THE SOURCE OF GOVERNMENT POWER

Paper Delivered By Mark Robinson at a BLEC Conference "Government Liability in Contract, Tort and Administrative Law" In Sydney on 24th & 25th February 1993

A. INTRODUCTION

You act for a large private body investing a huge sum of money in a project in conjunction with the State government. Eighteen months have been put into the negotiations. The contract to be executed is 4 cm thick and is to be signed by the Minister at 3:00 pm today. Out of the blue one of the project's financiers asks your immediate advice as to what is the source of power of the government to enter into the contract. At the same time, the Minister's office calls and wants to know why he is executing the contract and if so, pursuant to what power or authority. Is it prerogative power? Is it statutory power under an Act? Which Act? What if there is a State election imminent. Does the Minister have power to execute the contract in the lead up to the State election? Is the decision to enter into the contract reviewable?

These are questions often asked towards the end of a transaction. They should have been asked and answered 18 months ago at the initial stages.

The issues I will touch on this morning are the foundations of government liability in contract, tort and administrative law. Identification, examination and consideration of the constitutional and statutory power of a government entity is simply the most fundamental step in ultimately understanding government liability.

I will briefly look at:

- identifying the source of government power;
- what is the source of government power to contract;
- what is the source of government power in the context of judicial review and the concept of justiciability; acting beyond power; and
- I will touch on some recent developments in Crown immunity and the doctrine of shield of the Crown.

Identifying the parties

When considering the exercise of government power be it contract power or decision making power, the starting point should always be: Precisely who are you proposing to deal with? Is it:

- the state or federal executive government;
- the Minister or a department;
- a division, branch or section of a department;
- a statutory authority or instrumentality;
- a government business enterprise;
- an agent or employee of the Crown; or
- a combination of some or all of these bodies.

It is crucial that once the party you are proposing to deal with has been identified, that that entity be kept in mind throughout the transaction or dealing. The reason is that different legal implications arise when considering the powers and functions of the executive as opposed to those of individuals or instrumentalities of (or emanating from) the Crown. It is best to set it out in writing at an early stage.

It is equally important to ensure that a private party who is dealing with Government convey to the government precisely who that party is and whether it is a company, a private individual, a partnership or joint venture or a combination.

B. IDENTIFYING THE SOURCE OF POWER

Once you have identified the parties to the transaction or dealing, a threshold question is: what is the source and the basis of authority of the government or government entity to enter into this particular transaction or make the decision?

For practical purposes, government power in Australia is derived from:

- the Commonwealth of Australia Constitution Act;
- the various State Constitution Acts; and
- the Australia Act 1986 (Cth).

[Best sources on these Acts include: On the Commonwealth Constitution; Pat Lane, **Lane's Commentary on the Australian Constitution**, 1986, Law Book Co, Sydney (and the 4th cumulative supplement, 1992); On the State Constitutions; Darrell Lumb, **The Constitution of the Australian States**, 5th edition, 1991, University of Queensland Press; The Symposium on State and Territory Constitutional Law in (1992) 3 **Public Law Review** pp3-72 and 90-112; On the Australia Acts, see the articles in (1987) 27 **Federal Law Review** 25, (1987) 61 **Australian Law Journal** 779, and, (1988) 14 **Monash University Law Review** 298].

You will generally not need to look beyond these Acts to ascertain the constitutional source of government power. It is timely to recall the preamble to the Australia Act which states that it is:

> *"An Act to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation".*

We may treat these Acts as, in effect, the "ultimate" sources of power in relation to Australian law. [Mason CJ stated in **Australian Capital Television Pty Ltd v Commonwealth [No 2]** [1992] 66 ALJR 695 at 703, that the Australia Act 1986 (UK) "marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people"]. Deriving from these Acts are three categories of government power. They are:

- legislative power;
- executive power; and
- judicial power.

In this paper, I will focus on the executive power of government.

There are three sources of executive power and capacity deriving from constitutional power. They are:

- statutory power conferred by constitutionally valid legislation;
- prerogative power; and
- a capacity (rather than a power) to act in the execution of these powers that is neither statutory nor prerogative (such as, for example, capacity to act in the exercise of private rights as if the Crown were a natural person).

[These categories of powers or capacities are described by Brennan J in **Davis v Commonwealth** (1988) 166 CLR 79 at 108-110.]

Once you have identified the immediate sources and categories of relevant power, you must be aware of the background matrix, if any, involving:

- Australian constitutional conventions;
- the nature of representative and responsible government (including public accountability) [see the recent discussions in the **Australian Capital Television case, op cit and Nationwide News Pty Ltd v Wills** [1992] 66 ALJR 658]; and

- the legal, practical and commercial risks involved in dealing with government, including crown privileges and immunities; the possible problems in seeking enforceable guarantees and indemnities; remedies and damages against the government and enforcing judgments; doctrines such as executive necessity, or fettering of executive discretion; and the power of the parliament to pass legislation reversing any arrangements entered into or decision made [see, Peter Hogg **Liability of the Crown** 2nd Ed, 1989, Law Book Co; and Mark Aronson and Harry Whitmore **Public Torts and Contracts**, 1982, Law Book Co].

The source of government power is only one link in a broad chain of understanding in constitutional and administrative law that involves:

- ability to identify source of power;
- understanding of the nature of government power;
- a recognition of the limits of government power; which leads to:
    - the source of government liability.

My aim in this part of the paper is only to give some limited guidance in identifying the source of power and to suggest to you the benefits of considering the source of power at an early stage.

Ascertaining the source of government power is largely relevant to:

- the government's contract power; and
- the availability of certain administrative law remedies.

C. THE SOURCE OF GOVERNMENT POWER TO ENTER INTO CONTRACTS

Constitutional Limitations - Commonwealth

Commonwealth executive power has been held to derive from section 61 of the Commonwealth Constitution which provides that executive power is exercisable by the Governor-General and extends "to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." It is not obvious from the language of section 61 that it vests full executive power in the Governor-General. However, the High Court has repeatedly held section 61 as the source of power and that it includes all the prerogatives relevant to the Commonwealth. [See: **Davis v Commonwealth** (1988) 166 CLR 79; Leslie Zines "Commentary" in HV Evatt **The Royal Prerogative**, 1987, Law Book Co, at pp C3-C7; Harold Renfree **The Executive Power of the Commonwealth of Australia**, 1984, Law Book Co, Chapter 4 "Executive Power and the Crown Prerogative; and the discussion in the **Report of the Advisory Committee to the Constitutional Commission**, 1987, AGPS, p51-59.]

It may be that the Commonwealth's power to enter into contracts is limited to the subject matter over which the Commonwealth has power to make legislation. Section 51 of the Constitution provides for specific,

enumerated heads of power enabling the Commonwealth to make laws with respect to those specific matters. The Commonwealth executive arguably does not have the power to enter into contracts with respect to matters about which the Commonwealth could not legislate. [See, for example, **Commonwealth v Colonial Combing, Spinning and Weaving Co Limited** (1922) 31 CLR 421]. The limited power of the Commonwealth executive to contract can be expanded by taking into account the incidental powers found in placitum 39 of section 51 of the Constitution. One example of the use of the incidental powers is in **Attorney General (Vic) v Commonwealth** (1935) 52 CLR 533 in which a factory established by the executive during war time to manufacture uniforms and clothing for the defence forces was held able to extend its operations by manufacturing clothing for sale to outside bodies. [see further: Renfree, **op cit**, pp 469-473 and **Nationwide News Pty Ltd v Wills** [1992] 66 ALJR 658 at 660, per Mason CJ].

Commonwealth legislative power, and consequently its executive power also extends to some matters not covered by the Commonwealth Constitution at all. These powers are partly based on the status of the Commonwealth as an independent body politic. An example of these inherent powers is in **Davis v Commonwealth** (1988) 166 CLR 79 where the majority of Mason CJ, Brennan, Deane and Gaudron JJ held that the legislative powers of the Commonwealth Parliament extended beyond the specific powers conferred on it by the Constitution and included such powers as may be deduced from the establishment and nature of the Commonwealth as a polity. In that case the Commonwealth was held able to establish the Australian Bicentennial Authority, a company incorporated in the ACT pursuant to Commonwealth executive power (at p94). The object of the Authority was to plan and implement celebrations to commemorate the bicentennary in 1988 of the first European settlement in Australia.

Constitutional Limitations - State

The power of the executive government of the States to enter into contracts is probably at least as wide as the State's legislation making powers. These powers are very wide indeed. In New South Wales, section 5 of the Constitution Act 1902 (NSW) provides that the New South Wales Parliament has the power to make laws for the "peace, welfare and good government" of New South Wales. This is an extremely wide or plenary power which allows the State Parliament to enact legislation and to delegate its functions over a wide range of subject matters and to a very large variety of bodies. The legislative power of the State Parliament is in practical terms limited only by the Commonwealth Constitution and the necessity of a connection or "nexus" with the state. [See, **Union Steamship Company of Australia Pty Limited v King** (1988) 166 CLR 1].

Statutory Authorities

It is easy enough to ascertain the functions, powers and duties of statutory authorities. They may be found in the legislation creating the relevant bodies. The general power to enter into contracts is often found in the enabling legislation. This does not mean that it is a simple task to identify the powers of the authority. The powers must be read with the general principles of statutory interpretation and construction foremost in mind. Further, the relevant sections must often be read together with provisions in other legislation which may contain further powers. As many of you will appreciate, it can sometimes be a time consuming task simply to ascertain and identify such basic information as the power to contract.

Some government organisations are not endowed with power to contract and the executive is therefore required to enter into contracts on behalf of or delegate power to the body. An example is the Australian Protective Service ("**APS**") which is established as a "service" within the Department of Administrative Services under section 5(1) of the APS Act 1987 (Cth). The function of the APS is to provide protective and custodial services for and on behalf of the Commonwealth.

Prerogative Power to Contract

The general rule in respect of the prerogative power of the government to contract was formulated in 1934 by the High Court in **NSW v Bardolph** (1934) 52 CLR 455. Executive power of the Crown, both Commonwealth and State, includes a personal power to undertake commercial activity and to enter into contracts [see also H E Renfree **The Executive Power of the Commonwealth of Australia**, Legal Books, Sydney, 1984 at pp 469-484, and, **Johnson v Kent** (1974-75) 132 CLR 164].

In **Bardolph's case** the New South Wales Tourist Bureau was under the Chief Secretary's department. On behalf of the then Jack Lang Labor Government, a contract was entered into for weekly insertions of Tourist Bureau advertisements in the plaintiff's newspaper. The contract was entered into by an official of the Premier's Department, known as the Superintendent of Advertising, on the personal authority of the Premier. When the new State Government came into power it stopped paying for the advertising space and the newspaper sued. The State sought to overturn the contract. There was no statutory authority or authority by Order in Council or Executive Minute. There was an item called "Government Advertising" in the general State appropriations, but that item was much larger than the Tourist Bureau contract for the plaintiff newspaper. That the new government refused to pay for the advertising space might be understandable since the publication was the Labor Weekly and the Labour Government had been sacked by the then New South Wales Governor.

Dixon J said at page 508:

> *"No statutory power to make a contract in the ordinary course of administering a recognized part of the government of the State appears to me to be necessary in order that, if made by the appropriate servant of the Crown, it should become the contract of the Crown, and subject to the provision of funds to answer it, binding on the Crown."*

Although this case concerned a contract made by the Crown in the right of a state, the High Court made it clear that the principle applied equally to the Crown in the right of the Commonwealth.

The two elements arising from the principle in **Bardolph's case** are that:

- the contract must be "in the ordinary course of administering a recognised part of the government of the state" - otherwise the contract will be ultra vires and void; and

- the contract must be made by the "appropriate servant of the Crown".

Deciding whether a contract is in the ordinary course of administering a recognised part of government leads to difficulties when the government undertakes to enter into a new field of activity without legislative authority. Unless that activity is a recognised part of the government, government involvement may well be ultra vires. Of course, if no-one takes the point, the contract on that activity will at some point down the track no longer relate to a "new" activity of the government and will be on its way towards satisfying the test.

If new activity is considered it would certainly be preferable that the contract be supported by clear legislative authority.

As to who is an appropriate servant of the Crown so as to contractually bind the Crown, this question is generally determined according to the ordinary rules of agency and whether the act of the Crown servant is within actual, ostensible or usual authority.

In **Bardolph's case**, Starke J said at pp502-503:

> *"[Subject to constitutional practice and statutory provisions,] contracts made on behalf of the Crown by its officers or servants in the established course of their authority and duty are Crown contracts, and as such bind the Crown. The nature and extent of the authority may be defined by constitutional practice or express instructions, or inferred from the nature of the office or the duties entrusted to the particular officer or servant. It is not every contract made or purporting to have been made by an officer or servant of the Crown on its behalf that will bind the Crown, but only such as are within the authority delegated to that officer or servant. The authority is a matter which ultimately falls for determination in the Courts of law [footnote omitted]. The fact that a Premier, or a responsible Minister of the Crown, has entered into a contract on the part of the Crown, or has directed a subordinate official to do so by no means established the necessary authority: such a rule, while it might not destroy Parliamentary control over the amount and manner of expenditure of public money, would seriously weaken that control. In each case, the character of the transaction, and also constitutional practice, must be considered. The question of authority, in the case of contracts providing for the carrying on of the ordinary activities or functions of government, presents, as a rule, but little difficulty; other contracts, however, must be considered each in relation to its own facts."*

In **Bardolph's Case**, the fact that the contract was signed by the Superintendent of Advertising on the personal authority of the Premier was enough to establish his authority to bind the Crown in that case. Dixon J considered that the independent authority of the Superintendent to enter into the contract would probably have been enough without the Premier's direction [(1934) 52 CLR at page 507].

[See also, the case where it was held that the Prime Minister of New Zealand did not have actual, ostensible or "usual" authority to bind the Crown in relation to a contract to assist regional development; **Meates v AG (NZ)** [1979] 1 NZLR 415; As to department heads, see **Coogee Esplanade Surf Motel Pty Ltd v Commonwealth** (1976) 50 ALR 363].

It may be that too much reliance is placed on **Bardolph's case** and that the prerogative contract power is considerably wider at the Commonwealth level. [See the discussion of this view in Mark Arononson and Harry Whitmore, **Public Torts and Contracts**, 1982, Law Book Co, pp187-193; Dennis Rose "The Government and Contract" in PD Finn **Essays on Contract**, 1987, Law Book Co pp244-252; and Brennan J's views in the **Davis Case** 166 CLR at pp109-110. See also, the good discussion of **Bardolph's case** in **Northern Territory of Australia v Skywest Airlines Pty Ltd** (1987) 48 NTR 20].

In the absence of express statutory power, the safest course is to ensure that the appropriate minister executes the contract on behalf of the Crown. It is not difficult to ascertain which is the responsible minister and unless the authority of the Crown servant is crystal clear, execution by the minister is crucial to the peace of mind of any private party.

D. THE SOURCE OF POWER IN RELATION TO JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

Justiciability and the Prerogative

Another area in which it is important to identify the source of government power is in respect of applications for judicial review of administrative decision making and justiciability. An administrative decision is justiciable when it is amenable to or appropriate for judicial determination, as opposed to determination by some means other than the Courts.

Traditionally, the justiciability of an administrative decision at common law depends on whether the decision is an exercise of statutory or non-statutory power. If the decision is pursuant to statutory power, and providing the other judicial review criteria are met, the decision will be justiciable. If the decision is pursuant to a non-statutory power, it is traditionally not justiciable [see generally: the Administrative Review Council Report on **Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act**, Report No 32, AGPS, March 1989; pp 23-24, 84-87; Leslie Zines, **op cit**, at pp C25-C34; Aronson and Franklin in **Review of Administrative Action**, 1987, Law Book Co, pp 19-24 and 567-570; Margaret Allars **Introduction to Australian Administrative Law**, 1990, Butterworths, paragraphs 2.85 and 1.92 to 1.106 and Professor DGT Williams "Justiciability and the Control of Discretionary Powers" in Michael Taggart (ed) **Judicial Review of Administrative Action in the 1980's**, 1986, Oxford University Press, Auckland, p103].

The non-statutory powers include the common law or prerogative powers of the Crown such as:

- power to enter into contracts;
- undertakings between governments in exercise of political power;
- power to ratify treaties, defend the Realm and dissolve parliament; and
- power to commence (by ex officio information) or withdraw (nolle prosequi/no bill) a prosecution.

The traditional position of justiciability of decisions made under prerogative power was turned on its head by the House of Lords in **Council of Civil Service Unions v Minister for Civil Service** [1985] AC 374. This case concerned the validity of the Prime Minister's decision to ban membership of national trade unions by staff employed at a sensitive military communications and signals interception post known as Government Communications Headquarters [the case itself is often referred to by these initials GCHQ]. It was alleged that the Prime Minister had varied the terms and conditions of employment of GCHQ staff without consulting the unions. The decision was held not to be reviewable on judicial review principles for denial of procedural fairness. It was not reviewable because of the national security implications in the matter.

The House of Lords did hold that the fact that a power has a prerogative or common law source, rather than a statutory source, is irrelevant to the question of justiciability and judicial review. The Court held that notwithstanding that the decision could be treated by the Court as if it were a decision made under a statute (which it was not in that case) there were many categories of exercise of prerogative power that would be immune from judicial review for reasons such as those applying in that case, that is national security. Lord Scarman stated:

> *"Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter."*

Sir Anthony Mason in an article published in the Federal Law Review in 1989 ["Administrative Review the Experience of the First Twelve Years" 18 **Federal Law Review** 122] stated:

> *"The old rule that the acts of the Crown or its representative cannot be impugned has no application to the exercise of a statutory discretion by the Crown in council or by a Crown representative. Some decisions made in the exercise of prerogative power may well be susceptible to review. In England the House of Lords has so held. The Federal Court has decided that executive action is not immune from judicial review simply because the action was taken pursuant to a power derived from the prerogative rather than statute. This is consistent with the proposition, favoured by myself and Lord Scarman that the susceptibility of a decision to review depends on the subject matter of the decision and the grounds of review rather than the source of the decision in the prerogative. Decisions of the personal representatives of the Crown are now subject to judicial review for procedural fairness and for improper purpose and mala fides."* [footnotes omitted, at pp123-124].

Sir Anthony Mason argued that perhaps we are moving to a new concept of justiciability where the issue does not depend on the form of rigid distinctions between judicial, legislative and executive functions. [See also the comments of Sir Gerard Brennan in "The Purpose and Scope of Judicial Review" in Taggart, **op cit**, p18 at pp 26-27].

He referred to the decision of the Full Federal Court in **Minister for Arts Heritage and Environment v Peko-Wallsend** (1987) 15 FCR 274, 79 ALR 218 (which he pointed out was refused special leave to appeal by the High Court, see [1987] 8 **Legal Reporter No 21**) concerning the justiciability of a cabinet decision to submit stage 2 of the Kakadu National Park for World Heritage Listing.

The case established:

- executive action is not immune from judicial review in Australia merely because it was carried out in pursuance of a power derived from the prerogative rather than a statutory source;

- decisions of both Ministers and the Governor-General in Council made pursuant to the prerogative are reviewable;

- the particular cabinet decision regarding Stage 2 of Kakadu was not reviewable because of:

    - the complex subject matter of the cabinet decision; and

    - the relationship of the decision with the proposed inclusion on the list under the World Heritage Convention and related to Australia's international relations.

[See also the High Court's comments on prerogative powers in **R v Toohey; ex parte Northern Land Council** (1981) 151 CLR 170 and, the Full Federal Court decision in **Century Metals & Mining Limited v Yeomans** (1989) 100 ALR 383 applying the GCHQ case and holding that the decision maker was obliged to accord procedural fairness notwithstanding that broad social and political factors were involved in the decision to evaluate mining proposals at Christmas Island. The Minister had issued a press release stating that the process would be "impartial and thorough" and would be "independent". This gave the aggrieved applicant a legitimate expectation that it should be accorded procedural fairness].

Source of Power and the ADJR Act

Now that it generally does not matter whether the exercise of power is statutory or prerogative power, the question of justiciability no longer relates solely to the source of the power but more so to the subject matter of the decision. This is now the true test of justiciability. Decisions relating to for example, treaties, international obligations, the prerogative of mercy and the discretion to prosecute or discontinue a prosecution would still not be justiciable.

However, the identification of the source of power must still be made when considering whether judicial review is available under the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("**ADJR Act**"). A decision, or conduct for the purpose of making a decision from which judicial review can be sought must be a "decision of an administrative character made ... under an enactment". An "enactment" can also include an "instrument" made under an Act [sections 5(1), 6(1) and the definitions of "decision" and "enactment" in section 3 of the ADJR Act].

In government contract matters the line of cases relating to the meaning of "under an enactment" can be said to start with **Australian National University v Burns** (1982) 64 FLR 166, 43 ALR 25. In that case, the Full Court of the Federal Court considered the termination of a contract of employment of a professor of the university pursuant to the provisions of the ADJR Act. The terms and conditions of the contract were submitted to the professor and signed by him when he was first appointed to the university.

The Court held that the application did not come within the scope of the ADJR Act because the rights and duties of the parties to the contract of engagement arose from that contract and not from the relevant university Act. Bowen CJ and Lockhart J stated at page 175:

> *"If the making of a contract is authorized by an enactment, and such a contract, when made, in fact provides for the making of certain decisions, it does not necessarily follow that those decisions, when made, are not made under the enactment. This must depend on the language and operation of the particular enactment and contract."*

Sheppard J said at page 183:

> *"I emphasise that in the present case the decision to dismiss was made pursuant to the express power in that regard contained in the contract itself and only in the most indirect way pursuant to powers contained in the [ANU] Act. The contract itself was, of course, made pursuant to that Act."*

[The line of contract/ADJR cases since **ANU v Burns** include: **Hawker Pacific Pty Limited v Freeland** (1983) 52 ALR 185 (purchase contract was by prerogative power); **MacDonald Pty Limited v Hamence** (1984) 53 ALR 136 (activities of the Canberra Tourist Bureau which did not require statutory authority); **Glasson v Parkes Rural Distributions Pty Limited** (1983) 155 CLR 234 (state/federal scheme); **Australian Capital Territory Health Authority v Berkley Cleaning Group Pty Limited** (1985) 60 ALR 284 (tender decision distinguishing **ANU v Burns**); **Australian Film Commission v Mabey** (1985) 59 ALR 25 (employment); **Department of Aviation v Ansett Transport Industries Limited** (1987) 72 ALR 188 (Airlines agreement); and **Cash v Australian Postal Commission** (1989) 88 ALR 547 (post office agency agreement).]

These cases look towards the immediate source and proximity of the power under which a decision was made. If there is a legislative base for the existence of a specific power, that will be the source of the power.

Identifying the source and proximity of the power under which a decision is made is not always straightforward. There is no easy test to apply from the line of cases since **ANU v Burns**. Two tests used in one earlier case [**Evans v Friemann** (1981) 35 ALR 428 at 436] were to identify:

- the source of the power to make the decision; and
- the source of the power to enforce the decision.

The High Court in **Glasson's case** posed additional tests and they are:

- the source of the power to appoint the decision-maker; and
- the source of the decision's legal effect.

These tests are not decisive and are often difficult to apply.

Administrative Appeal Tribunal

Identifying the source of power is also relevant when considering appeals to the Commonwealth Administrative Appeals Tribunal ("**AAT**") pursuant to the AAT Act 1975 (Cth). Section 25 of the AAT Act provides that applications may be made to the AAT for "review of decisions made in the exercise of powers conferred by" particular enactments [section 25 of the AAT Act].

It is also relevant to determine whether or not a statement of reasons may be properly requested pursuant to the AAT Act or the ADJR Act.

In a recent case involving the jurisdiction of the AAT, **Hongkong Bank of Australia Limited v Trimboli**, decided by the Full Federal Court comprising Lockhart, Gummow and O'Connor JJ, in Sydney on 10 June 1992, [15 AAR 429; 108 ALR 70; 10 ACLC 920] there was a threshold question concerning the jurisdiction of the AAT based on the source of power for the relevant decision of the Australian Securities Commission ("ASC").

In that case, the ASC made a decision by written instrument under the hand of the ASC New South Wales Regional Commissioner, to authorise new trustees in the liquidation of Burns Philp Trustee Co Limited ("**Burns Philp**") to make application to the Court for an order pursuant to section 597 of the Corporations Law relating to the examination of persons concerned with the corporation. The applicants had the case heard urgently by the AAT. There was a lot of other related court activity occurring around the same time in the Supreme and Federal Courts, but I do not need to go into the detail of this for present purposes. The AAT decided that the ASC decision was no more than a step of an administrative nature and was not of itself "determinative and final" so that it did not fall within the definition of "decision" in the AAT Act. The Tribunal applied the principles of **Australian Broadcasting Tribunal v Bond** (1990) 170 CLR 321.

The case before the Full Federal Court was argued on the issue of the meaning of "decision". However, during the course of the hearing, I understand the Judges became concerned as to the source of the power of the ASC to make the original decision. The answer to that question determined the case.

The Full Court found that the source of power of the ASC to appoint the trustees did not come from section 597 of the Corporations Law or from any other provision of the Corporations Law. It did not come from a specific power in the ASC law although that the Court expected the ASC law would provide at least the primary source of the ASC's powers and functions. The Court said that the source of power was possibly found in section 11(4) of the ASC law which provides that the ASC has power "to do whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions". Review of ASC decisions based on ASC law are not reviewable by the Commonwealth AAT.

If judicial review of the ASC decision in that case had been sought in the Federal Court under the ADJR Act, it may be that the **ABT v Bond** case might have been applied so as to prevent judicial review of the decision. However, section 39B of the Judiciary Act (1903) (Cth) might have been available. The Full Court noted in the **Hongkong Bank** case that members of the ASC "could appear to be officers of the Commonwealth for the purposes of section 75(b) of the Constitution" (108 ALR at p74). They cited **Re Cram; ex parte NSW Colliery Proprietors' Association Limited** (1987) 163 CLR 117; and **Bond v Sulan** (1990) 26 FCR 580 at 584-585.

Section 39B Judiciary Act 1903

If a matter proceeds to the Federal Court the question of the source of power is not necessarily decisive if section 39B of the Judiciary Act 1903 (Cth) is pleaded, either on its own, or in combination with judicial review under the ADJR Act.

The benefits of a section 39B application are well known [and summarised by Alan Robertson in a paper titled "The Role of Courts and Tribunals in the Protection of Individual Rights - in Judicial Review" delivered to the Australian Institute of Administrative Law **1992 Administrative Law Forum** on "Administrative Law, Does the Public Benefit?", in Canberra on 27-28 April 1992].

In summary, a section 39B application is available when:

- a writ of mandamus [a writ to compel an officer to perform his or her duty]; or
- a writ of prohibition [writ to order an officer not to commence some action]; or
- an injunction

is sought against an officer or officers of the Commonwealth.

The advantages are:

- there are no express time limits;
- it is unnecessary to find a decision;
- it is unnecessary to find an administrative decision;
- it is unnecessary to find an enactment;
- decisions of the Governor-General are not necessarily immune;
- The classes of decisions to which the ADJR Act does not apply (found in Schedule 1) does not limit the kinds of cases that can be reviewed; and
- the Court can consider facts which were not before the decision maker.

Private Property/Contractual Rights Exercised by the Crown

Interesting questions concerning justiciability can arise when private property or contractual rights are sought to be exercised by the Crown.

Obviously, the Crown as a legal or juristic person can enter into contracts or exercise property rights as an ordinary natural person, subject to constitutional or statutory limits as I have described [see, Hogg, **op cit**, 163-164].

If the Crown acts pursuant to these rights, you will need to consider whether the exercise is one of governmental or public power or duty, or, one of private power [see generally, Allars, **Introduction, op cit** paras 1.64-67].

If the Crown acts as a landlord and issues a notice to quit to its tenant, is that exercise of power justiciable? Of course, if the power to lease is granted by a statute, so too is the power to terminate the lease [such a reverse power may be contained in a relevant Acts Interpretation Act]. This might bring the matter to the Federal Court under the ADJR Act or section 39B of the Judiciary Act, or in Victoria, to the Supreme Court under the Administrative Law Act 1978 (Vic).

Under the ADJR Act if the **ANU v Burns** hurdle can be overcome, that is, the decision to issue a notice to quit is a decision "under an enactment", the courts may hold that private exercises of non-governmental powers are not justiciable in judicial review proceedings. In **"Sydney" Training Depot Snapper Island Limited v Brown** (1987) 14 ALD 464, Wilcox J stated that while the notice to quit issued by the Government landlord was a reviewable decision under the ADJR Act (being an exercise of statutory power and affecting a property interest of the tenant), the obligation to afford procedural fairness did not apply to all legal relationships. He said, at page 465:

> *"The application of the obligation has expanded considerably in recent years, but it remains true that the obligation arises only in the realm of public law, that is to say, in cases where a person is considering the exercise of a power conferred by a statute or by the royal prerogative [citations omitted]. The concept of natural justice has no application to a case where a person is considering the exercise of a mere right of private property".*

In a Victorian case, where a notice to quit was issued by a council, [**Szwarc v Mayor & Councillors of City of Melbourne** (1990) 70 LGRA 162] the court held that the decision to issue the notice was not a reviewable "decision" under the Victorian Administrative Law Act 1978 because the rights arose from a contract between the council and the lessee [Grey J cited in support the **"Sydney" Training Depot case, op cit; Monash University v Berg** [1984] VR 383 (arbitrator's decision pursuant to an arbitration agreement) and **City of Melbourne v Holdenson & Neilson Fresh Foods Pty Limited** [1959] VR 626 (alleged improper purpose)].

In an unreported New South Wales case, **Nicholson v New South Wales Land & Housing Corporation (also known as Department of Housing)**, decision of Badgery-Parker J, in the Administrative Law Division, decided 24 December 1991, the Court held that a decision of the statutory corporation to issue a notice of termination of tenancy to a housing commission tenant under the Residential Tenancies Act 1987 (NSW) was vitiated by the authority's failure to accord the tenant procedural fairness. The Court ordered that the notice of termination be quashed.

In that case, the Court considered the public housing tenant had a legitimate expectation that his tenancy would not be terminated without giving him an opportunity to answer the allegations against him. Those allegations were that he may be using or supplying heroin from the premises and these were never put to him. The court applied recent High Court decisions on procedural fairness and quoted with the approval of those memorable words from the judgment of Deane J in **Haoucher v Minister for Immigration & Ethnic Affairs** (1990) 169 CLR 648 at 653 where he said the law seemed to him:

> *"to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognised as applying generally to governmental executive-decision making."*

[See also the unreported decision of Campbell J in the Common Law Division of the Supreme Court of New South Wales in **Spartalis & Franks v Department of Housing & Residential Tenancies Tribunal**, dated 10 February 1992 where a decision of the Tribunal to affirm 2 notices of termination of residential lease agreements were upheld. The court applied the **Nicholson case** on a construction point and considered (and rejected) various grounds based on error of law and wrongful exercise of discretion.]

In another area of private property rights being exercised by the Crown, in **Clamback v Coombes** (1986) 78 ALR 523, the Federal Court held that a decision of the Commonwealth to erect a fence on its own property at Bankstown Airport in Sydney was not made under an enactment or instrument under the ADJR Act. The decision was merely an exercise of the Commonwealth's common law right to fence its own land (see the cases cited at page 533). The problem with the fence was that it would have blocked aircraft moving to and from the flying school next door to the airport. The flying school land was leased from the Commonwealth and the Commonwealth was trying to stop the school from parking its planes on airport territory.

Tender Cases: ADJR Act

I refer you to some of the tender cases under the ADJR Act as part of the private contractual rights exercised by the Crown and the issue of justiciability. In **ACT Health Authority v Berkeley Cleaning Group Pty Limited** (1985) 60 ALR 284, the Full Court of the Federal Court held that an unsuccessful tenderer could challenge the rejection of its tender bid as "conduct for the purpose of making a decision" under section 6 of the ADJR Act and the decision to award a contract and the making of the contract was a "decision under section 5 of the ADJR Act". There was no discussion of the appropriateness of the subject matter for judicial review purposes. It seemed to be assumed that the matter would be justiciable. See also, **Century Metals & Mining NL v Yeomans** (1988) 85 ALR 29, per French J, and (1989) 100 ALR 383.

There are a number of tender cases where it has been held that the decision to let a contract was not a decision "under an enactment" as in, for example, **ABE Copiers Pty Limited v Secretary of Department of Administrative Services** (1985) 7 FCR 94, where a fine line was drawn under the Commonwealth Finance Regulations between the correct procedure in deciding to put out a tender (which would be reviewable) and a decision to accept a tender bid (which would not be reviewable because of inherent prerogative power). See also, **Hawker Pacific v Freeland** (1983) 52 ALR 185 to the same effect.

Tender Cases: Common Law Judicial Review

At common law, a statutory body's tendering activities may well be wholly regulated by legislation. Some of the decisions in this area depend on the rules of statutory construction as to whether a provision in legislation is mandatory or merely directory. I will speak more on this topic a little later.

Many local councils tendering procedures are wholly regulated by statute and any serious deviation from the rules will render the ensuing contract void [see: **Hunter Bros v Brisbane City Council** [1984] 1 Qd R 328; **Streamline Travel Service Pty Limited v Sydney City Council** (1981) 46 LGRA 168 (holding that a varied tender constituted a new or different tender and the council had to advertise under the rules), and, **Maxwell Contracting Pty Limited v Gold Coast City Council** (1983) 50 LGRA 29 (holding that variations of tender leading to invalidity is a question of egree). The landmark case on tenders and administrative law in the common law area is **Metropolitan Transit Authority v Waverley Transit Pty Limited** (December 1989) [1991] 1 VR 181, a decision of the Full Court of the Appeal Division of the Victorian Supreme Court. Leaving aside the Court's comments on termination of contract, bias and promissory estoppel, it was held that a bus operator had a legitimate expectation that its operating licence and contract would be renewed and that the rules of procedural fairness applied. The authority had put the contract out to tender and awarded the contract and new licence to another party. The Court held that the old licence and contract were effectively still on foot.

That case is an interesting example of the difficult issues a court can be faced with when a statutory authority acts pursuant to both contractual and statutory power at the same time to achieve a particular purpose, in that case, to rid itself of a bus operator the authority did not want.

In **White Industries Limited v Electricity Commission of New South Wales (Elcom)**, Supreme Court of New South Wales, Administrative Law Division, Yeldham J, unreported, 20 May 1987, the Supreme Court held that a decision in relation to public tenders for long term coal supplies to several power stations in New South Wales was not reviewable in the absence of mala fides or any obvious (to the Court) major deficiency in the tender process. The Court said (but did not need to hold) that the aggrieved tenderer was "not entitled to expect or require" that the principles of natural justice should be observed in relation to it. The nature of the power to contract by the acceptance of any one of a number of tenders was considered to be inconsistent with an obligation to observe the principles of natural justice. A potential "right" to gain a beneficial contract is not subject to the rules of natural justice. [Transcript at page 31]. The Court applied the Western Australian case of **Cord Holdings Limited v Burke** (1985) 7 ALN N72. This case highlights the practical difficulties faced by unsuccessful tenderers in that they often do not know the true or full position as to on what basis the decision to award the contract was made until all of the confidential tender documents and files of the decision maker have been examined by the court.

[See further, generally: Geoffrey Airo-Farulla "'Public' and 'Private' in Australian Administrative Law" (1922) 3 PLR 186; Margaret Allars "Administrative Law, Government Contracts and the Level Playing Field" (1989) **UNSW Law Journal** 114; Electoral and Administrative Review Committee ("EARC") **Report on Judicial Review of Administrative Decisions and Actions** December 1990, esp. pp 54-60 and 126-133; and the ARC **Report No 32, op cit**, p30-32 and 37.]

If issues of policy or public interest are involved in the exercise of private government rights, even more interesting questions arise. It is well settled that the proper implementation of a government policy will restrict the occasions for the courts to intervene in either judicial review proceedings, or, indeed, in civil actions. [See, for instance, the comments of Brennan J in the negligent misstatement case, **San Sebastian Pty Limited v Minister** (1986) 162 CLR 340 at 374]; and the impact of the policy change on the rights of Australia Post to vary its contracts in **Cash v Australian Postal Commission** (1989) 88 ALR 547, at 550 & 555].

Mechanisms the courts have devised that have the effect of keeping a broad distinction between public law and private law include the limitations imposed on the granting of prerogative remedies of prohibition, certiorari and mandamus against the Crown. Even declaratory relief will only be available when the decision or action complained of is able to determine legal consequences [see the discussion by the High Court of the prerogative remedies and declaratory relief in **Ainsworth v Criminal Justice Commission** (1992) 66 ALJR 271, and, Halsbury's **Laws of Australia**, 1992, Volume 1 paras 10-2440 to 10-2753].

Discretion in judicial review

Before I leave the present topic, I want to make the point that judiciability and the public/private law distinction are mechanisms in addition to the courts general discretion in administrative law matters not to make any orders even if a matter is justiciable because:

- the aggrieved party is partly responsible for the problem;
- there were delays in bringing the application;
- it relates to committal proceedings; or
- there is adequate provision made for review of the decision elsewhere.

[See, generally, section 10(2) and section 16 of the ADJR Act and commentary and cases cited by Geoffrey Flick in **Federal Administrative Law**, volume 1, at paragraphs 1396 to 1397, and 3229 to 3230; the discussions relating to the discretion in Allars, **Introduction**, Op Cit, paras 6.97, 6.98, 6.113, 6.119, 6.113-6.135, and 6.152 and Halsbury's **Laws of Australia**, op cit].].

E. ACTING BEYOND POWER - ULTRA VIRES

Once you have identified the source of the authority it ought to be clear or reasonably clear whether the decision maker was acting within proper statutory or prerogative power. If an action is found to be outside the power of the decision maker, it can be held to be ultra vires and void.

Such a finding can have devastating consequences when large sums of money are invested by a statutory authority that has no power to make such an investment. This was the case in the House of Lords decision handed down early last year in **Hazell v Hammersmith and Fulham London Borough Council** [1991] 2 WLR 372. It was held that numerous types of swap transactions entered into by a local council or authority in England were entered into with the authority having no express power under the relevant legislation. There was no express prohibition against the swap transactions in the legislation and the Court

held the transactions were not incidental to the authority's general borrowing powers as they were in the nature of a profit making venture.

The House of Lords declared the transactions to be void for want of power. An ultra vires transaction is unenforceable. [See: Michael Pearce "Hammersmith and Fulham: (1991) 6 Aust Banking Law Bulletin 61, and Elizabeth Solomon's paper "When Governments Act Beyond Power: How London Banks Stand To Lose ú600M" delivered at a BLEC seminar held in July 1991 entitled "When Governments Get Sued"].

The doctrine of ultra vires can be described in a number of ways. There are two broad areas:

- the first is variously called narrow or simple ultra vires and involves a complete lack of substantive or incidental power to do an act. The **Hazel v Hammersmith case** is an example.

- the second area is broad, or extended ultra vires which covers procedural defects and deficiencies (sometimes called "procedural ultra vires") and abuse of power, a category which contains the remainder of the administrative law rules that could render decisions void or illegal. Those rules will be covered in session 9 of this conference on the topic "Review of Administrative Decisions".

Put together, the two areas of ultra vires involve the following grounds of judicial review under the ADJR Act or the common law or both:

- denial of procedural fairness;
- procedures required by law to be observed were not observed;
- the person who purported to make the decision did not have jurisdiction;
- the decision was not authorised by the statute;
- the making of the decision was an improper exercise of power;
- power was exercised for the wrong purpose;
- the decision involved an error of law;
- the decision was induced or affected by fraud;
- there was nothing to justify making the decision;
- irrelevant considerations, or, failure to take into account relevant considerations;
- the decision was made in bad faith; or
- the decision was bad because it was manifestly unreasonable; the decision itself is uncertain; or the decision was out of proportion to the circumstances or situation ("proportionality"). [See the discussion of "proportionality" as a separate possible ground of review in **New South Wales v Law**, NSW Court of Appeal, unreported, 13 November 1992, per Kirby P.]

Procedural Ultra Vires

I will look at one of these categories where the source of power is important. What happens when, before a decision can be made under a particular statute, certain requirements must be met by the decision maker before the power can be exercised. The decision maker might be required to, for example:

- take certain matters or criteria into account;
- conduct an inquiry or receive certain advice;
- submit the appropriate prescribed form;
- seek the approval of the responsible minister; or
- place an advertisement or issue notices.

The effect of not complying with procedure is far from clear and many of the cases in this area have inconsistent results. [For a good discussion of these cases, see DC Pearce and RS Geddes **Statutory Interpretation In Australia**, 3rd edition, 1988 Butterworths, chapter 11 "Mandatory and Directory Provisions" pages 196-214.] The courts generally examine whether the particular requirement concerned is a mandatory or a directory requirement. Mandatory procedural provisions must be complied with or the decision or contract is illegal or void. Mere directory procedural requirements do not invalidate the contract or decision.

As Pearce and Geddes note in their book on statutory interpretation (at page 211) the courts must glean the intention of the legislature in relation to the designated procedure and will have to pick one of three broad parliamentary intentions;

1. that strict compliance is necessary;
2. that substantial compliance is necessary (plus a degree of substantial compliance); or
3. that compliance is not a pre-condition to the action or decision.

Breach of 1. or 2. will result in invalidity. A breach of 3. will have no adverse consequences for the person or party affected by the decision or action (in the absence of any express legislative effect or penalty).

In 1989, the High Court considered the directory or mandatory nature of a provision in the Australian Broadcasting Corporation Act 1983 (Cth) which empowered the ABC to enter into contracts for the performance of its functions. Section 70(1) of the Act provided that "the Corporation shall not, without the approval of the Minister -

> (a) Enter into a contract under which the Corporation is to pay or receive an amount exceeding $500,000 ..."

[**Australian Broadcasting Corporation v Redmore Pty Limited** 166 CLR 454]. In that case, Redmore was the owner of premises in Sydney of which the ABC was the tenant. A dispute arose in relation to the tenancy

and the parties negotiated the terms of an agreement providing for the grant of a new tenancy for a total rent for the period exceeding $500,000. The ABC changed its mind and denied the existence of any agreement. The ABC raised the issue that it did not have the power to enter into the contract without the Minister's approval and that the relevant section was mandatory so that the contract was void and illegal. This was the only issue the High Court considered.

The approach of the majority was to:

- identify the source or sources of power within the Act and consider the general structure of the Act;
- ascertain the legislative intent of the procedural provision to be discerned in the context of the Act as a whole;
- consider whether the procedural power is directory about the manner of exercise of powers already conferred and whether it is confined by other provisions; and
- ascertain whether the preferred construction is supported by the legislative history of the sub-section.

The High Court held that the provision was directory only to the ABC and did not operate to confine the actual powers of the ABC or to render the contract illegal or unenforceable. The majority stated at p457:

> *" ... the question whether section 70(1) should be construed as confining power or as directory of the manner of its exercise is a finely balanced one. The words of the sub-section are not compelling either way. In strict terms, they are directory. They speak of the exercise ("shall not ... enter into a contract"), rather than the existence, of power. Their direction is to the ABC and not to an innocent outsider having contractual dealings with the ABC, who would be likely to act on the basis that the ABC would have complied with any statutory duty to obtain the approval of its responsible Minister before purporting to enter into a contract of a kind which required such approval. In that regard it is relevant to note that the sub-section neither requires that the Minister's approval be in writing nor establishes any procedure by which a person dealing with the ABC can ascertain whether the Minister has given his approval to the precise terms of a particular contract. Nor do the words of section 70(1) either spell out the effect on third parties of a failure by the ABC to observe its statutory duty to obtain the Minister's prior approval or speak in terms which would be appropriate to refer to a purported or ineffective entry into a contract. If the statutory direction to the ABC not to enter into a contract of the specified kind without the approval of the Minister has the effect either of confining the actual powers of the ABC or of invalidating any contract with an innocent outsider entered into otherwise than in compliance with its terms, it must be by reason of a legislative intent to be discerned in the words of the sub-section construed in the context of the Act as a whole."*

F. SUMMARY AND CHECK LIST

The following is, in the form of a check list, a summary of what I have covered so far (with a few additional points in relation to prerogative power). In relation to the source of government power, you should:

1. Identify the parties.

2. Identify the source of power and whether it is legislative, executive or judicial.

3. Identify the relevant legislation and the apparent constitutional basis for the validity of that legislation.

4. If the source of power is either prerogative or statutory, ask what is:

   - the immediate source of the power to make the decision;
   - the immediate source of the power to enforce the decision;
   - the source of the decision's legal effect; and
   - the source of the power to appoint the decision maker.

5. If the power is a Crown prerogative or a common law power, categorise that power.

6. In contract matters, if power to bind the Crown is prerogative, ask:

   - is the contract in the ordinary course of administering a recognised part of government; and
   - who is the appropriate Crown servant.

7. The Crown servant who can bind the Crown in prerogative power is identified by considering:

   - the constitutional or conventional practice;
   - any express instructions;
   - the nature of the servant's office;
   - the duties entrusted to that servant; and
   - the character of the transaction.

8. If a decision or contract is made under statutory power, ask: Have all of the statutory directory and mandatory procedures been complied with?

9. Has the contract previously been entered into by the Crown and in what circumstances?

10. Identify the nature or subject matter of the decision or action and ask whether it is justiciable. If prerogative, it is probably not justiciable if it relates to:

- treaties or international obligations [**Peko-Wallsend case** (1987) 75 FCR 274; **Koowarta v Bejelke-Petersen** (1982) 153 CLR 168 at 229.]
- enforcement of governmental interests of a foreign State [**A-G (UK) v Heinemann Publishers Australia Pty Limited** (1988) 165 CLR 30];
- undertakings between governments in exercise of political power [**South Australia v Commonwealth** (1961-62) 108 CLR 130 especially at 140];
- arrangements between the Commonwealth and foreign governments [**Gerhardy Brown** (1985) 159 CLR 70 at 138, 139];
- sensitive national security matters [**GCHQ Case** [1985] AC 374; **Century Metals & Mining NL v Yeomans** (1989) 100 ALR 383 at 407; **R v Secretary of State for Home Department; ex parte Ruddock** [1987] 2 All ER 518 at 527];
- armed forces and defence of the realm [**Coutts v Commonwealth** (1984) 157 CLR 91].
- certain cabinet decisions that do not relate to a particular person's rights, interests or legitimate expectations [**Peko-Wallsend case** (1987) 15 FCR 274; **South Australia v O'Shea** (1987) 163 CLR 378; and cases cited in ARC Report No 32 at paragraphs 86-91];
- high government policy or political sensitivity [as argued in **Church of Scientology v Woodward** (1982) 154 CLR 25 (in relation to ASIO) and, **MacRae v A-G (NSW)** (1985) 9 NSWLR 268 and **A-G (NSW) v Quin** (1990) 170 CLR 1 (in relation to the appointment of judicial officers, especially Mason CJ);
- private exercise of property or contractual rights [see cases cited earlier];
- the prerogative of mercy [**de Freitas v Benny** [1976] AC 237 at 247; GCHQ case op cit, pp 400, 406 and 418; **Burt v Governor-General** [1992] 3 NZLR 672];
- a decision of the Attorney-General to prosecute or discontinue a prosecution [**R v Criminal Injuries Compensation Board; ex parte Lain** [1967] 2 QB 864 at 884; **Barton v R** (1980) 147 CLR 75];
- a decision of the Attorney-General to consent to a realter action [**Gouriet v Union of Post Office Workers** [1978] AC 435, R v Toohey; **Ex parte Northern Land Council** (1981) 151 CLR 170 at 218 and 220];
- removal from public office or service of the crown [**George v Minister for Education & Youth Affairs** NSWSC, Smart J, unreported, 31/8/89.

- Criminal Code (WA) & prerogative generally
- Wilsmore v Court [1983] WAR 190

There are many activities of government that are not sourced in statute, the prerogative power or stem from an exercise of personal power. It is doubtful whether these activities are justiciable in judicial review proceedings or the civil process. For example, the CES can decline to provide services to a company because a sexual harassment claim was being investigated against that company's manager by the Human Rights & Equal Opportunities Commission. In **Taranto (1980) Pty Limited v Madigan** (1988) 15 ALD 1, the Court found the Commonwealth had a common law duty to protect itself from claims against it and the source of power was found in the general administrative power of the Commonwealth to make arrangements for the proper carrying out of its functions (at page 5).

[See also: **Merman Pty Limited v Comptroller - General of Customs** (1988) 16 ALD 88 where it was held that a decision of Customs to conduct an inquiry into elements of anti-dumping matters was made in exercise of an executive power of general administration; **MacDonald Pty Limited v Hamence** (1984) 43 ALR 136, where certain decisions of the Canberra Tourist Bureau did not require statutory authority and were not reviewable under the ADJR Act; and **Century Metals & Mining v Yeomans** (1988) 85 ALR 29, esp. page 52-53, before French J, where it was unsuccessfully argued that the question of mining leases on Christmas Island was an exercise of the Minister's inherent power to manage Commonwealth land].

G. CROWN IMMUNITY - SHIELD OF THE CROWN

I now move to a topic that does not relate to the source of government power, but rather is an aspect of government power relating to the nature of government, and that is Crown immunity and the doctrine of the shield of the Crown. I am not going to speak about all of the immunities traditionally enjoyed by the Crown that might continue to have some operation in the present day. I will speak on the presumption of the Crown immunity from statutes. This is the most significant and relevant Crown immunity today.

Before launching into the new rule regarding the presumption of Crown immunity arising from the High Court case of **Bropho v Western Australia** (1990) 171 CLR 1, I want to spend a moment putting the topic in its broader context.

When looking at whether the Crown is immune from legislation, it must be in the context of these three questions:

1. Are you dealing with the Crown?

2. Does the statute bind the Crown? and

3. Does it matter anyway? (In civil litigation against the Crown - the rights of parties provisions).

While you are asking and answering those questions, you must also be aware of the different considerations that can apply when dealing with:

- State legislation binding the State;
- Commonwealth legislation binding the Commonwealth;
- State legislation binding the Commonwealth;

- Commonwealth legislation binding the States;
- "Applied" State law as being Commonwealth law in Commonwealth places.

Senate Committee Report on Shield of the Crown

Before taking you briefly through this topic, I should note that in December 1992, a report was released by the Senate Standing Committee on Legal and Constitutional Affairs entitled "The Doctrine of the Shield of the Crown". The origins of the committee reference stem from concerns back in early 1989 that certain State corporations had relied on the doctrine of the shield of the Crown to avoid the requirements of statutes and to obstruct the activities of the National Companies and Securities Commission ("NCSC"). There was a report of the Joint Select Committee on Corporations Legislation in April 1989 that recommended the topic of shield of the Crown be referred to the parliamentary committee for further examination.

The reference was advertised in 1989 and twenty or so submissions were received in that year. Only a handful were received by the committee since that year. This is unfortunate because the committee ultimately took three years and seven months to bring down its report and in that time there was substantial activity in relation to government business enterprises, corporatisation and privatisation and the landmark case of the High Court in **Bropho**. In addition, the entire Companies and Securities legislation and scheme was replaced and the Australian Securities Commission ("ASC") has now been operating for some two years in place of the NCSC.

The committee has done an admirable job in the circumstances although I had hoped it would re-advertise its reference and call for more current views in light of such major common law and political developments.

The committee recognised these limitations in its preliminary observations on the reference (pages 2 and 3) and made a number of recommendations that, to my mind, will unfortunately ensure that this often unpredictable area of law will remain so for quite some time.

The main recommendation of the committee is that "the common law doctrine of the Shield of the Crown should be clarified and reformed particularly insofar as it applies to government business enterprises and statutory authorities. The Commonwealth, the States and the Territories should consult together about the issue at a high level for example, at the meetings of the Council of Australian Governments or through the Standing Committee of Attorneys-General".

The second recommendation proposes legislation setting out the criteria by which government business enterprises and statutory authorities should be regarded as falling within the shield of the Crown.

As to the ASC's ability to deal with government business enterprises and statutory authorities, the committee recommended that the Joint Standing Committee on Corporations and Securities inquire into the effect of the doctrine of shield of the Crown in that regard.

Notwithstanding these shortcomings, the report is a good source of information on a subject that is by no means easy to come to grips with.

Are you dealing with the Crown?

Answer to this question is particularly important for government business enterprises and statutory authorities. Many of them, I suspect, would like to be regarded as an emanation of the Crown and thus within the shield of the Crown taking advantage of all of the real and perceived privileges and immunities of the Crown. Many would like to have their cake and eat it too, as it were. They would like the freedom to act commercially while at the same time reserving their right to claim immunity when it is convenient or necessary.

It is also important because Crown immunity in certain circumstances can extend to encompass those persons or corporations dealing with the Crown by way of contract, agency or arrangement (see, **Bradken Consolidated Limited v Broken Hill Proprietary Co Limited** (1979) 145 CLR 107).

To find out whether a statutory authority is within the shield of the Crown you need to:

- examine the legislation establishing the authority, and, as a matter of statutory construction, ascertain the legislative intent;

- consider the function that the authority is to perform and whether it is governmental (generally sacred), non-governmental (not so sacred) or a mix of the two;

- carefully examine the capacity of the government or the minister to control the authority's important functions. This is known as the control test and it is regarded as the most important test. What is not as important is the amount of control actually exercised by the government over the body.

[See, generally, the cases cited in; **Senate Report**; JC McCorquodale "Immunity of Commonwealth Government Business Enterprises from State Laws" (1992) 66 ALJ 406; and James McLachlan "The Application of the Trade Practices Act 1974 (Cth) to State Government Instrumentalities" (1990) 64 ALJ 710].

The question of whether a statutory authority was a servant or agent of the Crown and thus entitled to Crown immunity recently arose in the Court of Appeal in New South Wales in **Prospect County Council** (t/as **Prospect Electricity v Blue Mountains City Council**, unreported, per Mahoney Priestley and Handley JJA, [Mahoney JA dissenting] decided 11 September 1992. In that case the Court considered the general issue of whether the Prospect County Council in New South Wales, or any county council similarly constituted, could erect buildings without having the buildings considered and approved by the municipal authority of the area. What was involved in that case was the erection of electricity transmission poles. The decision is equally applicable though, to commercial and industrial buildings of whatever size.

The central issue is the case was whether Part XII of the Local Government Act 1919 (NSW) applied to the county council. Part XII of the Local Government Act regulates the erection of buildings and provides for various council approvals.

Up until 1987, county councils and, indeed, local councils providing electricity, were not regarded as being within the Crown in New South Wales. In 1987 legislation was introduced that made the electricity

councils subject to ministerial control and direction. Handley JA (with Priestly JA agreeing) held that this new control was significant in holding the county council as an arm of the Crown.

The county council's new legislation had what many regard as an insurmountable hurdle in identifying it as an arm of the crown in that the legislation did not expressly state it was to be a representative of the Crown. This hurdle was put in place by the High Court in 1982 in **Townsville Hospitals Board v Townsville City Council** (1982) 149 CLR 282, where Gibbs CJ said at page 291 that if the government wanted a body to be a Crown representative, it could have just as easily said so in the legislation. The **Townsville case** has provided a formidable barrier to some bodies being regarded as the Crown.

The case has almost created a presumption that the legislature did not intend a body being the Crown in the absence of express words in the legislation. Mahoney JA noted (in dissent) (transcript page 18) that due to recent comments of the High Court [in **Deputy Commissioner of Taxation v State Bank of New South Wales** (1992) 66 ALJR 250 at 253G - 254C], "it may be that the force of that presumption is now less than it was". In my view, this might be wishful thinking as the watering down or removal of the presumption gives the courts considerable scope within which to decide whether a body is within the Crown.

Handley JA provides a good rundown of the relevant cases and reaffirms the status of the control test as the pre-eminent test in this area. He hinted that the application of the control test (as the best indicator of parliament's intention) was more important than the hurdle posed by the **Townsville Hospitals Board case** (at page 6).

Does the statute bind the Crown?

Answer to the second question involves an appreciation of the old rule and the new rule after **Bropho's case**.

Prior to the 20 June 1990 (when the decision was handed down), there was a well-developed and entrenched presumption of Crown immunity from legislation in Australia. The rule was a common law principle of construction.

The old rule was that the Crown is not bound by a statute or a provision in a statute unless an intention that the Crown be bound appeared:

- either expressly, or
- by necessary implication from the words of the statute.

The test of necessary implication was not easily satisfied. It had to be:

- manifest;
- from the very terms of the statute;

that it was the intention of the legislature that the Crown should be bound.

The test in determining whether it was "manifest" from the statute was that it must have been possible to affirm that at the time when the statute was passed and received the Royal sanction, it was apparent from its terms that its good purpose must be wholly frustrated unless the Crown were bound. This was a very stringent test and the High Court noted the ordinary principle of statutory construction was elevated over time so as to be regarded as a "sacred maxim" that the Crown was not bound by legislation (at page 19).

The Court said that whatever assumptions lay behind the rationale of the rule, they:

> *"... would seem to have little relevance, at least in this country 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."* (page 19).

While not asserting that it was possible to draw a clear and fixed distinction between functions that are properly or essentially governmental and functions which are not, the Court stated:

> *"... the historical considerations which gave rise to a presumption that the legislature would not have intended that a statute bind the Crown are largely inapplicable to conditions in this country where the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour and where it is a commonplace for governmental commercial, industrial and developmental instrumentalities and their servants and agents, which are covered by the shield of the Crown either by reason of their character as such or by reason of specific statutory provision to that effect, to compete and to have commercial dealings on the same basis as private enterprise. It is in that contemporary context that the question must be asked whether it is possible to justify the preservation in our law of an inflexible rule which, in the absence of express reference, requires a reading down of the general words of a statute to exclude the Crown (and its instrumentalities and agents) ...".* (Page 19).

The Court held there is now a new rule that specifically applies to statutes enacted after the 20 June 1990 and that **might** apply to statutes enacted before that date (but **possibly** not those statutes enacted before that date that were the subject of judicial consideration). The new rule is able to be described as follows:

1. There is a presumption that the general words of a statute do not bind the Crown or its instrumentalities or agents. Stated another way, there is a prima facie immunity of the Crown from legislation not expressed to be binding on it;

2. The rule of construction is flexible;

3. The legislative intent must remain paramount;

4. The strength of the presumption 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. That is, whether we are dealing with the executive government, a statutory authority or employees.

5. The strength of the presumption is on a sliding scale. It is extraordinarily strong when considering the Sovereign herself and it is little more than a starting point if you are considering the employees of a government commercial or developmental enterprise.

Brennan stated the new rule in the following terms:

> *" ... the presumption 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. ... Those circumstances include the terms of the statute, its subject matter, the nature of the 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."* (at page 28).

The decision in **Bropho's Case** has only been discussed in a few cases and its full significance will not be made clear for many years to come.

[Its application was considered and rejected in the **Prospect County Council case** by Mahoney JA because the relevant legislation was enacted prior to 20 June 1990 and the question was affected by a longstanding State Supreme Court decision. See also the lengthy discussion of **Bropho** in: the Senate Committee Report; McCorquodale, **op cit**, McLachlan, **op cit**, Steven Churches "The Trouble with Humphrey in Western Australia: Icons of the Crown or Impediments to the Public?" (1990) 20 WALR 688; James Thomson "Beyond Superficialities: Crown Immunity and Constitutional Law" (1990) 20 WALR 710; Susan Kneebone "The Crown's Presumptive Immunity from Statute: New Light in Australia" [1991] Public Law 361.]

Does it matter anyway? The rights of parties provisions

One can question what is the practical effect of the shield of the Crown in any of its manifestations in the context of civil litigation by or against the Crown and the legislative provisions in Australia that equate the rights of the parties when the Crown is a party.

Section 64 of the Judiciary Act 1903 (Cth) provides:

> *"In any suit to which the Commonwealth or a State is a party, the rights of the parties shall as nearly as possible the same, and judgment may be given and costs awarded on either side as in a suit between subject and subject."*

There are similar provisions in section 5(2) of the Crown Proceedings Act 1988 (NSW) and section 25 of the Crown Proceedings Act 1958 (Vic).

I will now touch on the five possible scenarios I mentioned earlier relating to the various Crowns capacity to bind each other by legislation in Australia together with a general statement of the impact of the rights of parties provisions.

State legislation binding the State

This is the position discussed in **Bropho's case**. If the State Act does not bind the State Crown through the application of the new or old test arising from **Bropho's case**, it is arguable (at best) that the State Act may bind the State by operation of the rights of parties provisions in civil litigation. [See **Downs v Williams** (1971) 126 CLR 61 and the NSW Law Reform Commission's **Report on Proceedings by and against the Crown** (1975, LRC 24) at pp 71-73 and 133-148.]

Commonwealth legislation binding the Commonwealth

If a Commonwealth Act does not bind the Commonwealth under the principles in **Bropho's case**, query whether the Commonwealth could become bound on the commencement of civil proceedings by the operation of section 64 of the Judiciary Act. [See, **Maguire v Simpson** (1977) 139 CLR 362; **Commonwealth v Evans Deakin Industries Limited** (1986) 161 CLR 254.] The cases hold that section 64 relates to substantive as well as to procedural rights so as to make the rights to the parties as nearly as possible the same.

This situation is discussed at length in the Senate Committee Report.

State Legislation binding the Commonwealth

The case of **Evans Deakin** suggests that some State Acts which are not expressed bind the State or the Commonwealth could bind the Commonwealth by the operation of section 64 of the Judiciary Act in a substantive as well as procedural context and, in a manner so as to allow the commencement of civil proceedings based on the Act in question. This is the decision that threw the Commonwealth advisers into a panic. The Commonwealth realised it was potentially in serious trouble as a result of **Evans Deakin** and **Maguire v Simpson** and has tried and failed on 3 separate occasions to introduce legislation to clarify the position of the Commonwealth potentially being bound by state legislation in civil proceedings.

The 3 occasions are the introduction of:

- Commonwealth and Commonwealth Instrumentalities (Application of Laws) Bill 1989;
- Government and Government Instrumentalities (Application of Laws) Bill 1990; and
- Law and Justice Legislation Amendment Bill (No 2) 1991.

Each time the legislation was blocked by the combination of the Democrats and the Federal Opposition.

As to the general applicability of State legislation to the Commonwealth, the following propositions may be stated from the Full Court of the Federal Court in **Trade Practices Commission v Manfal Pty Limited** (1990) 97 ALR 231 and 21 FCR 230 at p239-240:

- The Constitution contains no implication conferring on State governments immunity from the operation of Commonwealth legislation or the reverse.

- The Commonwealth is not bound by state legislation which would adversely affect its property, revenue or prerogatives; the reason being that the Constitution contains no grant of legislative power to the States, so it does not subject the Commonwealth, as a body politic, to that power.

- The Commonwealth instrumentalities are not bound by State legislation which would impede performance by them of their statutory functions; the reason being that such a case involves an inconsistency between the relevant State and Federal legislation to which section 109 of the Constitution applies.

- But, to the extent that there is no interference with the property, revenue or prerogatives of the Commonwealth or with the performance of Commonwealth statutory functions, Commonwealth instrumentalities are bound by relevant State laws.

Commonwealth Legislation binding the States

The following further propositions come from **Manfal's case**, 21 FCR at 240:

- Commonwealth legislation which singles out State agencies for regulation will generally be invalid for want of power to legislate on that subject.

- The States, and State instrumentalities are bound by a Commonwealth law upon the topic within the normal legislative power of the Commonwealth if, upon its proper construction, the legislation applies to them. This is so notwithstanding that the legislation may adversely affect State property, revenue or prerogatives or the performance of State statutory functions; the reasons being that, in granting legislative power to the Commonwealth upon that topic, the Constitution subjects the States as bodies politic, to that power and, in relation to the inconsistent legislation, makes that of the Commonwealth dominant.

Commonwealth Places and State Law

This position is governed by the Commonwealth Places (Application of Laws) Act 1970 (Cth) and, the various State Acts, the Commonwealth Places (Administration of Laws) Acts. [See McCorquodale, **op cit**, page 411; Dennis Rose "The Commonwealth Places (Application of Laws) Act 1970" (1971) 4 Federal Law Review 263; Pat Lane "The Law in Commonwealth Places" (1970) 44 ALJ 403 and (1971) 45 ALJ 138; and **R v Holmes** (1988) 93 FLR 405].

Conclusion

In conclusion, all of the matters I have touched on this morning involving the source of government power, ultra vires, and the Crown immunity questions are matters that will need to be considered very early in the piece.

It is only when you have identified the source the power in the context of the nature of the power you can recognise the limits of government power and understand the source of government liability.

Thank you