# THE TROUBLE WITH HUMPHREY* IN WESTERN AUSTRALIA: ICONS OF THE CROWN OR IMPEDIMENTS TO THE PUBLIC?

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> One of the first actions of a loyal young Englishman who begins to study the law of the land is to read carefully the pages which are concerned with the King; and he learns with some surprise the ancient constitutional and legal principle that the King can do no wrong. He is surprised for this reason; that the whole course of his historical studies at school has led him to believe that at the material dates of English history the King was always doing wrong. ... It is not too much to say that the whole Constitution has been erected upon the assumption that the King not only is capable of doing wrong but is more likely to do wrong than other men if he is given the chance.
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> *Bold v The Attorney General*
> in A P Herbert *Uncommon Law*[1]

## STATUTES AND THE CROWN AT COMMON LAW

Until 20 June 1990 the strongest of presumptions existed in Anglo-Australian common law that the Crown was not bound by general statutes, that is to say, statutes which did not specifically refer to the Crown as being bound. However, on that day, the High Court delivered

* Sir Humphrey Appleby of *Yes Prime Minister*, J Lynn and A Jay (eds) *The Complete Yes Minister* (London: BBC Books, 1989).

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1. (London: Methuen, 1969 [first published in 1935]) 292.

its decision in *Bropho v State of Western Australia*[2] ("*Bropho*") and in the unanimous view of all seven members of the Bench, the strength of the presumption of Crown immunity from the operation of statutes was drastically curtailed.

The contrast which consequently exists between English, indeed now British, common law and that in Australia on this subject is all the more obvious in the light of the only definitive decision of the House of Lords on this matter, handed down on 30 November 1989 in *Lord Advocate v Dumbarton District Council*[3] ("*Dumbarton*"). Their Lordships unanimously affirmed the exclusion of the Crown from the operation of general statutes in the strongest possible terms. *Dumbarton*, in which the House of Lords determined that the common law on statutes and the Crown was the same in Scotland as it was in England, involved a conflict between different tiers of government, namely the Ministry of Defence on the one hand and Dumbarton District Council and Strathclyde Regional Council on the other. The two Councils were responsible for planning decisions and road closures on which the Ministry of Defence was impinging in the process of improving a security fence around a submarine base at Faslane. To that extent, *Dumbarton* had a strong factual resonance with the foundation case for the modern, extreme presumption of Crown immunity, *Province of Bombay v Municipal Corporation of the City of Bombay*[4] ("*Bombay*").

The High Court in *Bropho* was spared the problem of inter-governmental conflict, such as had bedevilled an early leading decision of that Court on this topic, *Roberts v Ahern*.[5] In *Bropho*, the question was simply whether the State of Western Australia and the Western Australian Development Corporation ("WADC") (this corporation being specified in its statute to be an emanation of the Crown) were bound to comply with the terms of the Western Australian Aboriginal Heritage Act 1972 ("the Act").

2. (1990) 93 ALR 207.
3. [1989] 3 WLR 1346; James Wolffe has commented on the passage of this litigation through the First Division of the Court of Session (J Wolffe "Crown Immunity from Regulatory Statutes" [1988] Pub L 339) and criticised the final result in the House of Lords (J Wolffe "Crown Immunity from Legislative Obligations" [1990] Pub L 14). P W Hogg *Liability of the Crown* 2nd edn (Ontario: Carswell, 1989) has affirmed the criticism of the common law presumption set forth in the first edition of that book.
4. [1947] AC 58.
5. (1904) 1 CLR 406.

The litigation arose over proposed redevelopment of the Swan Brewery site on Mounts Bay Road, Perth. The State owned the Swan Brewery site, and the WADC had commenced a redevelopment of the derelict buildings on that site. Robert Bropho is a person of Aboriginal descent who alleged that the Swan Brewery site was an Aboriginal site of "sacred, ritual and/or ceremonial ... importance and special significance within the meaning given to those terms"[6] in the Act.

Section 17 of the Act provides as follows:

A person who -

(a) excavates, destroys, damages, conceals or in any way alters any Aboriginal site; or

(b) in any way alters, damages, removes, destroys, conceals or who deals with in a manner not sanctioned by relevant Aboriginal custom, or assumes the possession, custody or control of, any object on or under an Aboriginal site, commits an offence unless he is acting with the authorisation of the Trustees in section 16 or the consent of the Minister under section 18.

*Bropho* was solely concerned with whether or not section 17 of the Act, not specified on its face to bind the Crown, affected the Crown in right of Western Australia and the WADC as an instrumentality of the Western Australian Crown.

The High Court's decision was framed in two judgments: that of Chief Justice Mason, Justices Deane, Dawson, Toohey, Gaudron and McHugh; and that of Justice Brennan who gave a separate and concurring judgment. The majority observed the undeniable existence of the presumption in the common law but concurrently noted the problem of the extension of the Crown immunity to the servants and agents of the Crown: such extension of the immunity may "offend notions of parity".[7] The majority said that the problem with the rule lay in ascertaining its content and operation which in more recent judicial authority, starting with *Bombay*, had given the presumption "the character of a formularised test".[8] The issue confronting the High Court was the line of authority stemming from *Bombay* to the effect that a statute would only bind the Crown if it contained express words to that effect, or if there was a

6. Supra n 2, 209.
7. Ibid, 213.
8. Ibid, 214.

"necessary implication" that the statute do so, and that such "necessary implication" meant that it "must be manifest, from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound".[9]

The majority found that the meaning of "manifest from the very terms of the statute" had constricted to "an eye of the needle test".[10] The rule as enunciated by the Privy Council in *Bombay* meant that the Crown would not be bound by necessary implication unless the statute was "wholly frustrated" (and the majority in the High Court emphasised the word "*wholly*"). This test would only be satisfied where a statute was dealing with a peculiarly Crown activity.

In short, the majority held that in this case, where 93 per cent of land in Western Australia was Crown land, and approximately 50 per cent of the land in the State was described as "vacant Crown land", "the Act would be extraordinarily ineffective to achieve its stated purpose of preserving Western Australia's Aboriginal sites and objects if it applied only in respect of the comparatively small proportion of the State which is not Crown land".[11] The process of reaching this robust and common sense conclusion was, however, subtle and finely shaded compared with some of the Court's other pronouncements on change in the last decade.

The motive for the majority's rethinking is apparent in their questioning whether sentiments such as Crown freedom from the operation of general statutes as "a sacred maxim", expressed in one British case in 1859,[12] had any relevance in Australia "to the question whether a legislative provision worded in general terms should be read down so that it is inapplicable to the activities of any of the employees of the myriad of governmental commercial and industrial instrumentalities covered by the shield of the Crown".[13] The majority answered this question, not by declaring the rule on Crown immunity from statutes to be obsolete, but rather, by finding a way to make practicable the application of the rule in a flexible form, relevant to the modern Australian community.

9. Ibid.
10. Ibid.
11. Ibid, 219-220.
12. *Moore v Smith* (1859) 5 Jur NS 892 Lord Campbell CJ, 893.
13. Supra n 2, 215.

The majority referred to the weight of authority in favour of the stringent test for Crown immunity, but did not bow to it. Their Honours confronted the argument that legislation in the past had been drafted with specific knowledge of the consequence of failing to refer to the Crown, but noted the failure of such an argument in the face of the reality of governmental activity and the range of modern statutes.

The majority found no compelling reason in logic for adhering to the inflexible rule of the past, and asserted that "a legislative intention to bind the Crown may be disclosed notwithstanding that it could not be said that that intention was 'manifest from the very terms' of the statute or that the purpose of the statute would otherwise be 'wholly frustrated'...".[14]

The crucial question thus becomes that of determining how the new, flexible rule will apply to statutes and the Crown in future. The majority view was that a legislative intention to bind the Crown could be found irrespective of the restrictive *Bombay* rule, and that once such an intent was found, the will of the legislature must prevail over the exercise of the presumption of Crown immunity. This legislative intention, the majority said, could be "found in the provisions of the statute - including its subject matter and disclosed purpose and policy - when construed in a context which includes permissible extrinsic aids".[15]

The majority Justices were at pains to stress that they were not abolishing the presumption that general words in a statute did not bind the Crown. What they could not accept, was that such a presumption should be enforced as a "stringent and rigid test" for excluding the Crown from the operation of statutes.[16] The majority were concerned as to the construction of statutes drafted in the light of *Bombay* and passed prior to the decision in *Bropho*. While acknowledging that the rigid tests of *Bombay* would be of general application to such statutes, the majority went on to say that the Crown might still be bound by such statutes if a legislative intent could be found. Such intent would presumably be discovered on the basis referred to above.[17]

14. Ibid, 217.
15. Ibid.
16. Ibid, 218.
17. Ibid. See text accompanying supra n 15 for the basis of discovering intent.

The majority said of legislation passed after *Bropho* that the strength of the presumption regarding Crown exemption "will depend upon the circumstances, including the content and purpose of the particular provision and the identity of the entity in respect of which the question of the applicability of the provision arises".[18] This latter point is of interest, as it recognises the reality of the modern Crown as fragmentary.

The majority took the two extreme examples of an attempt, on the one hand, to make the Sovereign in person liable to prosecution and conviction, and on the other hand, employees of a governmental corporation, such as the WADC, engaging in commercial activities in contravention of statutory provisions designed to safeguard and preserve places or objects.[19] This possible distinction between the application of a statute to the Sovereign individually or to a Crown instrumentality, as opposed to the application to employees or agents of the Crown was stressed in the decision of the majority.

The problem posed by this flexible reworking of the presumption regarding the Crown and statutes is to find a solid principle by which to calculate the possible binding effect of legislation on the Crown on future occasions. The facts in *Bropho* provided a relatively easy situation for the Court. The majority referred to the exceptionally large area of Western Australia which was Crown land, and which, under the *Bombay* test, would not have allowed of the operation of the Act. As previously noted, the majority would not allow the Act to be rendered so "extraordinarily ineffective".[20]

The majority concluded by referring again to "consideration of the subject matter and disclosed policy and purpose of the Act",[21] from which the "legislative intent" was extracted that Government employees should not be outside the prohibition on damaging Aboriginal sites or objects without appropriate authorisation or consent under the Act.

18. Supra n 2, 218.
19. Ibid 218-219. The concern for the personal position of the Sovereign is discordant in an otherwise subtle argument for change. The present heir to the throne is known to have indulged in under age drinking and to have committed speeding offences in his youth. The reference to the Sovereign signals judicial anxiety to limit the extremes of logic by involving a principle that common lawyers have difficulty with: the Crown personified. See the text after n 28 infra, for a possible explanation of the anxiety.
20. Supra n 11.
21. Supra n 2, 220.

It remains only to note that the majority were careful to pose the final result in terms of the binding effect of the Act on the employees of the WADC. That conclusion rendered unnecessary any enquiry as to the liability of the WADC or the Western Australian Government to prosecution for an offence against the Act. The majority observed that neither the WADC nor the Crown in right of Western Australia had any power to authorise employees or others to carry out activities in contravention of the statute. That is to say that neither the WADC nor the Crown had a capacity to dispense with the Act.[22]

The concurring judgment of Justice Brennan used *Sydney Harbour Trust Commissioners v Ryan*[23] as an example of the High Court on an earlier occasion distinguishing between areas of Crown activity which have been immune from the effect of statutory provisions, or contrariwise, had been bound by statutes.[24] Justice Brennan agreed that the presumption existed, but said that it "cannot be put any higher than this: that the Crown is not bound by statute unless a contrary intention can be discerned from all the relevant circumstances".[25] His Honour went on to say that

> [t]hose circumstances include the terms of the statute, its subject matter, the nature of mischief to be redressed, the general purpose and effect of the statute, and the nature of the activities of the Executive Government which would be affected if the Crown is bound".[26]

On the geographical distribution of Crown land in Western Australia, the inflexible *Bombay* test would, in the words of Justice Brennan, "eviscerate" the Act.[27] His Honour concluded that the test for interpretation of statutes in this regard should be the same for statutes passed before and after the decision in *Bropho*.[28] In this regard, his Honour was being forthright, where the judgment of the majority, appearing to allude to a distinction in this regard, had not provided workable tools to sustain the purported difference in approach to past and future legislation.

22. Ibid.
23. (1911) 13 CLR 358.
24. Supra n 2, 222.
25. Ibid.
26. Ibid.
27. Ibid.
28. Ibid, 223.

Some will complain that a formerly inflexible rule, that could be applied with almost mathematical precision, has now been replaced by a flexible test which will depend on a Court's assessment of a number of factors which will vary with the circumstances of each future case. The reality would seem to be that in future all regulatory and "mischief resolving" legislation will be presumed to bind the Crown, while, for example, the Crown's status will save it from the application of subordinate legislation administered by local councils. An example of potential future conflict would be the situation in Western Australia where swimming pool safety regulations are enforced under the Western Australian Local Government Act 1960 by local councils, so that safety fencing, required in other States under general legislation is required, if at all, in Western Australia pursuant to Local Government By-Laws. One can query whether a Court acting on *Bropho* would find in future that a swimming pool built on Crown land should comply with local council regulations requiring safety fencing.

The decision in *Bropho* may be subject to criticism for giving Courts flexible powers of interpretation, but the decision does set out general principles according to which the interpretation must be performed. The decision is both courageous and finely shaded, given that the decision is not concerned, as it at first seems, merely with a matter of statutory interpretation. The question of the relationship of statutes and the Crown is at heart a constitutional issue going to the equal application of the law. The decision in *Bropho* inevitably straddles the points of intersection between the Legislature, the Executive, and the Judiciary.

The High Court has adopted a wide discretionary power in determining the relationship of statutes to the Crown, but the reasoning in this area of public law was muted compared with some of the more recent assertions of judicial capacity in the private law area.[29] The Court did not approach the problem in terms of declaring a rule obsolete as Justice Kirby, President of the New South Wales Court of Appeal did in *Halabi v Westpac Banking Corporation*[30]. Rather, without explaining its reason-

29. See for example *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107; *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197.

30. (1989) 17 NSWLR 26.

ing in so many words, the High Court opted for the approach of Justice McHugh in *Halabi*, employing an evolutionary approach to common law principles whose rationale has been obscured by change in social circumstances. In the evolution of the law nothing is excised but all is retained while being developed or incorporated into wider general principles.

The other point of jurisprudential interest is the entirely different approaches adopted by the ultimate appellate Courts in Australia and the United Kingdom. *Bropho* is concerned with applying the reasonably ascertainable intention of the Legislature, recognising that often the intention will be that the Crown be bound, even though that is not stated, and secondly, emphasising that the Crown may not dispense with the operation of statutes in favour of its employees or agents. On the other hand, in *Dumbarton* Lord Keith of Kinkel, with whom the other Lords concurred, viewed the issue not from the point of the intent of Parliament, or a "consumer" concern with the equal application of statutory provisions, but rather with concern solely for the position of the Crown. This was ascertained by reference to the inflexible *Bombay* test. What the House of Lords decision did do was to remove any remaining reference in Anglo-Scottish law to Crown immunity from the operation of general statutes depending on a pre-existing prerogative or right in the Crown. In British law, statutes are to be construed for their relationship to the Crown simply by reference to the strict *Bombay* test.

There is an irony that neither ultimate Court referred to the long and involved historical evolution of the presumption. Failure to do this has allowed the High Court to drift unobserved to a position closely analogous with that expounded by Sir Edward Coke as Chief Justice of the King's Bench in the *Magdalen College Case*[31] nearly 400 years ago. Coke was attempting to find a balance between those occasions in which mischief-rectifying statutes should command the entire community including the King, and those instances in which the special position of the King required him to be outside the purview of legislation. Coke expounded inclusive and exclusive tests for the Crown's position, which tests have been progressively diluted and forgotten with the passing of

31. (1615) 11 Co Rep 66B; 77 ER 1235

the years. The High Court has commendably given itself and inferior Australian Courts capacity to find an appropriate balance in the future. The House of Lords, on the other hand, has failed to see the necessity to find any balance whatsoever between the position of the Crown and the will of Parliament.

## EXECUTIVE REACTION IN WESTERN AUSTRALIA TO *BROPHO*

Just two weeks after special leave was granted by the High Court in *Bropho* in late October 1989, a Cabinet minute emerged authorising the drafting of an amendment to the Western Australian Interpretation Act 1984 to entrench the *Bombay* rule. A Bill to this effect was duly introduced into the Western Australian Legislative Council three weeks after the decision was handed down in *Bropho*. Not only did the Bill purport retrospectively to re-apply a rigid rule of Crown immunity, it went on to attempt to expand that immunity in favour of persons contracting with the Crown. This is in line with the decision of the High Court in *Bradken Consolidated Ltd v The Broken Hill Proprietary Ltd*,[32] ("*Bradken*"), but the first limb of *Bradken*, affirming *Bombay*, had just been destroyed by *Bropho*, and this second limb, regarding the extension of Crown immunity to contractors, was, at the time that the Bill was introduced, about to come under attack in the High Court in *Australia Conservation Foundation Inc and Conservation Council of South Australia v The State of South Australia and Ophix Finance Corp Pty Ltd*[33] ("*Ophix*").

32. (1979) 145 CLR 107.

33. Special leave application to the High Court granted on 23 August 1990. The *Ophix* case concerns proposed commercial development for tourism of the Wilpena Pound area in the Flinders Ranges. Faced with the prospect of appeal to the High Court, the Premier of South Australia, Mr John Bannon, showed that elected members of the Executive side of government could play "Hacker" to match the activities of the "Sir Humphreys". A mere fortnight after the granting of special leave, Mr Bannon announced that his Government would introduce legislation to put the development beyond legal challenge. He said such legislation was necessary to cut through legal delays and "protracted guerilla warfare" now being waged in the Courts: The Advertiser 7 September 1990.

This Bill was clandestine in its preparation and precipitate in its introduction. Discussion was afforded neither to the community at large, nor to the legal profession.

The High Court decision in *Bropho* was in complete accord with the paradigm evolved by the Court over the last decade in cases such as *Townsville Hospitals Board v Council of the City of Townsville*[34] and *Groves v The Commonwealth of Australia*[35] to the effect that the law should apply uniformly and include the Government as well as the general community, it being for legislatures to spell out any exception from such generality of application. The Western Australian legislative initiative was an unblushing attack on a process of coherent evolution on the part of the High Court which was producing a paradigm appropriate to modern Australian conditions. Despite the vehemence of expression in the Bill, the existence of many Crowns in the Australian federation defeats much of the purpose underlying the Bill. The Commonwealth Judiciary Act 1903 ("Judiciary Act") will be of increasing utility,[36] and the Bill is constitutionally incompetent to deal with the major litigated problem raised by the presumption since *Bradken* over a decade ago, that of whether the Commonwealth Trade Practices Act 1974 applies to State Crowns. This raises the different issue of different tiers of Government referred to above,[37] and not resolved in detail in *Bropho*.

The Western Australian Bill is not merely a seemingly petulant attempt at discordance in the face of a successfully evolving pattern in Australian public law: its folly is made complete upon the realization that the remainder of the common law world outside the United Kingdom (where the law is curiously ossifying on this subject) is examining, if not yet embracing, a determination to level the playing field between government and community. Accordingly, Supreme Courts have destroyed[38] or made flexible[39] the presumption in favour of governmental immunity

34. (1982) 149 CLR 282.
35. (1982) 150 CLR 113.
36. See *The Commonwealth of Australia v Evans Deakin Industries Limited* (1986) 161 CLR 254 ("*Evans Deakin*").
37. See text at 689 above.
38. *State of West Bengal v Corporation of Calcutta* [1967] AIR 997.
39. *Nardone v United States* 302 US 379 (1937).

from the operation of statutes. Legislatures have reversed the presumption.[40] Law Reform Commissions have reported, or are in the process of preparing reports on problems of litigation with the Crown, or are particularly looking at the relationship of the Crown to statutes.[41] The Canadian and New Zealand Law Reform Commission reports are still pending, but the New South Wales Law Reform Commission report on *Proceedings By and Against The Crown*[42] recommended a flexible approach to the presumption which would tend overwhelmingly to the Crown being bound, while the South Australian and Ontario reports[43] recommended a legislative reversal of the presumption.

Against this array of considered views and measured reporting, the Western Australian Government has set the Ship (or perhaps more aptly the Canoe) of State to defy the flood tide of public law evolution. One of the justifications for a Federal system is to allow State Legislatures some scope for trying novel legislative solutions to social issues: the State as social laboratory. The Western Australian Government appears to have misunderstood the metaphor and opted for the State as legal museum.

40. Interpretation Act 1979 RSBC c 206 s 14 (first amended in this fashion in 1974) and Interpretation Act 1981 Prince Edward Island c 18 s 14.
41. New South Wales Law Reform Commission *Proceedings By and Against The Crown* (Report no 24 1975); Law Reform Committee of South Australian *Proceedings By and Against The Crown* (Report no 104 1987) (Justice Zelling, Chairman of the Committee, referred to the inutility of the standard common law presumption as early as 1977 in "The Scope of Judicial Development of The Law" in *Proceedings and Papers of the Fifth Commonwealth Law Conference* 1977, 47); Ontario Law Reform Commission *Report on the Liability of the Crown* (1989). The following are preliminary papers: Law Reform Commission of Canada *The Legal Status of Federal Administration* (Working Paper no 40 1985); Law Reform Commission of Canada *Towards a Modern Federal Administrative Law* (Consultation Paper 1987). The Canadian Law Reform Commission approach has been criticised by D Cohen "Thinking about the State: Law Reform and the Crown in Canada" (1986) 24 Osgoode Hall LJ 379; also preliminary is the New Zealand Law Commission on reference "Legislation and its Interpretation" *The Acts Interpretation Act 1924 and Related Legislation* (Preliminary Paper no 1 1987). The most recent New Zealand publication in the field is S Price "Crown Immunity on Trial - the Desirability and Practicability of Enforcing Statute Law Against the Crown" (1990) 20 Vict U Well L Rev 213.
42. Ibid, para 14.14 and following.
43. Supra n 41.

## THE WESTERN AUSTRALIAN CROWN SUITS ACT 1947

The Western Australian Crown Suits Act 1947 has, appropriately in the light of the above, become a museum piece. However, in the light of the Government's response to the judicially restrained remeasuring in *Bropho*, the Western Australian public can hardly expect rapid overhaul of this statute's creaking machinery.

In the light of modern jurisprudential developments, the most glaring failure in the Crown Suits Act is its restrictive reference to procedural equality between the Crown and other parties in litigation, without reference to equality of substantive legal rights between the Crown and such parties. Sections 5 and 9 of the Crown Suits Act provide for the Crown to be sued "in the same manner" as a subject, and the "process" is to be available to both Crown and subjects. Faced with this restrictive requirement for procedural equality only, and not equality of substantive legal rights, members of the Western Australian public are unable to rely on the growing body of authority resting on section 64 of the Judiciary Act. That section bestows equality of substantive legal rights in litigation between the Crown and subjects, and the High Court,[44] and in its wake, State Supreme Courts[45] have found a compulsion for the Commonwealth Crown to comply with the terms of State legislation. This had already started to undercut the severity of the *Bombay* test on Crown immunity from statutory provisions. Such an approach is in complete contrast with the West Australian anti-*Bropho* Bill. This antipathy is unlikely to encourage the legislative change effected in much of Australia in the last two decades regarding the next subject for review: vicarious liability for police torts.

44. *Maguire v Simpson* (1977) 139 CLR 362; *Evans Deakin* supra n 36.
45. *DTR Securities Pty Ltd v Deputy Commissioner of Taxation for Commonwealth of Australia* (1987) 8 NSWLR 204; *Verwayen v The Commonwealth* [1988] Aust Torts Rep 67,617; *Strods v The Commonwealth* [1982] 2 NSWLR 182.

## POLICE TORTS AND THE POSITION OF THE CROWN IN WESTERN AUSTRALIA

Within the Commonwealth only three jurisdictions, Western Australia, Victoria and Tasmania retain the common law theory that the Crown is not vicariously liable for the torts of police officers committed in the course of performing their duties.[46] The inability of liability for police torts to pass vicariously to the Crown finds its authoritive statement in the High Court decision in *Enever v The King*[47] ("*Enever*"). The writer has elsewhere attacked[48] this decision as being based on analogies from the turn of the century with other "employees" such as school teachers, ships' masters, and doctors in hospitals who did not pass their tortious liability to their "employers". The common law has since changed its attitude with respect to such persons. However, in 1986 the High Court delivered the decision in *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd*[49] ("*Oceanic Crest*") which explored at length the question of liability of an employer for torts committed by an employee performing functions and duties bestowed on him by statute. These facts are directly analogous to the position of police officers, working under statutory and common law powers, particularly the power of arrest.

46. The (Cth) Australian Federal Police Act 1979 s 64B, (Qld) Police Act 1937 s 69B, and (NT) Police Administration Act 1978 s 163 all adopted the Australian Law Reform Commission recommendations in *Complaints Against Police* (Report no 1 1975) and *Complaints Against Police: Supplementary Report* (Report no 9 1978). The (SA) Crown Proceedings Act 1972 s 10(2) purports to deal with the position of all Crown employees exercising independent discretions, but *State of South Australia v Kubicki* (1987) 46 SASR 282 has cast doubt on its efficacy. New South Wales made an example of itself and why legislation is so often less successful in reaching an appropriate response to a socio-legal problem: pursuant to ss 7A and 26A (inserted in 1978) of the (NSW) Police Regulation Act 1899 it became almost impossible to sue individual police officers in tort. This was ameliorated by the (NSW) Law Reform (Vicarious Liability) Act 1983 which made possible suit against the Crown, even though individual police tortfeasors were legislatively protected. See *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 Murphy J dissenting, 651 on the preferability of adjusting the common law, over legislating for change.
47. (1906) 3 CLR 969.
48. S Churches "'Bona Fide' Police Torts and Crown Immunity: A Paradigm of the Case for Judge made Law" (1980) 6 U Tas LR 294.
49. (1986) 160 CLR 626.

The employee in *Oceanic Crest* was a pilot employed by Pilbara Harbour Services, but the majority (Chief Justice Gibbs, Justices Wilson and Dawson) found that the pilot's functions were determined by a statute, and consequently there was not merely an absence of control by Pilbara Harbour Services, but a legal inability on the part of the company to control its pilot employee. The minority (Justices Brennan and Deane) found that Pilbara Harbour Services, as a private and non-Crown instrumentality, could be vicariously liable for the torts of the pilot, despite his acting under statutory authority.

In the present climate, apparently unconducive as it is in Western Australia to legislative reform of areas such as this, it rests with court lawyers to plot a course forward which will assist the High Court[50] in evolving a new and comprehensive rubric on the vicarious liability of employers for employees performing functions under a duty cast upon them by law.

An historical approach would note that *Enever* rested theoretically on the judgment of Chief Justice Erle in *Tobin v The Queen*[51] to the effect that where a duty to be performed is imposed by law, and not by the will of the employer, the employer is not liable vicariously for the employee's torts. The authorities on which *Tobin* was reasoned are defective, and the decision in *Tobin* fell curiously and rapidly out of step with the developing law on the liability of public bodies in the final third of the nineteenth century.[52] The decision in *Tobin* has been attacked decisively[53] and trenchantly[54] by eminent Australian academics.

To win the High Court to a view that *Enever* should no longer be strictly applied, an attempt will have to be made to provide a general theory of vicarious liability that will encompass employees performing functions directed by law. An attempt might be made in that direction by

50. I apologise for this emphasis on the High Court, but as *Bropho* supra n 2 illustrates, in accordance with the doctrine of stare decisis, in the Australian appellate hierarchy only the High Court can alter precedent bearing the imprimatur of the High Court or House of Lords.
51. (1864) 16 CB(NS) 310; 143 ER 1148.
52. Supra n 48, 300-301.
53. Z Cowen "The Armed Forces of the Crown" (1950) 66 LQR 478, 484.
54. G Sawer "Implication and the Constitution. Part I" (1948-1950) 4 Res Jud 14, 17-18.

arguing the passing of all employees' liability where their functions are integrated into a business.[55] A robust view would then be pursued as to the necessary functions of Government, including policing, constituting a "business".[56]

Notice might also be taken of recent cases such as *Cowell v Corrective Services Commission of New South Wales*[57] in which the New South Wales Court of Appeal was divided as to the application of *Enever* on the facts, Justice McHugh in the minority finding vicarious liability for false imprisonment by a gaoler to rest on the Crown in right of New South Wales. However, there can be no avoiding an analysis of *Oceanic Crest*.

It is apparent from the judgment of Chief Justice Gibbs in *Oceanic Crest* that counsel for the appellant[58] argued both that the modern principle of vicarious liability allowed an employer to be liable even if the employee performed work done in the exercise of special skill or independent judgment, and also that the English test of integration into a business of an employee's functions would indicate vicarious liability for the actions of the pilot in that case. The majority were not prepared to move from the position enunciated in *Enever* and reinforced in *Fowles v Eastern and Australian Steamship Co Ltd*[59] that no liability passed for torts committed while acting in performance of a duty imposed by law. However, with regard to the issue of the police as constables acting under statutory powers, and common law powers of arrest, it is notable that a number of cases from the time when railway companies employed their own police indicate that private employers of constables have been found by courts to be vicariously liable for torts committed by such employees.[60]

55. See *Stevenson Jordan and Harrison Ltd v Macdonald and Evans* [1952] 1 TLR 101 Denning LJ, 111.
56. *Town Investments Ltd v Department of the Environment* [1978] AC 359 Lord Diplock, 385.
57. (1988) 13 NSWLR 714.
58. D K Malcolm QC as he then was.
59. [1916] 2 AC 556. The majority in *Oceanic Crest* did not dismiss counsel's argument as idle, but held firm to *Enever* on the basis that absence of liability in the employer did not betoken a severance of the employer - employee relationship.
60. See supra n 49 Gibbs CJ, 638 and Churches supra n 48, 302 and 314.

Against the adherence to authority by the majority in *Oceanic Crest* might be pitted the decision of other common law Courts to allow vicarious liability for police torts to pass to the State. Thus, for example, the Appellate Division in South Africa determined in 1979 that the law should change comprehensively in this matter,[61] and in 1983 the National Court of Papua New Guinea determined similarly.[62] However, it is in the dissenting judgments of Justices Brennan and Deane in *Oceanic Crest* that assistance is found closest to home.

The heart of Justice Brennan's judgment on this area[63] condenses in three pages the problem of non-liability of the Crown or public authority for the actions of persons exercising independent responsibilities cast on them by law where the Crown or public authority have no authority themselves to discharge that responsibility or to control its discharge. This is because the employee, in discharging independent responsibility is not regarded as a servant of the Crown or public authority. Put another way, what the employee does in discharging independent responsibility is not a function which the employer is authorised to perform.

In distinguishing between Crown or statutory authorities on the one hand, and the possible liability of private employers on the other, Justice Brennan said:

> It is only when the functions of an employer are so limited by statute as to exclude the function performed by an employee in discharging his statutory responsibility that the employer is immune from liability for the employee's negligence in discharging that responsibility. But a trading corporation whose objects are advanced by the employment of servants to discharge independent statutory responsibilities and whose powers extend to the employment of servants to advance the corporate objects may be held liable on the same footing as railway companies employing constables....[64]

True it is that the common law jealously guards what has become increasingly a legal fiction, the independence of the police from direction by the Executive, but Justice Brennan's reference to "corporate objects" should be taken in the context of the entirety of government as a "business". On that basis, neither physical nor legal capacity to direct aspects of police functions would be necessary for the Crown to become vicariously liable for police torts.

61. *Minister of Police v Gamble* 1979 (4) SA 759 [AD].
62. *Kofowei v State of Papua New Guinea* [1983] PNGLR 449.
63. Supra n 49, 662-664.
64. Ibid, 664.

Nearly the entirety of Justice Deane's judgment in *Oceanic Crest* is devoted to wrestling with the question of vicarious liability for employees performing independent functions.[65] Justice Deane not only found the employer vicariously liable for the pilot's torts, but he took care to raise the possibility that a public authority or the Crown as employer of a pilot could also become vicariously responsible. His Honour said:

> It should not be inferred from the above that I would leave the authority of *Fowles* undisturbed even in a case where the negligent pilot is employed by the Crown or by a government instrumentality. As I have indicated, there is room for arguing that it is unreal to see the role of a licenced pilot in a case such as *Fowles* as being that of a public officer entrusted with the performance of public duties in the sense referred to by Starke J. and Dixon J. in *Field v. Nott* and by Dixon J. in *Little v. The Commonwealth* and that the existence and extent of the liability of the Crown or a government instrumentality for the negligence of a pilot in its employ should be determined by reference to the principles of law and statutory provisions which govern the liability of the Crown or a government instrumentality for the negligence of an ordinary employee in a trading activity which is carried on for reward.[66]

His Honour did not have to decide the issue. It remains to notice, of course, that the police are not employees of the Government in the sense of being employees "in a trading activity which is carried on for reward". Therein lies the utility in recognising the "business" of government as a composite, if heterogeneous, whole, which is not to be analysed solely by reference to the concepts of privately conducted business which is operated for simple monetary advantage.

The practicalities of change in this area of law are apparent. If the concept of vicarious liability is reduced to a simple "independent officer" embracing proposition, persons presently employed to perform statutory functions or exercise private discretions pursuant to the common law will be able to pass their tortious liability to their employers. The utility of pursuing an employer, who is equipped to protect himself with a general policy of insurance, was recognised at least as early as 1862 by Justice Willes in *Limpus v London General Omnibus Co.*[67]

65. Ibid, 673-679.
66. Ibid, 679.
67. (1862) 1 H & C 526, 539; 158 ER 993, 998.

In *Oceanic Crest* there was no failure to reclaim damages, as the pilot's tort liability was passed to the company which owned the ship that he was piloting. The litigation before the High Court concerned an attempt by that company to make the pilot's employer liable as a contributory. But for police officers,[68] prison officers[69] and judicial officers,[70] to name but some of the public officials that recent case law has referred to as being personally liable for their torts, a broadening of the principles of vicarious liability could only be an improvement. If legislation to rectify this problem cannot be expected from the Governmental glacier in Western Australia then it is to the Courts, and eventually the High Court, to which we must turn to improve the position of public officer tortfeasors, and members of the public as victims, in accordance with modern community requirements.[71]

In the last decade, Australian Courts have continued to apply the rule in *Enever* as a comprehensive authority on the subject of Crown liability for police torts.[72] The reported cases parade victims left suing individual tortfeasor police officers. The reported cases are only the tip of the tort iceberg, as the bulk of victims of police torts in jurisdictions applying *Enever* will have received legal opinion that they cannot sue the Crown standing behind the police officer.

On the subject of principled curial reworking of the common law, in general, and with particular regard to the issue of Crown liability for police torts, the words of John Doyle QC, Solicitor General for South Australia, are apposite. Doyle was referring to the work of all lawyers, not merely judges. He concluded:

> [I]f change is occurring, and if it does not simply happen, it must be in part the result of conscious or unconscious attitudes of those involved in the law. Those attitudes are shaped by numerous influences. We should aim to make ours an articulate, significant and intelligent influence.[73]

68. *Irvin v Whitrod (No.2)* [1978] Qd R 271; *Griffiths v Haines* [1984] 3 NSWLR 653 ("*Griffiths*"); *Skuse v Commonwealth of Australia* (1985) 62 ALR 108 ("*Skuse*").
69. Supra n 57.
70. *Rajski v Powell* (1987) 11 NSWLR 522.
71. See M McHugh "The Law-making Function of the Judicial Process" (1988) 62 ALJ 15 and 116; B Horrigan "Taking the High Court's Jurisprudence Seriously" (1990) 20 Qld Law Soc J 143.
72. See *Griffiths* and *Skuse* supra n 68.
73. J Doyle "The Future in the Distance" paper presented to the Law Society of Western Australia 1990 Summer School, Perth (WA) February 1990, 44.

# POSTSCRIPT

## I. Vicarious Liability - *Edna Bropho*

Since this article was submitted in draft form, *Edna Bropho v The State of Western Australia* ("*Edna Bropho*") has been argued in the Supreme Court of Western Australia and decided.[74] The plaintiffs argued that the State of Western Australia is vicariously liable for tortious acts of the police. Master White accepted the binding authority of *Enever* and judgments resting on it, but concluded:

> However, I do not feel able to hold that the plaintiffs' claims are manifestly groundless or that they plainly cannot succeed. I am of the view that the question whether at the time of the actions complained of the police officers concerned were acting under the independent authority conferred upon them by the common law or by statute or were acting at the direction and under the control of their superiors is, at this stage, arguable and that it is not appropriate that the issues be resolved summarily by way of a striking out order, thereby depriving the plaintiffs of the opportunity to have their case heard and determined in the ordinary way.[75]

The appeal period has elapsed since this judgment, and the matter is, at the time of writing, moving towards trial.

## II. *Bropho* - Legal Professional Reaction

At the time of writing, legal professional reaction to the High Court decision in *Bropho* is starting to materialise. Justice Jacobs of the South Australian Supreme Court has remarked on this "most recent joyride of the High Court".[76] The editor of the Australian Law Journal, Starke QC, has expressed ill-concealed distaste for *Bropho*.[77] The principal criticism of this "radical judgment" is that the result is "pure legislation", which work should be left to legislatures. Mr Starke dismissed the majority suggestion, that legislatures did not always consciously advert to the position of the Crown in respect of legislation, as "purely conjectural". This would appear to be more apt to his own notion of the inten ion of

74. (Unreported) Supreme Court of Western Australia 31 August 1990 no 8452 (Master White).
75. Ibid, 9-10.
76. The remark was made when proposing a toast at the 1990 South Australian Law Society Dinner, (1990) 12 Bulletin of the Law Society of South Australia.
77. J G Starke "The High Court's new approach to the question of whether the Crown is bound by a statute" (1990) 64 ALJ 527.

a modern legislature, "concerned generally to exclude the application of its statutes to agents or agencies of the Executive".[78]

Here lies the whole point of this area of law in a historical context. The political settlement of 1689 was designed to establish the authority of the Crown-in-Parliament over the Crown alone. This settlement followed a century long wrangle over whether, for example, Parliament even had the capacity to legislate in the field of the Crown's prerogative. The Bill of Rights in 1689 settled the absolute primacy of Parliament. Why, 300 years after the event, it should be assumed that the intent of legislatures is to defer to the Crown by excluding, without written reference, the general application of statutes to the Executive and its creatures, defeats the writer's understanding.

The conjecture on the part of Mr Starke is invalid in the light of the publicly available example cited by the New South Wales Law Reform Commission[79] of a New South Wales parliamentarian asking the Minister introducing the New South Wales Factories, Shops and Industries Bill in 1962 whether it should specifically bind the Crown. The Minister replied, "[t]he hon. member is not suggesting that the Crown will not be bound to comply with the provisions of the measure?"[80] Nine years later, in *Downs v Williams,*[81] the High Court found that the Crown in right of New South Wales did not have to comply with the safe fencing provision of the Act.

The role of the public service also requires consideration. What realistic hope is there that Parliaments will improve the lot of the citizen in relation to the Crown when Australian public servants, who control the flow and content of legislation through legislatures, in general adopt a consistently seigneurial attitude to Crown immunities. The Canadian experience at least shows a more empathetic response from public servants towards the public whom they are meant to serve.[82]

78. Ibid, 528.
79. *Proceedings By and Against The Crown* supra n 41, para 14.11.
80. New South Wales, Legislative Assembly 1962 *Debates* vol 43, 2038.
81. (1971) 126 CLR 61.
82. Supra n 41.

## III. The Danger of Retention

Recent events in Western Australia, in particular the State Government's much publicised commercial dealings, and a State police force under regular scrutiny in the media for possible excesses, require that these anomalies in the law be removed to allow proper law enforcement, and citizens a full and fair opportunity to seek redress for alleged wrongs in the Courts. There is little point in having a level playing field in the shape of a Crown Suits Act if the rules are preserved in ante-diluvian form to maintain Government possession of the ball.

The legal profession must expect to lend its reasoned support to change in this field. The alternative is that lawyers find themselves tending an intricate but obsolescent apparatus that amuses, teases and tests their intellectual calibre, but bears no relationship to community requirements. The articles referred to above[83] by Justice McHugh and Dr Horrigan are suitable starting points for practitioners to reassure themselves that the work of the High Court in a decision such as *Bropho* is not idiosyncratic tinkering, but a principled and reasoned evolution of the law. When an aspect of the law required congruity in the context of the rest of the law as much as did statutes and the Crown, or requires balance and harmony as much as police torts and the Crown, debate as to the source of recognition of need and in turn implementation of that congruity (that is, between Parliament and the Courts) is sterile. But for a Parliament at the behest of the Executive to reintroduce old law predating that freshly evolved by the Courts is worse than sterile: it is the retention of a dangerously malfunctioning gene.[84]

83. Supra n 71. The McHugh article was originally an address to the Law Society of Western Australia Summer School in 1988. One would hope that the combination of that address and that of John Doyle QC in 1990, supra n 73 to be impacting on the local profession.

84. In conclusion, I acknowledge my personal involvement in various capacities in *Bropho* supra n 2, in *Edna Bropho* supra n 74 and *Ophix* supra n 33. The views expressed in respect of these cases are intended for general application, and not as mere partisan commentary.