenges to his Honour's resolution of the issues posed for his determination. To a consideration of those issues I now turn.

Issue One - Did the first, second and third respondents trespass on the plaintiff's land or in his house on 8 March 2001? If so, did they do so on the instructions or with the encouragement of the fourth respondent?

[27] The learned trial judge resolved this issue against the appellant on the basis that, firstly, the first, second and third respondents had the appellant's implied consent to

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3 *Candy v Thompson & Ors* [2005] QSC 111; SC No 10684 of 2004, 9 May 2005 at [15].

4 *Candy v Thompson & Ors* [2005] QSC 111; SC No 10684 of 2004, 9 May 2005 at [11] and [16].

5 *Jones v Hyde* (1989) 63 ALJR 349 at 351 - 352; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479, 482 - 483; *Fox v Percy* [2003] HCA 22 at [26] - [31]; (2003) 214 CLR 118 at 127 - 129.

walk across his land to his house, secondly, that he invited them to enter his house and, thirdly, that he did not revoke his consent to their presence on his land.[6]

[28] As to the first of these conclusions, his Honour was plainly correct as a matter of law. There is no trespass involved in entering upon land to visit a house on the land. The law recognizes an implied consent to such entry by reason of the existence of means of access leading to the entrance of the ordinary suburban dwelling house. That this is so was reaffirmed by the decision of the High Court in *Halliday v Nevill*.[7] In that case, Gibbs CJ, Mason, Wilson and Deane JJ said:[8]

> "While the question whether an occupier of land has granted a licence to another to enter upon it is essentially a question of fact, there are circumstances in which such a licence will, as a matter of law, be implied unless there is something additional in the objective facts which is capable of founding a conclusion that any such implied or tacit licence was negated or was revoked: cf *Edwards v Railway Executive* ([1952] AC 737 at p 744). The most common instance of such an implied licence relates to the means of access, whether path, driveway or both, leading to the entrance of the ordinary suburban dwelling-house. If the path or driveway leading to the entrance of such a dwelling is left unobstructed and with entrance gate unlocked and there is no notice or other indication that entry by visitors generally or particularly designated visitors is forbidden or unauthorized, the law will imply a licence in favour of any member of the public to go upon the path or driveway to the entrance of the dwelling for the purpose of lawful communication with, or delivery to, any person in the house. Such an implied or tacit licence can be precluded or at any time revoked by express or implied refusal or withdrawal of it. The occupier will not however be heard to say that while he or she had neither done nor said anything to negate or revoke any such licence, it should not be implied because subjectively he or she had not intended to give it: see, generally, *Robson v Hallett* ([1967] 2 QB 939 at pp 950 - 952, 953 - 954); *Lipman v Clendinnen* ((1932) 46 CLR 550 at pp 556 - 557); *Lambert v Roberts* ((1980) 72 Cr App R 223 at p 230). Nor, in such a case, will the implied licence ordinarily be restricted to presence on the open driveway or path for the purpose of going to the entrance of the house. A passer-by is not a trespasser if, on passing an open driveway with no indication that entry is forbidden or unauthorized, he or she steps upon it either unintentionally or to avoid an obstruction such as a vehicle parked across the footpath. Nor will such a passer-by be a trespasser if, for example, he or she goes upon the driveway to recover some item of his or her property which has fallen or blown upon it or to lead away an errant child. To adapt the words of Lord Parker CJ in *Robson* ([1967] 2 QB at p 950), the law is not such an ass that the implied or tacit licence in such a case is restricted to stepping over the item of property or around the child for the purpose of going to the entrance and asking the householder whether the item of property can be reclaimed or the child led away.

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6 *Candy v Thompson & Ors* [2005] QSC 111; SC No 10684 of 2004, 9 May 2005 at [15].

7 (1984) 155 CLR 1; cf *Plenty v Dillon* (1991) 171 CLR 635.

8 (1984) 155 CLR 1 at 6 - 8 (citations footnoted in original).

> The path or driveway is, in such circumstances, held out by the occupier as the bridge between the public thoroughfare and his or her private dwelling upon which a passer-by may go for a legitimate purpose that in itself involves no interference with the occupier's possession nor injury to the occupier, his or her guests or his, her or their property."

[29] In any event, a view to the contrary of his Honour's first conclusion would itself be contrary to the appellant's own evidence in cross-examination.

[30] The second of his Honour's conclusions flows from his Honour's findings of fact as to the circumstances of the entry by the QPWS officers into the appellant's house on 8 March 2001. While those findings of fact stand, this conclusion is unimpeachable. The weight of the evidence supported the findings made by his Honour. There is no reason to doubt that those findings were correct.

[31] Moreover, the challenge mounted by the appellant to his Honour's conclusions is misconceived. It proceeds on the footing that the QPWS officers were obliged to find statutory authority for their entry. In the circumstances found by his Honour, no such statutory authority was necessary because the QPWS officers had the appellant's consent to enter the house. That consent was not obtained under false pretences.

[32] As to the third of his Honour's conclusions, while the evidence suggests that the appellant grew increasingly unhappy with the activities of the QPWS officers once they were inside his house, he never asked them to leave the premises or implied they should do so without the kangaroo.

[33] To the extent that the appellant's argument seeks to rely upon his daughter Emma's adjurations to the QPWS officers to leave the house, Emma was not the person entitled to withdraw the consent given to the QPWS officers by the appellant for them to enter upon the premises. Only the appellant, as the owner of the premises, could rescind the consent which he had given.[9]

[34] In my respectful opinion, his Honour's resolution of the first issue posed for his determination was correct.

Issue Two - Did the first, second and third respondents wrongfully take or keep the kangaroo from the lawful possession of the appellant?

[35] In *Yanner v Eaton*,[10] the majority of the High Court described the *Fauna Act* 1974 (Qld), the statutory predecessor of the Act, 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.

[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

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9 *Plenty v Dillon* (1990) 171 CLR 635 at 647.

10 [1999] HCA 53 at [30]; (1999) 201 CLR 351 at 370.

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.[11] 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 mammal such as the red kangaroo was a "protected animal" for the purposes of the Act.[12]

[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.

[40] In any event, having regard to the learned primary judge's acceptance of the evidence of the first, second and third respondents, there is no basis shown on which this Court would be justified in setting aside his Honour's finding that the appellant consented to the removal of the kangaroo from his possession. On the basis of that finding of fact, the appellant's claim to have been unlawfully dispossessed of the kangaroo would fail.

[41] In my respectful opinion, his Honour's resolution of this second issue was correct. The first, second and third respondents were found by his Honour to be authorized persons who could lawfully take the kangaroo. But whether or not they were so authorized, the real issue for the purposes of the appellant's claim for trespass to goods was whether the respondents interfered with his lawful possession of the kangaroo; and it is clear that they did not.

Issue Three - Was the fifth respondent a party to any wrongful taking or keeping of the kangaroo?

[42] His Honour's conclusions in relation to the preceding issue were correct. They also suffice to resolve this issue against the appellant.

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11 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.

12 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.

Issue Four - Were the sixth, seventh and eighth respondents legally responsible for the conduct of the first, second and third respondents?

[43] The sixth, seventh and eighth respondents were the director of the QPWS, the Minister of the Department and the State of Queensland. As the conclusions reached in relation to issues one and two mean there cannot be said to have been anything legally objectionable about the conduct of the first, second and third respondents, this issue can only be resolved against the appellant.

Issue Five - Did the appellant suffer any loss or damage by reason of the conduct referred to in issues one and two above?

[44] My conclusions in relation to the first two issues mean that this question is hypothetical but, in any event, the learned trial judge's resolution of this issue was plainly correct.

[45] The appellant claimed that he had suffered loss and damage consisting of loss of the kangaroo and consequent mental anguish as well as economic loss upon the sale of his house and increasing telephone bills. He also claimed exemplary damages. There is obvious difficulty in demonstrating a causal nexus between the removal of the kangaroo and the consequences which the appellant alleges ensued, especially in relation to his claim for economic loss. There were other deficits in his claims.

[46] The appellant's claim of mental anguish as a result of the removal of the kangaroo was unsupported by medical evidence. He sought leave to call some such evidence, but this was only after the respondents' case had closed, and his Honour refused him leave.

[47] As to the appellant's claim that he has suffered economic loss resulting from the sale of his house in consequence of the removal of the kangaroo, it emerged at trial that he had put the house on the market before 8 March 2001. Not only does this circumstance render untenable any claim that he was compelled to sell his home as a result of the removal of the kangaroo, but it reflects adversely on his credibility generally.

[48] The appellant's claim to exemplary damages is without foundation. The conduct of the officers of the QPWS could not objectively be said to have been so high-handed, oppressive, insulting or lacking in good faith as to establish a basis for a claim for exemplary damages. There is no evidence to suggest that the QPWS officers acted with "a conscious and contumelious disregard" for the appellant's rights.[13] On the contrary, the impression given by the evidence is that the officers sought, at every stage, to act with tact and restraint in the course of carrying out their duties.

Issue Six - Is the appellant entitled to any other relief (including declaratory or injunctive relief) arising out of the foregoing circumstances or relating to the foregoing conduct?

[49] Inevitably, having regard to the disposition of the earlier issues, his Honour answered this question in the negative. He was correct to do so.

Conclusions and orders

[50] It follows that the appeal should be dismissed. The appellant should pay the respondents' costs to be assessed on the standard basis.

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13 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471.

[51] **JONES J:** I agree with the reasons of Keane JA. The appeal should be dismissed with costs.