

13 September 2013

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Dear Research Director

Nature Conservation and Other Legislation Amendment Bill (No. 2) 2013

Thank you for providing Queensland Law Society with the opportunity to contribute to the Health and Community Services Committee (HSCSC) inquiry into the *Nature Conservation and Other Legislation Amendment Bill (No. 2) 2013* (the Bill).

This submission deals only with concerns in relation to the issue of reducing the State's exposure to liability on Queensland Parks and Wildlife Service (QPWS) lands. It is not suggested that this submission represents an exhaustive review of the Bill given the time available to the Society and its committee members. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles which we have not commented upon.

Reduce the State's exposure to liability on QPWS

The Society raises significant concern and opposes the proposal to significantly alter public liability of the State for members of the public on QPWS land.

We note the Bill contains the following relevant amending clauses which are of concern:

- Clause 14 – Replacement of s96E (Protection from liability) of the *Forestry Act 1959*
- Clause 22 - Amendment of s147 (Protecting prescribed persons from liability) of the *Marine Parks Act 2004*
- Clause 80 – Replacement of s142 (Protection from liability) of the *Nature Conservation Act 1992*
- Clause 97 – Amendment of s228 (Protecting officials from liability) of the *Recreation Areas Management Act 2006*

The Society is concerned that these amendments are in breach of the fundamental legislative principle that legislation should not confer immunity from proceeding or prosecution without adequate justification.

Nature Conservation and Other Legislation Amendment Bill (No. 2) 2013

The Explanatory Notes for the Bill relevantly state at page 12:

OQPC advises that the proposed amendments are inconsistent with the FLPs outlined in section 4(3)(h) of the Legislative Standards Act 1992 (LSA) conferring immunity from a proceeding without adequate justification, as well as removing the common law rights of State citizens in circumstances where the resources of the State is a relevant consideration in determining the extent, if any, of the State's duty of care (CLA part 3, division 1) and failing to have sufficient regard to the rights and liberties of individuals. OQPC consider the provisions contained within the CLA, with regard to dangerous recreational activities, as well as those provisions currently within section 142 of the NCA to provide sufficient coverage for matters of civil liability.

Existing law is sufficient

The Society concurs with the views expressed by the Office of Parliamentary Counsel Queensland (OPCQ) and notes, particularly that section 19 of the *Civil Liability Act 2003* (CLA) provides:

19 No liability for personal injury suffered from obvious risks of dangerous recreational activities

- (1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the person suffering harm.
- (2) This section applies whether or not the person suffering harm was aware of the risk.

Additionally section 15(1) of the CLA provides:

15 No proactive duty to warn of obvious risk

- (1) A person (defendant) does not owe a duty to another person (plaintiff) to warn of an obvious risk to the plaintiff.

Also, section 16 of the CLA states relevantly:

16 No liability for materialisation of inherent risk

- (1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.
- (2) An inherent risk is a risk of something occurring that can not be avoided by the exercise of reasonable care and skill.
- (3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

This statutory position aligns with the many common law court decisions demonstrating the courts response to the liability of public bodies where members of the public were injured taking part in recreational activities. For example:

- in *Roads and Traffic Authority (NSW) v Dederer*¹, a boy dived from a road bridge into a river and suffered a severe spinal injury. The majority in the High Court found that the Roads and Traffic Authority did not breach its duty of care as there were signs prohibiting diving and climbing on the bridge

¹ [2007] HCA 42

Nature Conservation and Other Legislation Amendment Bill (No. 2) 2013

- in *Felhaber v Rockhampton City Council*,² the Queensland Supreme Court noted that a youth who was rendered quadriplegic following a dive into water was involved in a voluntary recreational activity with inherent risks. The court found that the Council did not breach their duty as the Council had no special knowledge relating to the risks
- in *Vairy v Wyong Shire Council*³, a boy suffered serious injury after diving into water from a rock platform. The majority noted a number of factors including the inherent risks involved in physical activity and found it was not reasonably necessary or appropriate to adopt any measures to protect the appellant at the point of injury, and
- in *Reardon v State of Queensland*⁴ where the plaintiff suffered injuries after he dived into a rock pool. The court found that a duty of care existed however the judge did not find that the breach of duty caused the plaintiff's injury, as the plaintiff would have dived into the pool regardless of a warning sign.

Additionally, the recent 2012 Court of Appeal decision of *Graham v Welsh*⁵ considered whether an elderly relative visiting a home had fallen due to slipping on a gumnut on the steps of the home. The Court of Appeal found the home owner not to be negligent as the owner regularly swept the steps which was sufficient in discharging the occupier's duty of care and the plaintiff was reasonably aware of the risk.

These decisions are to be contrasted with the recent decision in *Kelly v State of Queensland*⁶, which is currently the subject of an appeal by the State of Queensland. In *Kelly* the State was held liable for insufficiently warning of the risks of harm at Lake Wabby on Fraser Island. The plaintiff, a 22 year old man, was seriously injured running down the sand dune and into Lake Wabby.

The State did not dispute that a duty of care was owed to the plaintiff. The court found that the fall was not to be considered an obvious risk under the *Civil Liability Act 2003*. Evidence of 18 incidents in the 17 year period prior to the plaintiff's injury, many of which involved serious spinal injury was placed before the court. The court referred to a memorandum by a manager at Fraser Island in 1993 suggesting "an urgent formulation of an action plan." In 2002, an assessment, "Risk Assessment on Diving Injuries at Lake Wabby" was undertaken which concluded that the risk of injury to recreational users at the site in terms of consequences and likelihood was "High". The recommendation arising from the assessment proposed further education of commercial operators of the risks associated with patrons diving into Lake Wabby. This recommendation was not acted upon. The court also found that "the warning signs and information provided to visitors did not bring home to those visitors the risks involved in the activities likely to be enjoyed at Lake Wabby."

The factors relevant to the court's determination in *Kelly* which distinguish the decision include the defendant's special knowledge of a serious risk arising from a well known and documented history of incidents and serious injuries.

We have included more detailed case summaries of relevant decisions in the attached **Schedule** for the assistance of the Committee.

² [2011] QSC 23

³ (2005) 223 CLR 422

⁴ [2007] QCA 436

⁵ [2012] QCA 282

⁶ [2013] QSC 106

Nature Conservation and Other Legislation Amendment Bill (No. 2) 2013

The Society, like the OPCQ, considers that current statute and common law provides sufficient coverage for matters of civil liability for the State.

No Adequate Justification for conferring immunity

The Society is concerned about the breach of fundamental legislative principles embodied in the Bill and does not consider that there is adequate justification presented for the need to deny the fundamental rights of individuals.

The Explanatory Notes for the Bill relevantly state at page 12:

These reforms are considered justified in terms of the dramatic increases (emphasis added) over the last decade in the liability of, and compensation paid by, public authorities for personal injuries incurred on land owned or occupied by that authority. Even where signs provide a warning to visitors, claims of negligence have been brought against the State. Given the Government's commitment to extend access to national parks and other areas for recreational and commercial purposes, there are increased potential risks that the State will be exposed to large personal injury claims.

This trend towards increasing claims demonstrates that reliance cannot be placed on the existing provisions of the CLA to minimise the liability of the State for the present use of protected areas under the NCA, let alone the wider variety of uses that may result from the policy direction of the Queensland Government to encourage access to lands managed by QPWS. As a result, the amendments provide clear and concise limitations to the liability of the State.

The Society has reviewed the Annual Reports relevant to National Parks for the past four years⁷. These documents detail all litigious matters and potential litigious matters the Department was engaged in or notified of. We understand that this information refers to all civil litigation claims including personal injury claims and other civil matters.

Figures relating only to civil liability claims against the State for injuries occurring on QPWS managed lands are not publicly available, except through a right to information request. It is difficult to assess the assertion that there has been a "dramatic increase" in the incidence of claims for these injuries in the absence of published data.

However, claims for injuries occurring on QPWS managed lands are included in aggregate litigation figures published by the Department which includes QPWS as a portfolio agency. These figures do provide a guide as to general trends, but are not specific to National Parks claims particularly.

Figures relating to National Parks were previously collated by the Department of Environment and Resource Management (DERM). Our analysis of these results shows a consistent decrease in the rates of all litigation.

⁷ Annual Reports relating to National Parks, under the Department of National Parks, Recreation, Sport and Racing and previously the Department of Environment and Resource Management

Nature Conservation and Other Legislation Amendment Bill (No. 2) 2013

Litigation in progress

Court	2009⁸	2010⁹	2011¹⁰
Anti Discrimination Court		-	1
Supreme Court	15	13	11
District Court	1	1	1
Magistrates Court	1	2	1
Jurisdiction not available – lodged with Department*	44	24	18
Total	61	40	32

The most recent Annual Report by the Department of National Parks, Recreation, Sport and Racing provides the following figures relating to all claims against the Department filed in the courts or lodged with the Department.

Litigation in progress (at June 30 2012)

Court	2012¹¹
Anti Discrimination Court	-
Supreme Court	3
District Court	1
Magistrates Court	-
Jurisdiction not available – lodged with Department*	3
Total	7

It would appear that these figures do not support a contention that there has been a consistent “dramatic increase” in the State’s exposure to liability on QPWS managed areas in recent years. It is unfortunate that these figures are not routinely made public to permit objective assessment of the claims in the Explanatory Notes.

⁸ Department of Environment and Resource Management Annual Report 2009 - 10, Notes to and forming part of the Financial Statements, page 158

⁹ Department of Environment and Resource Management Annual Report 2010 - 11, Notes to and forming part of the Financial Statements as at 30 June 2011, page 65

¹⁰ Department of Environment and Resource Management Annual Report 2010 - 11, Notes to and forming part of the Financial Statements as at 30 June 2011, page 65

¹¹ Department of National Parks, Recreation, Sport and Racing Annual Report 2011 - 12, Notes to and forming part of the Financial Statements as at 30 June 2012, page 38

Nature Conservation and Other Legislation Amendment Bill (No. 2) 2013

It would be desirable for any agency to justify claims in Explanatory Notes about increases in claims numbers or expenditure to support those statements with facts to better inform the public, especially where the information relied upon is not readily available.

It is also salient to note that the numbers of potential claims do not translate to actual litigation when the potential claims from one period are compared with the actual litigious matters for the next year.

A further purported justification to confer immunity from proceeding was that:

the Government's commitment to extend access to national parks and other areas for recreational and commercial purposes, there are increased potential risks that the State will be exposed to large personal injury claims.¹²

The Society expects that the QPWS will enter into contractual arrangements with operators undertaking commercial enterprises on QPWS managed lands and will insist upon an indemnity for public liability directly occurring as a result of that commercial activity and require those commercial operators to carry their own public liability insurance. This is usual commercial and State Government practice and would address the liability of the State for the activities of the commercial operators. The Department's website relevantly states¹³:

Public liability insurance

General information

To obtain a permit for an activity on a national park, conservation park, resource reserve, marine park, recreation area, state forest, forest reserve or timber reserve, you may be required to have public liability insurance sufficient to cover any liabilities that may reasonably be expected to arise in using the permit.

To comply with the conditions of your permit, your insurance policy must provide at least the minimum public liability cover specified for the activity covered by the permit, in respect of:

- the death of or injury to any person, or*
- the loss of or damage to any property (including any area controlled by QPWS).*

...

Guidelines and policies

Permits conditions will include the public liability insurance declaration and the indemnity, release and discharge.

An authorised representative of your organisation will also be requested to complete a statement confirming that you have read and understand the public liability, indemnity, release and discharge requirements of the QPWS and agree to comply with and be bound by the conditions.

The minimum level of public liability cover required is \$10,000,000 for any single event.

¹² Nature Conservation and Other Legislation Amendment Bill (No. 2) 2013, Explanatory Notes, p12

¹³ See http://www.npsr.qld.gov.au/licences-permits/administration/public_liability_insurance.html

Nature Conservation and Other Legislation Amendment Bill (No. 2) 2013

The Society is unconvinced that the recent claims trends or the introduction of commercial operators to QPWS managed lands will have the effect described and would justify the breach of fundamental legislative principles embodied in the Bill.

Conclusion

The Society therefore suggests that the amendments proposed in clauses 14, 22, 80 and 97 of the Bill are removed as:

- current statute and common law provides sufficient coverage for matters of civil liability for the State with respect to injuries occurring in National Parks; and
- the recent litigation claims trends for the Department and the effect of the introduction of commercial operators to QPWS managed lands does not justify the breach of fundamental legislative principles embodied in the Bill.

Thank you for providing the Society with the opportunity to comment on the Bill. For further inquiries, please contact Principal Policy Solicitor, Mr Matthew Dunn on (07) 3842 5889 or m.dunn@qls.com.au.

Yours faithfully

Annette Bradfield
President

Nature Conservation and Other Legislation Amendment Bill (No. 2) 2013

Schedule 1 – Case summaries

Case Name	Facts	Held
Graham & Ors v Welch [2012] QCA 282	A 76 year old woman slipped and fell on steps after stepping on a gumnut which had fallen from a nearby gumtree. Argued the defendants had failed to ensure access ways were safe.	The woman was familiar with the stairs and was aware of the presence of gumnuts on them. She was therefore reasonably aware of the risk that she might “lose her footing if a gumnut is stood on inadvertently”. The risk she “would suffer injury of the type that eventuated was remote”. It would not be reasonable to require the tree be removed, as trees are “common place and desirable attributes of homes in residential areas”. Further, gumnuts would still have blown on the stairs had the tree been pruned. Regularly sweeping the steps was sufficient in discharging occupier’s duty of care.
Roads and Traffic Authority (NSW) v Dederer [2007] HCA 42	Boy aged 14 years dived from road bridge across a river from the highest of three horizontal railings. There were signs prohibiting diving and climbing on the bridge. Boy struck submerged sandbank and suffered a severe spinal injury.	Majority found that the roads authority did not breach its duty of care it owed to the youth. The youth knew he was taking a risk. He knew the depth of the water was variable and the existence of a moving sandbar beneath the surface of the water. Authority knew youngsters were jumping from bridge, and erecting signs was reasonable and adequate.
Vairy v Wyong Shire Council (2005) 223 CLR 422.	Boy dived into water from rock platform near popular beach and suffered serious injury after his head struck sandy bottom of ocean. Numerous other parties dived safely into water on day of accident. No steps were taken by the council to warn of dangers from diving from rock platform.	Majority found that it was neither reasonably necessary nor appropriate to adopt any measures to protect the appellant at point of injury. Factors supporting this included: the inherent risks involved with the physical activity; the age; knowledge, and experience of the boy; the length of the coastline for which the council was responsible; the conduct was engaged in the boy’s free will; and that it was a recreational activity engaged in by numerous other people without injury.
Felhaber v Rockhampton City Council [2011] QSC 23	17 year old was rendered quadriplegic after he dived head first into the water and struck his head on the river bed.	Judge reached the view that the activity which plaintiff was engaged was a voluntary recreational activity commonly enjoyed in waterways around the district, the risks inherent in the activity were obvious and there was no reason to think these risks could be forgotten or overlooked, the Council was not armed

Nature Conservation and Other Legislation Amendment Bill (No. 2) 2013

		with special knowledge relating to the risks and Council was responsible for a significant area of parkland... and thus indicates no breach of duty [42].
Reardon v State of Queensland [2007] QCA 436	Plaintiff suffered injuries after he dived into a rock pool in a creek at the Bowling Green Bay National Park near Townsville, striking his head on a rock ledge which was not visible above the water. Argued that council breached its duty of care as occupier by failing to place signs at the waterhole warning of the dangers of submerged rocks.	Court found a duty of care existed. Given that there was undoubtedly some level of risk involving waterholes across the Park, the positioning of such a sign where potential users of the creek would see it was reasonable responses to the danger. However, the judge did not find that the breach of duty caused the plaintiff's injury: the existence of such a sign would have made no difference: the plaintiff would have still dived into the pool (drew from principles of Chappel v Hart i.e. voluntary assumption of risk).

Further examples of recent cases where Courts have not imposed liability on an occupier defendant of a public place as they do not attribute liability unless there is a demonstrated breach of duty, include:

- *Vreman and Morris v Albury City Council* [2011] NSWSC 39
- *Garzo v Liverpool/Campbelltown Christian School Limited & Anor* [2011] NSWSC 292
- *Laoulach v Ibrahim* [2011] NSWCA 402
- *Swindells v Hosking and Anor* [2011] QDC
- *Smith v BHP Billiton* [2012] WADC 21
- *Warren Shire Council v Kuehne & Anor* [2012] NSWCA 81
- *Alexandra Annas v Gidaro Constructions Pty Ltd* [2012] NSWDC 79
- *Streller v Albury City Council* [2012] NSWSC 729
- *Kelly v Trentham Holdings Pty Ltd & Ors* [2012] QDC 141
- *State of Queensland v Nudd* [2012] QCA 281
- *Stone v Owners Unit Plan 1214 and Ors* [2012] ACTSC 164