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Proposed new legislation may limit the State of Queensland's exposure to personal injury claims

By Rebecca Stevens, Partner and
Jessica Schaffer, Solicitor

***Kelly v State of Queensland* [2013] QSC 106**

Earlier this year, the Supreme Court of Queensland held the State of Queensland liable for damages suffered by a tourist on Fraser Island in the decision of *Kelly v State of Queensland (Kelly)*.¹ The plaintiff, an Irishman who was holidaying in Australia, was rendered a tetraplegic when he tripped and fell headfirst in shallow water at Lake Wabby on Fraser Island after running down a sand dune and jumping into the lake. The court determined that the injury was caused by the State's negligent failure to warn of the risk, in circumstances where it was on notice of the risk which eventuated due to a number of other serious incidents at the lake in previous years.

The decision is currently the subject of an appeal lodged by the State of Queensland.

On 20 August 2013, the State Government introduced into parliament the Nature Conservation and Other Legislation Amendment Bill (No. 2) 2013 (**Bill**) which makes a number of amendments to several Acts² with a view to limiting the State's exposure to liability in Queensland Parks and

Wildlife Service (**QPWS**) managed areas. While the Bill is unlikely to operate retrospectively and therefore will not have any impact on the *Kelly* appeal, the first reading speech indicates the Bill was introduced in direct response to court decisions such as *Kelly* and the State Government's concerns regarding its growing exposure to more frequent, costly and vexatious personal injury claims.

The proposed legislative amendments

The Bill had its first hearing in August 2013 and is currently before a parliamentary committee. The Bill proposes a suite of amendments to existing legislation to provide civil liability protection to the State, the minister, the chief executive or any employee or volunteer in undertaking their responsibilities for managing QPWS land in any proceeding for damages based on liability for personal injury (including death), damage to property or any resulting economic loss.

The proposed amendments provide that both State and nominated officials will not be civilly liable in a proceeding for any act done, or omission made, in relation to the functions of those entities under the relevant Act. This includes acts or omissions which constitute negligence.

The amendments specify that the State's exposure to claims in negligence with respect to roads and other State fixtures (such as lookouts, stairways), programmed burning or culling, workers' compensation claims and motor accident claims remain unchanged by the proposed legislation.

Parliament, in introducing the Bill, has justified the further protections based on a reported commitment to increase and improve access to national parks and other public lands for recreational and commercial purposes. The first reading speech by the Honourable Steve Dickson, acknowledged the government's concern that its exposure to large personal injury claims will continue to escalate as a consequence of its commitment to extend access to public land.

The explanatory memorandum to the Bill references a reportedly dramatic increase in large personal injury claims against the State and cautions that this trend is evidence that the existing provisions of the *Civil Liability Act 2003* (Qld) (CLA) do not afford adequate protection to the State. The explanatory memorandum argues that the amendments are justified by the dramatic increase in the liability of the State for personal injury claims and the Honourable Steve Dickson confirms that the amendments are directed towards reducing the State's financial exposure to what it describes as 'frivolous'³ claims.

Commentary

The need for further protection to be afforded to the State is unclear.

The CLA was enacted a decade ago with the purpose of tort reform to reduce and prevent frivolous claims and excessive damages awards. The State has enjoyed the application of the general liability provisions applicable to all entities as well as specific protections in relation to claims involving dangerous recreational activities⁴ and the as-yet untested provisions providing protections to public authorities found at ss 36 and 37.

In previous Queensland⁵ and High Court cases,⁶ the courts have shown a willingness to make allowances for the significant pressure placed on public authorities' resources by finding against plaintiffs who have suffered injuries at State-owned facilities in circumstances where the court is satisfied that the public authority had no special knowledge of the risk or where there were no reasonable or appropriate measures it could have taken to prevent the injury.

This position can be contrasted with the decision in *Kelly* where the court found that the State was liable due to its special knowledge of a serious risk of injury posed to holiday-makers attending Lake Wabby. The amendments proposed in the Bill go further than the courts' historical position and seemingly further than the protections provided by the CLA, to remove any avenue for a claim against the State for losses which occur in QPWS managed areas even in the event of its negligence.

Without the existing public authority protections having been tested, it is difficult to determine whether the proposed amendments are warranted or even necessary. The suggestion that the State has been subject to increasing numbers of claims of significant size, or that those claims are vexatious or unmeritorious, is difficult to reconcile based on the trend seen in decisions of the courts in the past decade. However, not having been privy to those claims which are resolved informally or which do not progress, it is difficult to appreciate the concerns of the government in forming its views.

Carter Newell awaits the outcome of the referral of the Bill to the parliamentary committee and the second reading speech with interest to determine whether the Bill remains as proposed and successfully amends the various pieces of legislation.

¹ [2013] QSC 106.

² *Nature Conservation Act 1992, Forestry Act 1959, and Marine Parks Act 2004 and Recreation Areas Management Act 2006.*

³ Queensland Parliamentary Debates, 20 August 2013, page 2605 (Honorable SL Dickson).

⁴ See section 15, 16 and 19 of the *Civil Liability Act 2003*.

⁵ *Felhaber v Rockhampton City Council and Reardon v State of Queensland* [2011] QSC 023.

⁶ *Vairy v Wyong Shire Council and Roads and Traffic Authority v Dederer* [2005] HCA 62.

Authors



Rebecca Stevens

Partner

P: 3000 8347
E: rstevens@carternewell.com



Jessica Schaffer

Solicitor

P: 3000 8394
E: jschaffer@carternewell.com

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Brisbane

Level 13, 215 Adelaide Street
Brisbane QLD Australia 4000

GPO Box 2232, Brisbane QLD 4001

Sydney

Level 6, 60 Pitt Street,
Sydney NSW Australia 2000

Phone +61 2 9241 6808

Phone +61 7 3000 8300

Client feedback feedback@carternewell.com

ABN 70 144 715 010

www.carternewell.com

