

COMMENTS

STATUTES AND THE CROWN — PREJUDICE AND BENEFIT — THE CROWN IN A FEDERATION — SHIELD OF THE CROWN — PARTIES TO AGREEMENTS WITH THE CROWN

“The Premier and the Minister for Consumer Affairs met with representatives of oil companies and found themselves in basic agreement that discounting should end.

It was even pointed out to the Minister by one of the representatives present that it was only in the presence of governments, which are exempt from the Trade Practices Act, that such discussions on pricing could take place at all.”

Australian Financial Review,
19 June 1980, p. 3.

In five cases in 1979 the High Court rested its decision at least in part on a determination of the relationship of Statutes to the Crown: *McGraw-Hinds (Aust.) Pty. Ltd. v. Smith* (1979) 53 A.L.J.R. 423; *Bradken Consolidated Ltd. v. The Broken Hill Proprietary Co. Ltd.* (1979) 53 A.L.J.R. 452; *Superannuation Fund Investment Trust v. Commissioner of Stamps (S.A.)* (1979) 53 A.L.J.R. 614; *Brisbane City Council v. Group Projects Pty. Ltd.* (1980) 54 A.L.J.R. 25; and *China Shipping Co. v. State of South Australia* (1980) 54 A.L.J.R. 57. The cases covered not only the basic problems of whether the Crown was bound by, and whether it could take the benefit of statutes, but the additional ones of “different Crowns” in a federation, bodies within the shield of the Crown, and the effect of this “public law” on parties to agreements with the Crown.

Of 26 judgments in the five cases, 22 concerned themselves with an aspect of the above issues, and only Barwick C.J. (twice) and Murphy J. (once) wrote dissenting judgments. The apparent coherence of views on these figures may, however, be illusory. It has become noteworthy that the basis of the non-operation of general statutes upon the Crown is no longer clear. Texts on statutory interpretation refer to the “maxim of construction” (and see Hogg, *Liability of the Crown* 1971, p. 166), but more recently McNair¹ has described the reality of modern decisions as indicating a *prerogative* of Crown immunity from general statutes. The immunization of parties to agreements with the Crown from the operation of statutes has proceeded on the basis of ensuring that the Crown is not *prejudiced*, but such an approach, exemplified in the majority judgments in *Bradken*, ignores the complexity and social thrust of modern statute law. Is it prejudicial for a commercial arm of the Crown not to be able to engage in activity that a statute has proclaimed antithetical to the well being of this society?

The pursuit of certainty in this area of the law has been sought in mechanical simplicity, but the operation of facile formulae could act to the exclusion of social utility and legislative intention, as the following fictitious judgment may suggest. Using a crystal ball and a little imagination, one can foresee the judgment of d’Laid J. of the New South Wales Supreme Court in *A.G. (N.S.W.) ex. rel. Silvertail v. G.O.B.B.L.E. and Porky Piggeries Pty. Ltd.*, a case arising under the Land Usage Act, 1981, (N.S.W.). Mr. Justice d’Laid will be reported saying:

1. (1978) 56 *Canadian Bar Review* at 149.

This case concerns the operation of the Land Usage Act which for present purposes has two major effects. Firstly, all land in New South Wales is subject to zoning prescribed by the Central Zoning Commission, and secondly, the torts of private nuisance and trespass to land are subsumed by the Act, their ambit completely covered, and their nomenclature retained in the Act, which is also expressed to bind the Crown.

The plaintiff occupies premises on Nob Hill, an area zoned entirely "two-storey mansion". The first defendant, a Commonwealth Statutory Authority, Government Optimum Buying Better Land Enterprise (G.O.B.B.L.E.) purchased land immediately adjacent to the plaintiff's and contracted to sell the land to the second defendant, Porky Piggeries, upon completion of a twenty-storey pig pen on the site. This edifice has since been built and the property sold to Porky Piggeries. The piggery is in operation.

The plaintiff has obtained the Attorney-General's fiat to enforce the zoning provisions of the Act against the defendants, seeking damages from the first, and an order to alter the building against the second. The plaintiff in his own right sues the second defendant under the Act claiming various nuisances: in particular, noise far exceeding the normal range of neighbourhood activities, and an overwhelming, offensive odour. The first defendant has counterclaimed under the Act claiming trespass by the plaintiff in consequence of his having decorated the piggery with large signs proclaiming its offensive nature while the first defendant was still the owner.

Counsel for the defendants made out a simple argument, and I think made it conclusively. Firstly, G.O.B.B.L.E. is entitled to the shield of the Crown in right of the Commonwealth. [His Honour enumerated his reasons for so holding. He also indicated that *ex hypothesi* he would not base his judgment on the remarks of Windeyer J. in *Worthing v. Rowell and Muston*² that acquisition by the Commonwealth for public purposes be given a wide definition, which would attract s. 52 (1) of the Constitution and consequently leave exclusive legislative power over the acquired place with the Commonwealth.] Secondly, the Commonwealth Crown, in the absence of express words or necessary implication is not bound by State statutes, even where, as here, the statute is expressed to bind the Crown. It is to be inferred that the Crown bound is the legislating Crown. I accept the High Court decision in *Bradken* dealing with the Trade Practices Act (Cth.), expressed to bind the Crown, particularly the judgments of Gibbs A.C.J. at 456-457 and Mason and Jacobs JJ. at 462, as authority on this aspect of federalism.

[His Honour accepted defence counsel's claim that even if this State Act could be construed to bind the Commonwealth Crown, that was merely a threshold step to the question of whether a State statute could constitutionally operate upon the Commonwealth Crown: Fullagar J. in *Bogle*³. His Honour assumed it could not: Fullagar J.⁴; Barwick C.J. in *Victoria v. The Commonwealth*⁵ and *Maguire v. Simpson*⁶ and that it followed that s. 4(5)(c) of the Commonwealth Places (Application of Laws) Act, 1970(Cth.) worked to preserve this position with regard to the activities of the Commonwealth Crown in Commonwealth places, because that section made plain what was in any case implicit: the authority of the State Parliaments to affect the Commonwealth Crown was still determined by basic constitutional principles.]

2. (1970) 123 C.L.R. 89, 127.

3. (1953) 89 C.L.R. 229, 259.

4. *Ibid.*

5. (1971) 122 C.L.R. 353.

6. (1977) 139 C.L.R. 362.

In the absence of any express words binding the Crown, a statute is analysed for a necessary implication in general terms. One does not look at the rights and liabilities brought about by the statute. In the words of Stephen J. in *China Shipping*⁷, “the first enquiry is whether the Statute has anything at all to say concerning the rights of the Crown and the liabilities of subjects at the suit of the Crown. If...not, the enquiry ends.” There is no necessary implication that the Crown is bound just because the purpose of the statute would otherwise be partly frustrated. For the necessary implication to arise, the statute would have to be wholly frustrated by the exclusion of the Crown from its operation⁸.

It follows that the plaintiff must fail against the first defendant, because the Land Usage Act (N.S.W.) provisions on zoning will not be wholly frustrated by the activities of the Commonwealth Crown in any of its manifestations in non-compliance with the Act.

As to the first suit against Porky Piggeries, counsel for the defendant contended, successfully in my opinion, that the Act did not apply to Porky Piggeries’ use of their land on Nob Hill in so far as the user was governed by the terms of the contract with G.O.B.B.L.E.. This is because, expressed most broadly, where the Crown’s contracts, arrangements or understandings are not affected by a statute, the other party to such arrangements is exonerated from the effect of the statute⁹. Put more specifically, such parties are not bound if there would be any *prejudice to Crown interests*¹⁰ and with regard to user of Crown land see the *dicta* of Wilson J. in *Brisbane City Council* at 32 with whom Gibbs and Mason JJ. concurred; although I take Wilson J.’s point that subsequent steps might be taken to rezone the land once it had ceased to be Crown property.

In the second suit against Porky Piggeries, on the ground of statutory nuisance, I find for the defendant. I accede to counsel’s submission that the noise and offensive odours were an inherent result of the Crown’s construction of a piggery on that site, as much as the contractual arrangements in *Bradken* led to parties being in non-compliance with the intention of the Trade Practices Act. I think it hair-splitting to say that the nuisances are attributable only to Porky Piggeries’ populating the building with battery pigs. The structure exists for the sole purpose of porcine habitation, and as the statutory provisions regarding nuisance do not apply to the Commonwealth Crown, they do not apply to the logical consequences of arrangements between the Crown and other parties. One cannot have an operational piggery without noise and smell. To hold otherwise would have left G.O.B.B.L.E. with a twenty-storey pig pen unusable and hence much diminished in value. Crown interests may not be prejudiced, authority for which proposition was found by the High Court in the English cases *Clark v. Downes*¹¹; *Wirral Estates v. Shaw*¹²; *Rudler v. Franks*¹³; and *In re Telephone Apparatus Manufacturers’ Application*¹⁴.

The operation of the piggery in this case is as fundamental to the agreement between the two defendants as was the arrangement between the manufacturers in *Telephone Apparatus* to their dealings with the Crown. However, the

7. p.74.

8. Wilson J. in *Brisbane City Council* at 32 with whom Gibbs and Mason JJ. agreed, and Gibbs J. in *China Shipping* at 66.

9. Mason and Jacobbs JJ. in *Bradken* at 463.

10. *Bradken*: Gibbs A.C.J. at 458, Stephen J. at 460.

11. (1931) 145 L.T. 20.

12. [1932] 2 K.B. 247.

13. [1947] K.B. 530.

14. [1963] 1 W.L.R. 463.

protection afforded by Crown involvement may not extend indefinitely. It is not clear whether a third party acquiring an interest in the site from Porky Piggeries will take its interest free of the effect of the Land Usage Act. Common sense applied to the facts of a large and expensive building in commercial operation, and the comments of Wilson J. in *Brisbane City Council*¹⁵ incline me to answer this hypothetical question in the affirmative. The contrary decision of the English Court of Appeal in *Wirral Estates* arose in the simpler fact situation of a rent restriction statute.

Finally I find that G.O.B.B.L.E. succeeds in its counter-claim against Silvertail. Although the Act does not bind the Commonwealth Crown, that does not prevent it taking the benefit of the statute, in this case the provisions regarding trespass to land. To hold otherwise would be, as Gibbs A.C.J. said in *McGraw*¹⁶, irrational. Murphy J. so held¹⁷ because the Crown must be protected from malpractice, and Mason J. (with whom Aickin J. concurred) held¹⁸ that the presumption against statutes binding the Crown did not operate where benefits were involved. Where the Crown was protected, not prejudiced, it would be illogical to exclude the Crown from the statute's operation.

Counsel for the plaintiff made submissions in opposition to my findings, submissions which bluntly must be said to be based on dissenting opinions, academic criticism, subjective claims of social utility and ultimately the need to rewrite the common law of the last one hundred and fifty years. I concede that counsel made the best of the little-cited *Rural Bank of N.S.W. v Municipality of Bland*¹⁹ in which the High Court found a body statutorily expressed to be the Crown to be bound by an Act which did not bind the Crown, but more recent authority sways me.

Counsel contested the "general presumption" approach to statutes, and in the alternative submitted that there was here a necessary implication that the Crown was bound. To his first point counsel cited Murphy J. in *Bradken*²⁰ where his Honour examined the nature of the Trade Practices Act and asserted the primacy of its purpose: to protect the public, a concept his Honour appeared to find more important than the question of Crown prejudice. Counsel then attempted to find a necessary implication that the Crown was bound, in reliance on the approach of Barwick C.J. in *China Shipping*²¹ that a statute's subject matter, policy and language could combine to produce the implication. Windeyer J., dissenting in *Downs v. Williams*²², was also cited on social necessity in the finding of the implication. With all respect, I find these judgments to be substantially removed from the law as established in the authorities I have set out above. I feel no logical compulsion to make the inference, and I believe counsel now sees his error.

Counsel then proceeded to attack the immunities flowing from the "verbally impressive mysticism" (to quote Latham C.J.) of a plurality of Crowns. He claimed that the judgments of Gibbs A.C.J. and Mason and Jacobs JJ. in *Bradken*²³ indicated the reliance of present High Court authority on Starke J. in *Minister of Works v. Gulson*²⁴ to the effect that statutes made by one parlia-

15. p. 32.

16. p. 425.

17. p. 434.

18. p. 429-430.

19. (1947) 74 C.L.R. 408.

20. Dissenting at 464.

21. Dissenting at 63.

22. (1971) 126 C.L.R. 61, at 71-72 and 89-90.

23. 456-457, 462.

24. (1944) 69 C.L.R. 338, 358.

ment in a federation did not extend to other Crowns, because, resting on *A. G. v. Donaldson*²⁵, “the law as made by Parliament is made for subjects and not for the Crown”. Counsel cited Professor Street²⁶ showing that the principle in *Donaldson* had no better basis than the argument of losing counsel in *Willion v. Berkley*²⁷. Counsel claimed this as part of the *communis error* in the fabrication of the modern presumption²⁸ and said the error should not be compounded by extending it to the problems of a federation. I must say I prefer consistency in the law founded on well established, if *communis error*, to the incoherence of uncertain application of a principle, whatever its antecedents.

Turning from the Crown and its *alter ego*, G.O.B.B.L.E., counsel questioned the nature of the prejudice to Crown interests that would follow if Porky Piggeries were bound by the zoning and nuisance provisions of the Land Usage Act. He conceded the zoning point, suggesting a rezoning with the consequent compensation provided under the Act, but contested the prejudice to the Crown of the nuisance point. He cited Windeyer J.²⁹ on the distinction between “antecedent rights” and “remedial rights”, saying that as the Commonwealth Crown would have been liable for common law nuisance under the Judiciary Act, 1903 as amended (Cth) ss. 56 and 64, it would be anomalous if a codification resulted in its immunity from liability for nuisance, let alone immunity for a party contracting with the Crown. However, I find that reference to “antecedent rights” smacks of the reservation of Crown prerogatives from the operation of general statutes to be found in Coke’s report of the *Magdalen College* case³⁰, a principle now in desuetude (see *China Shipping* per Stephen J. at 74), and on the general theory outlined above, I find this argument also fails.

Finally counsel contested the capacity of G.O.B.B.L.E. to take advantage of the Act if it were held immune from the restrictive operation of its provisions. Relying on the most general principles he asked how the common law, which takes such a dim view of “blowing hot and cold”, could retain such an idea. It has retained it not only in Australia, but also in the United Kingdom, as indicated by Lawton L.J. in *Town Investments v. Department of the Environment*,³¹ although in that jurisdiction it now has legislative sanction.

Counsel concluded with a reference to *Willion v. Berkley* and the *Magdalen College* case, wanting to know how courts in the high days of the Royal Prerogative could have found general statutes restricting the Crown, while in a modern democracy the executive and its creatures are so frequently immunised by the courts against the operation of statutes. He compounded his rhetoric by citing Stephen J.’s doubts as to whether parliament would ever alter this portion of the common law (*Bradken* at 459). Counsel suggested that such alteration would receive no encouragement from the permanent members of the executive, and that in any event parliamentary activity would not necessarily solve the problems posed by federation. He urged the courts not to shirk their responsibility to the community in this matter, and to take a less mechanical, more socially relevant approach to statutory construction. This is an argument which counsel will have to sustain in the Palace of the Almost Infallibles, if I

25. (1842) 10 M. & W. 117 at 124; 152 E.R. 406, 409.

26. *Governmental Liability*, 144.

27. *Willion v. Berkley* (1560-1561) 1 Plo. 223 at 239; 75 E.R. 339 at 365-366.

28. Professor Hogg, *Liability of the Crown*, 167 and 194.

29. Dissenting in *Downs v. Williams*, *supra.*, n. 22 at 83.

30. (1615) 11 Co. Rep. 66b; 77 E.R. 1235.

31. (1976) 3 All E.R. 479 at 489-490.

may amend and apply MacKinnon L.J.'s epithet for the House of Lords to our High Court, capable as it is of reversing itself if sufficiently moved.

For myself, I hold that the Crown in right of the Commonwealth is not bound by this Act, in disregard of which it may build piggeries wherever it chooses within New South Wales. The only uncertainty created, the only expectations defeated concerning land usage are those based on lay supposition, not the law. I conclude by agreeing with plaintiff's counsel that in an age of increasing statute law Dicey's proud boast should be rewritten to read, "We live under a government not of men, but of laws for the citizenry, and general immunity for the Government, and Statutory Authorities, Commissions, Qangoes, etc. that take its privileges, and anyone who can place his dealings with such a body in a protected position."

*S. C. Churches**

* A Practitioner of the Supreme Court of South Australia.