Book Reviews

Liability of the Crown

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P Hogg
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"Uneasy lies the head that wears a Crown." Nowadays the Government often finds itself in the worst of both worlds as it is exposed to public law and private law remedies in relation to an ever widening area of governmental activity and an ever diminishing area of governmental immunity. The two fields of exposure are not always congruent. For example, a private contracting party is usually allowed to act in a way favouring his or her own self-interest and without first consulting the other party. Yet if the Crown is involved, the other party can choose between contractual and administrative law remedies, and it will be no defence to the Crown accused of acting unreasonably or denying natural justice that a private contracting party had no similar obligation. This is perhaps as it should be, in a legal system where the private litigant continues to have a legal right to do "shoddy things" or "dirty tricks" but the Crown has not (*R v Tower Hamlets LBC; Ex parte Chetnik Ltd* [1988] AC 858 at 877). But it can lead to difficulties if the Crown seeks to defend a contractual claim on public law grounds or vice versa.

Professor Hogg's excellent book is a reminder that effective equality before the law is a recent phenomenon, and that other countries still lag far behind Australia in this area. His broad sweep of the law of *Liability of the Crown* shows that much of what we take for granted here is still in the category of advocated reforms elsewhere. For example, injunctive relief is not available against the Crown in Canada, New Zealand or the United Kingdom. Discovery is not generally available against the Crown in Canada. The United Kingdom, most Canadian provinces and New Zealand still maintain pockets of residual Crown immunity in tort: the "model" of the Crown Proceedings Act 1947 (UK) fell short of the position achieved in the Australian colonies in 1887 through the Privy Council's bold and biased interpretation of the Australian predecessors of s64 of the Judiciary Act in *Farnell v Bowman* (1887) 12 App Cas 643.

The history of Crown liability in tort is a curious one, as Professor Hogg demonstrates. The maxim that "the King can do no wrong" meant in the middle ages that the King was not privileged to commit illegal acts. If he did, he could not be sued (because of the feudal prohibition of being impleaded in one's own court) but he was under a duty (albeit unenforceable) to give the same redress to a subject whom he had wronged as his subjects were bound to give to each other. In the nineteenth century the petition of right, which had become the principal means of suing the Crown, was held not to be a remedy in tort. The old maxim was turned on its head and pressed into Crown service. English and Canadian courts held that the nineteenth century reforms relating to the petition of right were procedural only and should not be interpreted as imposing liability in tort by implication. This effectively conferred Crown immunity in tort - usually at the expense of exposing the Crown servant to personal liability.

But not so for the Australian colonials. In *Farnell v Bowman* the Privy Council decided that the identical statute in New South Wales had the opposite effect. Liability in tort was imposed on the Crown. As Hogg points out (pp80-81) :

> "Their Lordships said frankly that in their view the English law was not apt to cope with the conditions in the Australian colonies, where governments 'as pioneers of improvements' had to embark on many undertakings that in England were left to private enterprise; it followed that if the maxim that 'The King can do no wrong' were applied to the colonial governments, 'it would work much greater hardship than it does in England'."

So the burden of errors was shouldered by government and the loss distributed. Crown servants could rest easier in bed and continue to exercise powers boldly.

In the past, the common law was the solicitous protector of the Crown. For example, the Crown neither paid nor received costs. "As it is his [the King's] prerogative not to pay [costs] to a subject, so it is beneath his dignity to receive them" (*Blackstone's Commentaries on the Laws of England* vol 3 p400). The Crown also had a prerogative immunity from garnishment orders. This really operated in favour of Crown servants who failed to pay judgment debts. Instead of deploring the inequality between Crown servants and other wage-earners, the courts supported this result on the ground that Crown servants ought not to be denied their wages in case "the temptation of poverty" affected the performance of their duties (cases cited by Hogg at p53). These and other quaint prerogatives had to be removed by statute.

Yet nowadays, at least in Australia, it is the courts who are at the forefront of removing all but essential pockets of Crown immunity. "Prerogative" is now a dirty word that a law officer daren't utter in the hearing of a judge, although he or she will occasionally get away with "non-justiciable".

Again and again, as Hogg points out, Australian courts have been in the vanguard of this levelling process, encouraged no doubt by Parliament's unwillingness to shore up diminishing areas of Crown immunity. Cases like *Sankey v Whitlam* (1978), *Groves v The Commonwealth* (1982) and *Bropho v Western Australia* (1990) illustrate this development. Limits upon the once-sacred notion that the Executive cannot be estopped from changing its mind were signalled in *Attorney General v Quin* (1990). Time will tell whether the pendulum has swung a little too far. A very recent Court of Appeal decision involving logging activities applied the offence of killing protected fauna to the Crown even though there was no express declaration to that effect: *Corkill v Forestry Commission*. This was understandable since *Bropho*, although one wonders whether a judgment convicting a private litigant might at least have offered some reasons for rejecting a serious submission that *mens rea* had to be proved.

There have, of course, been areas where new doctrines have been fashioned by the judges to recognise the peculiar role of government. One is the policy planning/operational distinction in the area of negligence which is discussed at some length in this book.

It must be a peculiar pleasure for the author of a textbook to be able to note, in a second edition, the way in which suggestions for reform made in the first edition, have been

"taken on board" by courts, whether or not they have acknowledged the source. This second edition is able to trace many such developments, especially in Australia. Yet it is as full as the first of critical comment about the existing law, so is as likely as its predecessor to serve as a weathervane for future developments.

The work covers the whole field of civil liability affecting the Crown or its servants and agents. It deals with remedies, procedural and evidentiary rules as well as substantive rights. Crown rights and duties in tort, contract and other civil obligations are discussed in detail, with full access to relevant overseas authorities. There is a timely collection of the cases involving the limits of immunity of judges and prosecutors. There is even a chapter about federal questions, which deals with issues such as jurisdiction and choice of law in a federal context.

This book is a must for those involved in suing the Crown - and isn't that practically everybody these days.❑

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Misleading or Deceptive Conduct

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CCH Australia Limited, 1991, RRP $64.00)

"A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." (s.52(1), *Trade Practices Act* 1974 [Cth]).

The authors of this important, substantial and useful work, respectively a Sydney solicitor and a Sydney legal academic, point out in its preface that there are now over five hundred reported or digested cases in the *Australian Trade Practices Reports* on s.52 of the *Trade Practices Act* 1974 (Cth). In relation to this "myriad" of authorities generated by those 23 words, they quote the comment of McGechan J of the New Zealand High Court: "To dip is rewarding; to swim is to drown." The importance of this work is that it will help readers keep their heads above water when grappling with s.52 and with the almost identical words of s.42 of the States' Fair Trading Acts.

And grapple they surely will, and increasingly frequently. For as the authors say:

> "Section 52(1) is a 'comprehensive provision of wide impact' which is expressed in 'very general language' and 'cast in the widest terms' to ensure its effectiveness as a 'catch-all' provision for conduct falling outside the specific prohibitions of Div. 1. Its metamorphosis from its intended role as a residual consumer protection provision to a versatile and significant action for purely *inter partes* and essentially commercial litigation is of a magnitude without parallel in Australian jurisprudence. Section 52 in conjunction with the flexible remedies of Part VI provides a broad-spectrum antidote to a wide range of conduct falling short of the norm that it establishes. It does not simply add to the general law, but in some circumstances totally embraces common law actions." (pages 2-3)

Because of this, practitioners are now used - indeed, resigned - to the presence of s.52 claims in many commercial proceedings which previously would have been cast in contract or in tort, or not brought at all. They may soon see even more claims under s.52 given the recent decision of the Supreme Court of New South Wales in *AMP Society v Specialist Funding Consultants Pty Limited* [1991] ATPR 41-137 (Rogers CJ in Comm Div). There it was held that a claim for damages under s.52 could be brought outside the three-year period for bringing actions established by s.82 of the Act, if the claim amounted to an equitable defence (at 52,988). Alternatively, it could be brought beyond the three years because "[u]sing s.52 as a defence to a claim is not an 'action' [under s.82]" (id).

The ability to use s.52 in this way may solve the common problem that arises where action is brought for breach of contract and the party sued attempts to allege that entry into the contract was induced by the plaintiff's misleading or deceptive conduct. Before the *Specialist Funding* decision, such attempts could often be defeated by the fact that more than three years had passed since entry into the contract - the time at which the three-year period normally begins to run. Previously, if the victim of misleading and deceptive conduct remained misled or deceived for the whole three years, he or she was thought to be without a remedy under s.52 - an injustice lamented by the Full Federal Court in *Jobbins v Capel Court Corporation Ltd* (1989) 91 ALR 314 at 318.

Readers should note that in *Spedley Securities Limited (in liq) v Bank of New Zealand* (Supreme Court of NSW, 19 September 1991, unrep.), Cole J declined to follow *Specialist Funding*, relying instead on the decision of the Full Federal Court in *State of Western Australia v Wardley Australia Ltd* [1991] ATPR 41-131.

Wardley's primary significance lies in its holding that the three-year period does not begin to run when mere "potential" or "likely" damage has been suffered; there must be "actual" damage before time runs. This decision will make application of the three-year rule more difficult, and practitioners can look forward to many hours of pondering the distinction drawn by the Full Court (which declined to follow the reasoning of a differently-constituted Full Court in *Jobbins*). Special leave to appeal from the decision of the Full Court in *Wardley* was granted by the High Court on 5 September 1991. Until the High Court rules, trial judges are in the "very unusual situation" of being confronted with two conflicting decisions of the Full Federal Court: *Thannhauser v Westpac Banking Corporation* [1991] ATTR 41-136 at 52,983 (Pincus J restoring on the basis of *Wardley* paragraph to a Statement of Claim that he had earlier struck out on the basis of *Jobbins*).

Misleading or Deceptive Conduct, after several introductory chapters, deals with the law that has developed around s.52 under four categories where an action for misleading or deceptive conduct can lie:

- as a general advertising remedy;
- as an "unfair competition" remedy;
- as a remedy for misrepresentation in pre-contractual negotiations;
- as a remedy for "advice" or "information" in other areas.