Chapter 29

Suing Governments*

The object of this paper is to take a theme which runs through the law concerning suits against governments, and to relate that theme to a number of particular topics which are likely to be of interest to practitioners. The scope of the subject is too great to permit any comprehensive examination in a paper like this.[1]

The theme is set by a phrase commonly used in legislation which permits suits against the Crown, and which replaces the ancient procedure of petition of right.[2] A litigant's rights in a suit against the government are said to be "as nearly as possible the same" as would be the case in a suit between subject and subject. The phrase indicates two things. First, the aspiration is towards equality before the law. Second, there is a recognition that complete equality is not possible. What is regarded as possible changes from time to time; sometimes by legislation, and sometimes by judicial decision. In this context, as will appear, "possible" has a meaning involving considerations of appropriateness.

In New South Wales, which first established a procedure for suing a nominal defendant on behalf the government in 1857, the *Claims Against the Government and Crown Suits Act 1912* provided, in s 4, as follows:

> The petitioner may sue such nominal defendant at law or in equity in any competent court, and every such case shall be commenced in the same way, and the proceedings and rights of parties therein shall as nearly as possible be the same and judgement and costs shall follow or may be awarded on either side as in an ordinary case between subject and subject.

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* An address to the Australian Bar Association Conference, San Francisco, 19 August 1996.

1 For a broader coverage of the subject, see Hogg, Peter W, *Liability of the Crown*, (Sydney: Law Book Co, 1989); Seddon, Nicholas, *Government Contracts*, (Sydney: Federation Press, 1995); Aronson, Mark and Harry Whitmore, *Public Torts and Contracts*, (Sydney: Law Book Co, 1982); New South Wales Law Reform Commission, *Proceedings By and Against the Crown: LRC 24*, (Sydney: NSWLRC, 1975). (See also more recent publications such as Hogg, Peter W, Patrick J Monahan and Wade K Wright, *Liability of the Crown*, 4th ed, (Toronto: Carswell, 2011); "Immunity from Civil Liability" in Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws ALRCR 129,* (Sydney: ALRC, 2016); Seddon, Nicholas, *Government Contracts: Federal, State and Local,* (Sydney: Federation Press, 2009); Seddon, Nicholas, "The Crown" (2000) 28 *Federal Law Review* 245; and Aronson, Mark, "Government Liability in Negligence" (2008) 32 *Melbourne Law Review* 46. – *Ed*)

2 At common law, the sovereign could not be sued. For a subject to assert property rights against the Crown, a petition of right had to be addressed to the Crown. In 1860, the procedure was simplified by the *Petitions of Right Act*. The Crown, if so advised by the Attorney-General, would issue a *fiat justitia* enabling the petition to be heard in the Court of Chancery or King's Bench. The procedure was abolished in the United Kingdom in 1947. – *Ed.*