alive to his responsibilities, he will know what he should do or not do. It is to be hoped that as a result of *Clyne's* case advocates will not be deterred from carrying on their clients' causes with characteristic courage and intellectual vigor. At the same time, it is equally to be hoped that *Clyne's* case will be a constant reminder not to abuse the privileges granted to counsel in the combative processes adopted in our system of justice. The ultimate responsibility must be a personal one. It depends primarily on the self-discipline exerted by the individual, and on the collegiate discipline exerted by a Bar Association through precept and example. If these should fail then drastic steps as in this case must be taken to ensure that privilege does not become the avenue of abuse and injustice to innocent people.

It should perhaps be added that although proceedings were taken in this case in New South Wales under legislation quite different from that in Victoria, the same kind of principles would apply to practitioners in this State and, in particular, with respect to barristers. The latter practitioners are subject to the provisions of the Legal Profession Act 1958, and if any were guilty of misconduct in the relevant sense, they could be struck off the roll of barristers and solicitors. In assessing whether their conduct as barristers amounted to misconduct the same kind of consideration would have to be made as was given by the High Court to *Clyne's* case. As a result, the reasons for judgment in that case are of particular interest to any persons practising or intending to practise solely at the Bar and should be read carefully by them as a guide to their future behaviour when faced with the problem of reconciling their forensic duty to their client with their responsibility as professional men engaged in the judicial procedures in which they are required to act decorously, fairly and according to the standards of common decency.

O. J. GILLARD Q.C.

CHIEF SECRETARY OF NEW SOUTH WALES v. OLIVER FOOD PRODUCTS PTY LTD[1]

Statutory bodies—Tests as to Crown agency—Immunity from statute—Terms of incorporation

The plaintiff, the Chief Secretary of New South Wales, a Minister of the Crown, and established as a corporation sole by section 41A of the Fisheries and Oyster Farms Act 1935-1949 (N.S.W.), sued the defendant for the price of fish sold and delivered to the defendant. Section 41A entitled the plaintiff to sue in and by its corporate name. The defendant pleaded that, as the sales in question were completed before 1949, the action had not been brought within six years of accrual of the cause of action, and he relied on the Statute of Limitations[2] to bar the claim. The plaintiff demurred to this on the ground *inter alia* that under section 41A of the Act the plaintiff was an agent of the Crown and thus immune from the operation of the Statute of Limitations, by virtue of the Crown privilege of immunity from statute unless expressly or impliedly bound.

The three judges of the New South Wales Supreme Court agreed that the plaintiff represented the Crown, and was not bound by the Statute. Judgment was given for the plaintiff on the demurrer.

[1] (1960) 77 W.N. (N.S.W.) 122; Supreme Court of New South Wales; Herron, Sugerman and Else-Mitchell JJ. [2] 21 Jac. I c. 16.

Herron and Sugerman JJ. concurred in their decision on whether the Chief Secretary was a Crown agency. Else-Mitchell J. took this for granted and did not mention the point. Herron J., in analysing the Fisheries and Oyster Farms Act, noted that the Crown had decided to take an active part in the marketing of fish as a power ancillary to the general control of fishing.[3]

Their Honours adopted the tests for agency laid down by Latham C.J. in *Grain Elevators Board (Vic.) v. Shire of Dunmunkle*.[4] A corporation or statutory body exercising a discretion independently of the Crown cannot be a Crown agent, but if, on considering, the extent to which the body's function was within the 'province of government', its terms of incorporation, the extent of its financial autonomy, and the control exercised by the executive over its activities, it cannot be said to exercise an independent discretion then it will be regarded as a Crown agency.

But Herron J., and Sugerman J. with less enthusiasm, emphasized that while absence of control was decisive, existence of control by the Crown was not sufficient. The function of the corporation must be within the 'province of government'. While the courts cannot say what this ought to be, they can determine its extent at the time, and the legislature, in the relevant Act, may show an intention to extend it into new areas by either making a new corporation in effect a government department or by expressing a more direct intention. This argument is supported by the judgment of Brereton J. in *Electricity Commission of New South Wales v. Australian United Press Ltd.*[5]

Their Honours concluded that the Chief Secretary was a Crown agent. The corporation had no independent discretion or financial autonomy from the Executive, as the Chief Secretary himself was a Minister of the Crown. They also considered that the Fisheries Act showed that Government intended to enter the field of fish marketing as a new field of government. The Chief Secretary's 'functions are included in an expanding conception on the Legislature's part of what is requisite in the public interest by way of regulation and exploitation of one of the State's natural resources'.[6]

A Minister of the Crown is entitled to Crown immunity, so long as he is acting in the Service of the Crown, even though he is incorporated,[7] and whether or not he is dealing with Crown property.[8] Herron J. noted, however, that a body may be a Crown agent for some purposes and not for others, and thus only entitled to Crown privilege for these purposes.[9] However, no such distinction between the Chief Secretary's trading functions and his general control over the industry could be admitted here.

Their Honours' opinion was that the Minister's incorporation did not affect his immunity. It was a mere device to facilitate the bringing of actions by and against the Minister, the acquisition, disposition and devolution of property, and the making of contracts. The Minister must not be regarded as split into two persons for different purposes, one carrying immunity and the other not, but rather as a Crown servant who has been invested with a certain status to aid him in his duties.

[3] (1960) 77 W.N. (N.S.W.) 123. [4] (1946) 73 C.L.R. 70, 75, 76.
[5] (1954) 72 W.N. (N.S.W.) 65; (1955) 55 S.R. (N.S.W.) 118.
[6] (1960) 77 W.N. (N.S.W.) 129.
[7] *Graham v. Public Works Commissioners* [1901] 2 K.B. 781.
[8] *Administrator of Austrian Property v. Russian Bank for Foreign Trade* (1931) 48 T.L.R. 37.
[9] *Victorian Railways Commissioners v. Herbert* [1949] V.L.R. 211.

While incorporation was not itself regarded as a bar to Crown immunity from statute, the court was concerned that section 41A might specifically waive the Crown privilege of general immunity to statute. The relevant part of the section reads:

> The said corporation sole . . . may . . . sue and be sued and shall be capable of . . . doing and suffering all such other . . . acts and things as a body corporate may by law do and suffer.[10]

It was argued that use of the word 'suffer' would subject the corporation to liability to statute. Herron J. rejected this out of hand saying that the phrase was merely a stock phrase of incorporation. Sugerman J. thought that the object of these words was to subject the corporation to the ordinary procedure of the Court in which he is sued. The effect of this is to open the Crown or the corporation to discovery as in *Skinner v. The Commissioner for Railways* (N.S.W.)[11] and to garnishee proceedings which was held in *Ex parte The Milk Board; Re Farmers' Fertilizers Corporation Ltd.*[12] But His Honour considered that the things which section 41A required the corporation to 'suffer' did not include the setting up of a defence that the cause of action was barred by the Statute of Limitations. This was beyond the effect of the *Milk Board* case.[13] The phrase was only a stock phrase and failed to show a clear intention that the corporation was to be subjected to the operation of all statutes, and not only to the Statute of Limitations.

Else-Mitchell J. thought himself bound by authority to follow this view, though he felt that, as the intention of section 41A was to assimilate the position of the Crown to that of a private person, its effect should be to impose the disabilities of the Statute of Limitations upon the corporation. Its effect would be similar to the provisions in the Judiciary Act, and in the Claims against the Government Act that the position of the nominal defendant of the Crown 'shall be the same . . . as in an ordinary case between subject and subject'.[14] But the analogy could not be extended to section 41A.

This case is not novel or exciting, not striking out into any new fields, but conforming quite solidly with the accepted authorities. But it must be commented upon, not because it is a wrong decision in the face of the settled law, but because it reflects an inadequate and misconceived portion of the law, yet at the same time suggesting with a few hints that the courts are realizing the real social problems involved.

The first major issue was whether the Chief Secretary was an agent of the Crown. The court accepted the tests of Latham C.J. in *Grain Elevators Board v. Shire of Dunmunkle.*[15] Agency is determined by the relevant Act.[16] Failing an explicit statement of this, the body is an agent,

[10] Fisheries and Oyster Farms Act 1935-1957 (N.S.W.).
[11] (1937) 37 S.R. (N.S.W.) 261. [12] (1935) 35 S.R. (N.S.W.) 583. [13] *Ibid.*
[14] Judiciary Act (1903-1955) (C'th), s. 64. Claims against the Government and Crown Act 1912 (N.S.W.), s. 4. [15] (1946) 73 C.L.R. 70, 75-76.
[16] *Electricity Commission of New South Wales v. Australian United Press Ltd* (1955) 55 S.R. (N.S.W.) 118, Brereton J.; *Wynyard Investments Pty Ltd v. Commissioner for Railways* (N.S.W.) (1955) 93 C.L.R. 376, *per* Williams, Webb and Taylor JJ. It is interesting to note that in *Commonwealth v. Bogle* (1953) 89 C.L.R. 229, the majority of the High Court, Dixon C.J., Fullagar, Kitto, Taylor and Webb JJ., held that, though the company was controlled completely by the executive, the fact that it was incorporated under the Victorian Companies Act showed that it was not intended to be a Crown agent.

firstly, if its activities are within the 'province of government'[17]—a lesser thing than traditional governmental functions—and which may be extended by an intention evinced in the Act of Parliament and, secondly, if it does not exercise a discretion independent of the executive. This is determined by examining the amount of freedom of action, financial autonomy, its function, and the powers of the Minister. If it satisfies these tests the body is within the 'shield of the Crown', and is entitled to the Crown's privileges and immunities.

This is the present state of the law. However, this court confirms a recent line of argument. In the pioneer 'shield of the Crown' case, *Mersey Docks and Harbour Board Trustees v. Cameron,*[18] Blackburn J. laid down that a body must be performing a governmental purpose to be a Crown agency. This was criticized by many, who were of the opinion that the court cannot decide what governmental purposes were to be.[19] They were met by those who in fact did decide the question.[20] But the New South Wales Court, while retaining governmental function as an ingredient of agency, make it depend not on the court's judgment, but on the intention of Parliament, which can extend it as it wishes. This fortunately discards the traditional distinctions between public and private enterprises, profit and non-profit, governmental and trading enterprises, and recognizes that any government activity may be in the public interest. No particular political philosophy is imposed.

The Court applied the routine tests of control and financial autonomy. These are good standards if one is asking 'is the body an agent?' or 'what independent discretion does this body exercise?' Professor Friedmann's criticisms of the tests of extent of ministerial control and of financial autonomy[21] fall down when one considers the effect which these factors have in practice on a body's independence.

But the whole test of 'agency' is, in my mind, misconceived, resting on a false notion of the nature of a statutory corporation. It assumes that not all such bodies are instruments of public policy, that some are mere 'substitutes for private enterprise', in other words that not all these bodies are identified with the executive. But they are. They are not created to be agents or independent bodies, but to merely aid the implementation of government policy.

Non-lawyers face this fact. Sir Richard Boyer, former Chairman of the Australian Broadcasting Commission, states that the government is forced by the growing complexity of administration to enter more into the life of the community, into non-governmental spheres in the public interest. Thus the statutory body is created, not to be separate from the executive, but to ease administration by mixing accountability to the

[17] *Electricity Commission of New South Wales v. Australian United Press Ltd* (1955) 55 S.R. (N.S.W.) 118, 137, *per* Brereton J.

[18] (1864) 11 H.L.C. 443; (1864) 11 E.R. 1405.

[19] 'It is not for a court to impose on any parliament any political doctrine as to what are and what are not functions of government . . .' *per* Latham C.J., *South Australia v. The Commonwealth* (1942) 65 C.L.R. 373, 423.

[20] *E.g.* the distinction between 'alienable and inalienable' governmental functions made in *Coomber v. Justices of Berkshire* (1883) 9 App. Cas. 61. Courts have also asked whether a body was a 'government department', or 'a substitute for private enterprise'. Sawer, G., 'Shield of The Crown Revisited' (1958) 1 *M.U.L.R.* 137, 141, elaborates on this point citing numerous cases.

[21] Friedmann, 'Legal Status of Incorporated Public Authorities' (1948) 22 *Australian Law Journal* 7.

executive with the experience and flexibility of the business world.[22] Thus if the corporation is already acting as a governmental instrument, why should we raise the question of identification with the executive again by asking if it is an agent? But the difficulty with this view is that it forces us into the position that all statutory bodies are Crown agents and thus should be given Crown immunity.

This shows the need for a revised definition of the immunities and privileges of statutory corporations. However, the agency test is so deeply embedded in the law that the courts will not rapidly discard it.[23] So the position will remain obscure, because of the vagueness and uncertainty of the agency test, and because the legislature, except in rare cases,[24] persistently fails to define the issue in statutes incorporating public bodies. However, the Court's recognition in the present case that the incorporation of the Minister was a mere procedural device[25] for easing the exercise of his duties, and the comment that Parliament may extend the province of government,[26] are hints that the courts may in time realize that all statutory bodies are mere cloaks for government policy.

No problems arise with the propositions that a body, once established as a Crown agency, is entitled, though incorporated, to Crown privileges and immunities, but it must be noted only while it is exercising functions involved in the task of agency and none other.[27] These principles are merely a logical extension of the agency concept.

The next main feature of the case is the Court's attitude to the effect of the words of incorporation in section 41A as limiting the Chief Secretary's immunity.

> The said corporation . . . may in the corporate name sue and be sued and shall be capable of purchasing, holding, granting, devising, disposing of, and alienating real and personal property and of doing and suffering all such other acts and things as a body corporate may by law do and suffer.[28]

The Court refused to extend the effect of these words beyond destroying certain procedural immunities, discovery and garnishee proceedings.[29]

Herron J.'s approach rejected the extension as they were mere stock phrases of incorporation, and as incorporation itself does not bar immunity then the immunity is left untouched. But this overlooks the fact that the phrase 'sue and be sued' exposes the Crown to certain proceedings. Thus such words can affect liability and must not be disregarded merely because they are used often.

A ground of distinction can be found easily enough between procedural privileges and the subjection of the Crown to statutes generally to limit the word 'suffer'. It would require a weightier reason than a common

[22] Sir Richard Boyer, 'The Statutory Corporation as a Democratic Device' (1957) March, *Public Administration* 29.

[23] Sawer, *op. cit.* 143.

[24] *E.g.* Barley Marketing Act 1958, s. 5 (2), 'The Board shall not be deemed to represent the Crown'. We could only wish that this sort of provision appeared more frequently.

[25] (1960) 77 W.N. (N.S.W.) 122, 126, 129.

[26] *Ibid.* 125, 129.

[27] *Victorian Railways Commissioners v. Herbert* [1949] V.L.R. 211.

[28] (1960) 77 W.N. (N.S.W.) 122, 131.

[29] *Skinner v. The Commissioner for Railways (N.S.W.)* (1937) 37 S.R. (N.S.W.) 261; *Ex parte the Milk Board; Re Farmers' Fertilizers Corporation Ltd* (1935) 35 S.R. (N.S.W.) 583.

phrase to destroy Crown immunity from statutes. Sugerman J. points this out but his other reason is difficult to comprehend. The argument was rejected as it attached too much weight to a formula which is directed to the capacity of the corporation rather than to its status. Section 41A refers to capacity rather than status. But the argument on the word 'suffer' also concerns capacity and not status, that is, whether the Statute of Limitations can be pleaded against the Crown. So it seems that His Honour confused the extent of the privilege of a Crown agent with the question of whether it was an agency at all.

The courts have set their face against discarding Crown privilege in its present form, and adhere to the agency test. Inroads on immunity made in *Skinner's* case and the *Milk Board* case have been halted, and so until the legislature settles the questions of immunity and agency specifically in incorporating statutes the present confusion will remain. The question will be litigated at great expense each time a new body is set up.

R. C. HORSFALL

ATTWOOD v. THE QUEEN[1]

Evidence—Questions tending to show accused of bad character—Relevance—Crimes Act 1958 (Vic.), section 399 (e)

This was an application for special leave to appeal to the High Court against an order of the Victorian Supreme Court rejecting A's appeal against a conviction of murder. The sole point at issue was the permissibility of certain questions asked of the accused which tended to show him to be a person of bad character. It was submitted on A's behalf that the questions asked were contrary to the provisions of the Victorian Crimes Act 1958, section 399 proviso (e). This provides that:

> . . . a person charged and called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—
> (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
> (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecution or the witnesses for the prosecution . . .

A was charged with the murder of one Mrs P. The Crown alleged that A had strangled her, and brought evidence that she and A had been carrying on an adulterous relationship. A's defence was that he had killed her accidentally whilst attempting to silence her. To rebut such defence and substantiate the allegation of an amorous *contretemps* the Crown cross-examined A, asking questions tending to show that A was

[1] (1960) 33 A.L.J.R. 537. High Court of Australia; Dixon C.J., McTiernan, Fullagar, Taylor and Menzies JJ.