COMMENT

THE COMMONWEALTH V MEWETT (1997) 191 CLR 471: COMMON LAW ACTIONS, COMMONWEALTH IMMUNITY AND FEDERAL JURISDICTION

Nick Seddon

INTRODUCTION

As the millennium and possibly a republic approach, Crown immunity continues to be a problem in Australia. In this issue of the *Federal Law Review* two High Court cases involving Crown immunity questions are the subject of comments. In the last issue the Commonwealth's, and in some circumstances the States' and Territories', substantial immunity from the operation of the trade practices legislation was the subject of analysis.[1] It is strange that the spectre of this mediæval concept not only continues to loom over government activities, including commercial activities, but also that its precise workings are still the subject of controversy. Strangeness is compounded when the origins of this immunity are spelt out in modern cases: the sovereign could do no wrong and could not be impleaded in his or her own courts.[2]

In Australia, even before federation, all colonies except Victoria had enacted Crown proceedings legislation which abolished immunity from suit in tort and contract cases.[3] The concept of Crown immunity, or at least immunity from suit, was treated differently in Australia from its English origins at the time of federation. In addition, the task of constitutional oversight given to the High Court by chapter III of the

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1 N Seddon, "*JS McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419: The Trade Practices Act and Government Immunity" (1998) 26 *F L Rev* 401.

2 See the historical discussion by Gummow and Kirby JJ in *Commonwealth v Mewett* (1997) 191 CLR 471 at 542-545. These precepts were more applicable to torts cases than to contract cases. The petition of right enabled a citizen to seek redress for breach of contract by the Crown, though this procedure gave no absolute right to the citizen whose status was that of a suppliant: *Commonwealth v Miller* (1910) 10 CLR 742 at 756 per Isaacs J.

3 P Finn, "Claims Against the Government Legislation" in P Finn (ed), *Essays on Law and Government, vol 2, The Citizen and the State in the Courts* (1996).

Constitution necessarily meant that the Crown could be challenged in legal proceedings. Despite these egalitarian beginnings, the problems generated by the concept of Crown immunity continue.

The basis upon which the Commonwealth is liable in tort and contract claims was closely examined in *Commonwealth v Mewett*.[4] The case also raised questions of choice of law in federal jurisdiction suits and acquisition of property otherwise than on just terms, contrary to the Constitution, s 51(xxxi). It was on the first issue that differences of opinion still remain.

THREE SAILORS SUFFER INJURIES

Mewett was in fact three cases heard together. Three members of the Royal Australian Navy suffered injuries: Mewett on HMAS *Kembla* in August 1979 just outside Port Phillip Bay in Victorian waters and Rock and Brandon on board HMAS *Stalwart* in October 1985 on the high seas between Sydney and Surabaya. Each sought damages from the Commonwealth in negligence and for breach of contract by filing proceedings in the Sydney office of the High Court registry. Each proceeding was remitted by consent to the Federal Court. The Commonwealth filed defences which asserted that each action was barred both because the limitation period had expired and by the Safety, Rehabilitation and Compensation Act 1988 (Cth) (the Comcare Act), s 44. Each of the plaintiffs sought from the Federal Court extensions of time under the relevant limitation legislation. The Commonwealth filed notices of motion to have the claims struck out.

Foster J rejected the Commonwealth's defences and dismissed the notices of motion to have the claims struck out.[5] The Commonwealth wished to have the validity of s 44 of the Comcare Act determined. This question was reserved for the Full Federal Court which dismissed the appeals.[6] The Commonwealth appealed to the High Court. At the time when the High Court considered the issues, the application for extension of the limitation periods in each case had not been determined by the Federal Court.

THE ISSUES

The immediate issue for determination by the High Court was the effectiveness or otherwise of s 44 of the Comcare Act. The Commonwealth therefore sought a re-examination of *Georgiadis v Australian and Overseas Telecommunications Corporation*.[7] The appeal also necessitated an examination of the basis of the Commonwealth's liability in tort and contract, the application of the Constitution, ss 75 and 78 and the Judiciary Act 1903 (Cth), ss 56, 64, 79 and 80 and the determination of what State law applies in federal jurisdiction suits.

Georgiadis revisited

The High Court had to determine whether s 44 of the Comcare Act was effective to bar the claims. This section came into force on 1 December 1988 and was part of the Commonwealth's new workers' compensation scheme. Section 44 provides that

4 (1997) 191 CLR 471.
5 (1994) 126 ALR 391.
6 (1995) 59 FCR 391.
7 (1994) 179 CLR 297.

common law damages claims in respect of injuries or loss of property suffered by an employee in the course of employment would not lie against the Commonwealth or Commonwealth bodies covered by the scheme. The section applies to causes of action which accrued before or after the commencement of s 44 on 1 December 1988 but not to causes of action already the subject of proceedings at that date. The question whether this section was valid in respect of a cause of action which had already accrued on 1 December 1988, but which was not statute barred by the limitation legislation, had already been considered by the High Court in *Georgiadis*. It was held that s 44 effected an acquisition of property otherwise than on just terms and was invalid under the Constitution, s 51(xxxi).

All judges in *Mewett* made it clear that they were not prepared to re-open the issues settled in *Georgiadis*. The Commonwealth argued that the present cases were different because in *Georgiadis* the cause of action was extant at the time of filing suit whereas in these cases the causes of action were statute barred by the limitation legislation. It was accordingly no acquisition of property for the purpose of s 51(xxxi) to provide that no action shall lie against the Commonwealth in respect of these claims, even though they had accrued before the commencement of s 44. In the case of Mewett the six-year limitation period had run by 1 December 1988 whereas the claims of Rock and Brandon still had just over 3 years to run at that date. All judges were of the view that the Commonwealth's argument could not succeed because each plaintiff had the possibility of having the limitation period extended (and had applied for such extension) and that therefore their causes of action were not extinguished or, alternatively, rendered unenforceable by the limitation legislation.[8] Accordingly, it was an invalid acquisition of property to purport to bar these causes of action by s 44. Alternatively, Gummow and Kirby JJ argued that, because there was no Commonwealth statute of limitations, there was no law to bar the claims which existed on 1 December 1988 and that s 44 then purported to extinguish those causes of action contrary to s 51(xxxi).[9] Gaudron J thought that, until the applications for extensions of time had been determined, no final answer could be given as to whether s 44 was invalid.

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8 The effect of the expiry of the limitation period is usually that a claim is not enforceable, that is, there is a procedural bar to the claim but the claim is still extant. However, the Limitation Act 1969 (NSW), s 63 provides that the cause of action is extinguished once the limitation period has expired. This legislation applied to Rock's and Brandon's cases. The Court did not decide (and did not have to decide) whether it would be an acquisition of property to destroy a cause of action which was procedurally barred but substantively still alive. Gummow and Kirby JJ expressed the view that a statute barred cause of action may still have "sufficient substance" to answer the constitutional description of "property": (1997) 191 CLR 471 at 534. Dawson J also appeared to be of the same view at 511-512.

9 (1997) 191 CLR 471 at 552-553. The State limitation legislation was only invoked or attracted, according to Gummow and Kirby JJ, either by the act of bringing suit or possibly by the act of filing a defence by the Commonwealth (at 556-557).

The Commonwealth's liability in tort and contract

There is no doubt that the Commonwealth[10] is liable for damages in tort or for breach of contract. What is not so clear is the basis on which that liability rests. The question is not just academic because the answer to it may determine whether the Commonwealth Parliament can legislate to affect the Commonwealth's liability. It is also relevant where s 51(xxxi) is in issue because, if the source of a right is purely statutory, then it is inherently susceptible to modification or extinguishment by further legislation without being an invalid acquisition of property.[11] The question can be broken down into sub-questions.

1. What is the basis for the Commonwealth's liability to tort and contract claims—the common law, the Constitution or statute?
2. What is the basis for the Commonwealth no longer being able to claim immunity from suit in contract and tort claims—the Constitution or statute?
3. What law applies to a suit in which the Commonwealth is a party and how is this determined?

These questions were not always kept distinct in *Mewett*. For example Dawson J under the heading "The source of Commonwealth liability in contract and tort" actually discussed the removal of immunity from suit, though he later made the distinction between the underlying cause of action and the immunity question. The reason for keeping these two questions distinct is, again, because it is relevant to the issue of whether legislation can be enacted to control or remove potential liability. For example, it may be possible for the Commonwealth Parliament to legislate to prevent a common law liability arising (as in s 44 of the Comcare Act which, it is accepted, is effective to prevent Commonwealth common law liability arising from injury or loss suffered after 1 December 1988). On the other hand it may not be valid (at least on one view) for the Parliament to legislate to remove Commonwealth immunity from suit.

On the first sub-question—the basis of the Commonwealth's common law liability—Gummow and Kirby JJ (with whom Brennan CJ agreed) went back to *Commonwealth v New South Wales*.[12] Isaacs, Rich and Starke JJ had said that the mediæval concepts of the sovereign doing no wrong and not being amenable to suit in his or her own courts was removed by s 75 of the Constitution. This view gave rise to a possible difficulty because a constitutional basis for the Commonwealth's liability meant that the Commonwealth Parliament would not be able to legislate with respect to Commonwealth liability, contrary to the view of Dixon J that the Parliament had "complete authority over all ordinary causes of action against the Commonwealth and over the remedies for enforcing them."[13] Dixon J attempted to resolve this difficulty in *Werrin v Commonwealth* by saying that s 75 merely exposed the Commonwealth or a State to a remedy and did not alter the underlying liability.

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10 The liability of the Commonwealth will be discussed here. The same arguments apply to the States in cases of federal jurisdiction, that is, where a State is a party to a suit covered by the Constitution, s 75(iv): (1997) 191 CLR 471 at 549 per Gummow and Kirby JJ.

11 *Georgiadis* (1994) 179 CLR 297 at 305-306 per Mason CJ, Deane and Gaudron JJ. In *Mewett* Gummow and Kirby JJ hinted that even the destruction of a purely statutory right might be an acquisition of property: (1997) 191 CLR 471 at 552.

12 (1923) 32 CLR 200.

13 *Werrin v Commonwealth* (1938) 59 CLR 150 at 167.

> It treats the liability as already existing *in abstracto* as a duty of imperfect obligation and made perfect by the creation of a jurisdiction in which the Crown may be sued without its consent.[14]

Gummow and Kirby JJ endorsed this statement and concluded that the Commonwealth's liability is created by the common law. At the same time they answered the second sub-question (above).

> As Brennan J put it in *Georgiadis*, the liability is created by the common law. In respect of that liability, the Constitution applies to deny any operation to what otherwise might be doctrines of Crown or executive immunity which might be pleaded in bar to any action to recover judgment for damages in respect of that common law cause of action.[15]

They therefore rejected the Commonwealth submission that rights of action in tort or contract owe their existence entirely to statute. They pointed out that the existence of liability at common law and the removal of immunity being constitutionally based still gives the Parliament much scope for the exercise of its powers with respect to Commonwealth liability, including the extinguishment of liability (subject to the payment of compensation) and the prevention of liability from arising at all.

Gaudron J provided a detailed analysis of the choice of law question raised by these appeals (to which I will return). At the end of her judgment she stated the same conclusions on the first and second sub-questions (above) as were reached by Gummow and Kirby JJ, namely that "liability attaches to the Commonwealth under the general law and the Constitution applies to deny immunity from suit".[16]

Dawson J, on the other hand, considered that the basis of the Commonwealth's common law liability was statutory. However, as already mentioned, Dawson J focused, at least initially, only on the second sub-question (above), namely, the proper basis for saying that the Commonwealth's immunity from suit had been removed. He argued that s 75(iii) of the Constitution, in conferring original jurisdiction on the High Court, has nothing to say about Commonwealth Crown immunity.[17] It is legislation made pursuant to s 78 of the Constitution (which gives Parliament the power to confer rights to proceed against the Commonwealth and States in federal jurisdiction cases) which is the source of the abolition of immunity from suit. That legislation is, of course, the Judiciary Act 1903 (Cth). The well-accepted principle that executive power (including privileges and immunities) may be modified or abrogated by statute reinforced Dawson J in his view that immunity from suit was removed by statute. "Statutory provision to sue the Commonwealth may be made under s 78, but in the absence of such provision, the Crown enjoys immunity from suit in contract and tort."[18]

Dawson J was, like Gummow and Kirby JJ, concerned about the question whether the Commonwealth Parliament could legislate to control the Commonwealth's exposure to common law liability. He concluded that, if the Commonwealth's liability is statutorily based, then legislation could control that liability. This argument elides a step in the process. If the removal of immunity has been achieved by statute then it follows that Parliament could re-establish immunity, modify immunity or otherwise

14 Ibid at 168.
15 (1997) 191 CLR 471 at 550-551 (footnote reference omitted).
16 Ibid at 531.
17 Ibid at 496.
18 Ibid at 498.

deal with it. It does not follow that liability, that is, the initial legal liability for a wrong, owes its origin to statute. Later in his judgment, when referring to the majority view in *Georgiadis* (from which he dissented), Dawson J acknowledged the difference between the immunity question and the basis for the underlying common law liability and seemed to accept that the cause of action was based on the common law and not on statute. It would therefore be possible to combine the reasoning of Gummow and Kirby JJ with that of Dawson J and conclude that the origin of Commonwealth liability in tort and contract is the common law and that the abolition of immunity has been brought about by statute rather than the Constitution. On this basis the Parliament would not be hampered by any constitutional argument, save the one based on s 51(xxxi).

Dawson J then went on to consider which sections of the Judiciary Act have abolished immunity from suit. There has been a running controversy on this point too. The contest is between s 56 which stipulates in which courts actions against the Commonwealth in contract or in tort should be initiated; and s 64 which provides that the rights of the parties to a suit in which the Commonwealth or a State is a party shall as nearly as possible be the same as in a suit between subjects. Dawson J, having canvassed the different views which have been expressed over the years on this controversy, opted for s 64 saying that its equating of the government party to that of a subject must necessarily mean that immunity from suit has been removed.

Toohey J expressed agreement with Dawson J[19] but opted for s 56 rather than s 64 of the Judiciary Act as being the statutory provision which has abolished immunity from suit. He also endorsed the view that causes of action against the Commonwealth arise under the general law.[20] McHugh J did not deal with these issues directly but had said in *Georgiadis* that the Commonwealth's liability was purely statutory and that the Judiciary Act 1903 (Cth), ss 56 *and* 64 removed immunity from suit. He was not prepared to countenance the Commonwealth's attempt to re-open *Georgiadis*.

The applicable law

It is clear that s 64 of the Judiciary Act has the effect of ensuring as nearly as possible that the rights of the parties to a federal jurisdiction suit are the same. When the section operates this necessarily means that the government party cannot claim special privileges or immunities. It also means that both procedural and substantive law are invoked to determine the rights of the parties.[21] What s 64 does not do is to say *which* law applies if there is a choice of law. To determine the answer to this the Judiciary Act 1903 (Cth), s 79 provides:

> The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

Section 80 provides:

> So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment,

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19 Ibid at 512.

20 Ibid at 513.

21 *Maguire v Simpson* (1977) 139 CLR 362; *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254.

> the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

In *Mewett* these provisions were examined because there was a possible issue as to which limitation statute applied to the causes of action in contract and in tort of the three plaintiffs. As it turned out, there was no contest on this issue and it was accepted that the New South Wales Limitation of Actions Act 1969 applied to the actions by Rock and Brandon and to the contract claim by Mewett. This was simply because the action was commenced in New South Wales and heard by the Federal Court in New South Wales. In the case of Mewett's tort claim the Victorian Limitation of Actions Act 1958 applied because s 79 picked up New South Wales law, including choice of law rules.[22] These required Mewett's claim to be maintainable in the place where the accident occurred, namely, Victoria. Each Act made provision for the extension of the limitation period by application to a court and each of the plaintiffs, as already mentioned, had made such an application which was not determined at the time when the High Court heard the appeals.

Gaudron J devoted much of her judgment to the choice of law question. She canvassed the possibilities that the determination of which law applies in a federal jurisdiction suit is brought about by a combination of ss 56 and 64 of the Judiciary Act, by a combination of ss 56, 64 and 79, of ss 56 and 79, of ss 64 and 79 or ss 79 and 80. Gaudron J was concerned to ensure that, so far as possible, the same set of facts should produce the same legal result no matter where the facts arose or where the case is adjudicated. Having rejected ss 56 and 64 as being finally determinative of what law should apply, she considered that the key to the solution is s 80. This section is the starting point because s 79 is expressed to be subject to the laws of the Commonwealth of which s 80 is one. On this analysis, s 79 takes on a supplementary role and is enlivened only when there is a gap in Commonwealth law or the common law generally. Section 80 speaks of the common law in Australia and Gaudron J was very much in favour of a national common law being found and applied where choice of law issues arise, including, most importantly, national common law choice of law rules.

> In my view, s 80 of the *Judiciary Act* now requires that, for matters within federal jurisdiction, [the choice of law] rules be identified as part of "the common law in Australia".[23]

Gaudron J spoke of Mewett's tort claim being determined not by Victorian law but by the "common law of Australia" and his contract claim being determined by the "Australian law of contract".[24] Of course, this approach is not possible in relation to legislation unless there is relevant Commonwealth legislation. Section 79 then has to be employed. As far as the applicable limitation law was concerned, Gaudron J came to the same conclusion as outlined above, namely that the New South Wales law applied to all claims except Mewett's tort claim which was governed by the Victorian law.

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22 Choice of Law (Limitation Periods) Act 1993 (NSW).

23 (1997) 191 CLR 471 at 526.

24 Ibid at 521. See also the same approach to Rock's and Brandon's claims at 527.

Gummow and Kirby JJ referred to the analysis of Gaudron J and expressed agreement with her approach but nevertheless preferred to base their conclusion on the choice of law question on the operation of s 79 because, according to their Honours, there had been no submissions made about s 80.[25] Brennan CJ, on the other hand, though in favour of the concept of a uniform Australian common law, did not consider that the paramount provision for determining choice of law problems was s 80 because it too was expressed to be subject to the "laws of the Commonwealth", which laws included s 79.[26] Section 79 specifically "picks up" laws relating to procedure, evidence and the competency of witnesses. It appears that Brennan CJ considered limitation laws to be procedural in nature.

CONCLUSION

The immediate issue in *Mewett* is unlikely to arise again because, as already mentioned, s 44 of the Comcare Act is effective to prevent Commonwealth common law liability from arising in respect of a cause of action which would accrue after the commencement date of s 44. The Commonwealth Parliament can control the Commonwealth's liability for the future through a provision like s 44. The case does, however, have wider implications. It is clear that the High Court has endorsed the principle that the Commonwealth's liability in contract and tort actions is a common law liability with only McHugh J saying that the liability is based purely on statute and no judges prepared to re-open this question. A bare majority held that removal of immunity from suit is effected by the Constitution. The minority put forward three different versions of how the Judiciary Act removes immunity from suit. This leave open the possibility that at some later time the Parliament may pass legislation which revives immunity from suit for a particular purpose. Whether such legislation would be valid is not clear.

It is reasonably clear that where there is a choice of law issue in a federal jurisdiction suit, s 79 of the Judiciary Act picks up the law of the place where the case is argued but that law may, in some circumstances, attract the law of another jurisdiction in tort claims. In contract claims it may be possible to apply a "common law of Australia" approach and say that the law to be applied, through the operation of s 80, is the proper law of the contract. That, in turn, may also point to the law of another jurisdiction.

25 Ibid at 554-555.
26 Ibid at 492-493.