17. Executive Immunities

Contents

A common law principle

17.1 It is a fundamental tenet of the rule of law that no one is above the law. This principle applies to the government, its officers and instrumentalities: their conduct should be ruled by the law. AV Dicey wrote that the rule of law encompasses:

> equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.[1]

17.2 In general, the government, and those acting on its behalf, should be subject to the same liabilities, civil and criminal, as any individual.[2]

17.3 While various statutes now provide for immunities for the executive arm of the Commonwealth in a wide range of specific contexts, these immunities should have no wider application than is necessary to achieve the specific legislative purpose.

17.4 This chapter considers immunities granted by statute to the executive arm of government. It discusses the source and rationale of the principle that executive immunities from legal liability should be limited; how this principle is protected from statutory encroachment; and when laws that give the executive a wide immunity may be justified.

---

1 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, Third, 1889) 190.

2 The issues in this chapter overlap considerably with those in Ch 16 on statutes authorising conduct that would otherwise be a tort.

17.5 The ALRC calls for submissions on two questions.

> **Question 17–1** What general principles or criteria should be applied to help determine whether a law that gives executive immunities a wide application is justified?
>
> **Question 17–2** Which Commonwealth laws unjustifiably give executive immunities a wide application, and why are these immunities not justified?

17.6 The executive historically had the benefit of the broad common law immunity of 'the Crown'.[3] However, that general immunity has been abrogated by statute in all states and territories.[4] For the federal government, crown immunity from suit was abolished by the *Judiciary Act 1903* (Cth)[5] ('*Judiciary Act'),* and arguably under section 75(iii) of the *Australian Constitution*.[6] Under ss 56 and 64 of the *Judiciary Act* the executive is, so far as possible, subject to the same legal liabilities as the citizen.[7]

17.7 Thus the Commonwealth of Australia now has no general Crown immunity from liability in tort or other civil actions and is subject to the same procedural and substantive laws as those which govern claims by one individual against another.[8] The Crown is also now subject to vicarious liability for the torts of its servants and agents, and may also have a non-delegable duty, to the same extent as an individual.[9]

17.8 Many statutes, however, provide an express immunity from liability arising out of certain functions or operations of government.[10] There is also a general presumption of statutory interpretation (which has been called 'a presumption of crown immunity from statute'[11]) that statutes were not intended to bind the Crown,[12] in the absence of

---

3 The term 'the Crown' refers to 'the government and its myriad components': Mark Aronson and Harry Whitmore, *Public Torts and Contracts* (LBC Information Services, 1982) 2, and following. This arises in the discussion of the history of Crown immunity and its abrogation. In contrast to the government, separate public authorities did not come within crown immunity: Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 215. Whether or not a government instrumentality is to be regarded as 'the Crown' may be significant on a purely procedural level of deciding who to sue: Aronson and Whitmore, 30.

4 See further Aronson and Whitmore, above n 3, Ch 1.

5 *Judiciary Act 1903* (Cth) ss 64, 56.

6 Cf *Commonwealth v Mewett* (1997) 191 CLR 471.

7 Nicholas Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 4th ed, 2009) 176.

8 *Maguire v Simpson* (1977) 139 CLR 362. See further Aronson and Whitmore, above n 3, 7.

9 The Crown was not, at common law, vicariously liable for its servants' or officers' torts and also had no direct liability to its citizen: Sappideen and Vines, above n 3, 215. But the laws abrogating Crown immunity reverse that position. For example, the Commonwealth was held to have a non-delegable duty in negligence as a school authority to its pupils: *Commonwealth v Introvigne* (1982) 150 CLR 258.

10 Immunities of non-government actors from liability in tort were considered in Ch 16.

11 Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Discussion Paper No 64 (2000) [5.171]–[5.172].

12 'Generally speaking, in the construction of acts of parliament, the king in his royal character is not included, unless there be words to that effect': *R v Cook* (1790) 3 TR 519, 521 (Lord Kenyon). See also: *Attorney-General v Donaldson* (1842) 10 M&W 117, 124 (Alderson B); *Ex Parte Post Master General; In re Bonham* (1879) 10 Ch D 595, 601 (Jessel MR).

clear words or necessary implication.[13] In 1990, the High Court in *Bropho v Western Australia* held that this presumption only provides limited protection to the government from liability under or control by statute. Contrary to some conflicting authority, the High Court emphasised that the presumption was simply a rule of statutory interpretation, and should not be elevated to any higher status.[14] It gives way to an express or implied intention that legislation binds the executive.[15] Where this rebuttable presumption applies and legislation is interpreted as not binding government, it may be said to give the executive a form of 'immunity' from laws which apply to ordinary citizens.[16]

17.9 However, this chapter is concerned only with express immunities from civil and criminal liability provided in Commonwealth statutes to the executive and its officers, employees, and agents.

17.10 An express immunity will often be qualified by a good faith requirement.[17] So for example, s 99ZR of the *National Health Act 1953* (Cth) provides:

> (1) ... neither the Commonwealth, the Chief Executive Medicare nor any person performing duty as a Customs officer or as a Departmental employee ... is liable for any act done in good faith by such a Customs officer, by the Chief Executive Medicare, or by such an employee in the performance of functions or duties, or the exercise of powers, under this Division.

Protections from statutory encroachments

Australian Constitution

17.11 Section 75(iii) of the *Australian Constitution* may be taken to impliedly extinguish common law crown immunity. It states:

> In all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party, the High Court shall have original jurisdiction.

---

13 *Province of Bombay v The Municipal Corporation of Bombay* [1947] AC 58; *The Commonwealth v Rhind* (1966) 119 CLR 584.

14 *Bropho v Western Australia* (1990) 171 CLR 1, 15 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ), 28 (Brennan J).

15 Ibid 18–19.

16 In modern times, with the increased outsourcing of governmental functions, the principle could provide protection to parties contracting with the Crown, but only where the application of statutory liability would impair the Crown's legal interests, or prevent the divestment of proprietary, contractual or other legal rights and interests of the Crown: *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1, 36–37 [64]–[68] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

17 For example, the *Environmental Planning and Assessment Act 1979* (NSW) provides that a council issuing a planning certificate in respect of land 'shall not incur any liability in respect of any advice provided in good faith': *Environmental Planning and Assessment Act 1979* (NSW) s 149. Such a section would prevent a council incurring liability for negligent misstatement in a certificate, as had occurred in *Shaddock v Parramatta City Council* (1981) 150 CLR 225.

17.12 Further, crown immunity is removed by s 64 of the *Judiciary Act*:

> In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.[18]

17.13 However, s 64 of the *Judiciary Act* may be superseded or overridden by legislation providing for a specific immunity to a person or entity.

The principle of legality

17.14 The principle of legality provides some protection for the principle that executive immunities should be only as wide as necessary to achieve the legislative purpose, and should not unduly derogate from individual rights.[19] When interpreting a statute, courts will presume that Parliament did not intend to grant the executive a wide immunity from liability, unless this intention was made unambiguously clear.[20] In the absence of clear language, the courts will narrowly construe any provision providing a immunity.

17.15 In *Board of Fire Commissioners v Ardouin* (1961)[21] the High Court considered a section of a New South Wales statute giving immunity from liability for the Board of Fire Commissioners where damage was caused by a bona fide exercise of statutory authority under that Act. Kitto J expressed the principle of interpretation which arose:

> Section 46 operates to derogate, in a manner potentially most serious, from the rights of individuals; and a presumption therefore arises that the Legislature, in enacting it, has chosen its words with complete precision, not intending that such an immunity, granted in the general interest but at the cost of individuals, should be carried further than a jealous interpretation will allow.[22]

17.16 In the same case, Dixon J pointed out that the immunity in that case was confined to aspects of the executive's operations that justified special protection from liability:

> It was not, however, expressed in terms which make it applicable to the doing of things in the course of performing the functions of the Board, which are of an ordinary character involving no invasion of private rights and requiring no special authority. [23]

17.17 Further, in *Puntoriero v Water Administration Ministerial Corporation* (1999),[24] McHugh J pointed out that statutes providing for immunities were to be read in the same way as statutes authorising what would otherwise be unlawful:

---

18 See also, *Judiciary Act 1903* (Cth) s 56; *Australian Constitution* s 78.

19 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

20 *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 30–33 [42]–[46]; *Evans v State of New South Wales* (2008) 168 FCR 576, [72] (French CJ); *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115 130.

21 *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105.

22 Ibid.

23 Ibid 110.

24 *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575.

> In principle, there is no reason for construing a statutory provision limiting liability for government action differently from a statutory provision authorising government action. The reasons which require provisions of the latter kind to be read narrowly apply to provisions of the former kind. For that reason, provisions taking away a right of action for damages of the citizen are construed 'strictly', even jealously.[25]

17.18 Kirby J, although dissenting, also stated:

> It has been stated in a series of decisions in this Court that immunity provisions, such as the one in question here, will be construed jealously or strictly so as to confine the scope of the immunity conferred. The reason for this attitude on the part of courts is not, ostensibly, to defeat the purposes of the legislature. It is no function of courts to do that. Rather, it is to ascertain the true purpose of the provision upon an hypothesis, attributed by the courts to Parliament, that legislators would not deprive a person of legal rights otherwise enjoyed against a statutory body, except by the use of clear language. A similar rule applies in the construction of legislation defensive of liberty. A like approach is taken to the construction of legislation said to deprive the individual of procedural fairness.[26]

International law and bills of rights

17.19 While international covenants typically do not refer to prohibitions on excessively wide executive immunities as such, art 17 of the *International Covenant on Civil and Political Rights* provides:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

17.20 Article 17 may represent some limit on excessively wide executive immunities for arbitrary or otherwise unlawful interferences with a person's privacy, home, honour or reputation. International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[27] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[28]

Justifications for encroachments

17.21 The key rationale for executive immunities is that the executive performs unique functions. The executive may need special powers and privileges to discharge its functions properly and effectively in what the government judges to be the broader public interest. The discharge of government functions goes beyond the adjudication of

---

25 Ibid [34] (McHugh J).
26 Ibid [59].
27 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).
28 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

rights, interests and obligations between persons, and is focused on the public good, community and distributive justice.[29]

17.22 As discussed in Chapter 16, statutes providing immunity from tort liability are generally based on the need to protect socially worthwhile agencies, activities or services from liability for negligence or strict liability. This is especially so where certain types of liability would make the agency's task almost impossible. An example is the immunity given under s 57 of the *Archives Act 1983* (Cth) to the Commonwealth against liability for defamation where access is given to records required to be made available for public purposes.

17.23 Some Australian laws that give executive immunities a wide application may be justified. The ALRC is seeking submissions identifying those Commonwealth laws that are *not* justified, and explaining why these laws are not justified.

29 Steven Price, 'Crown Immunity on Trial: Desirability and Practicality of Enforcing Statute Law against the Crown' (1990) 20 *Victoria University of Wellington Law Review* 213, 219, 228; David Cohen, 'Thinking about the State: Law Reform and the Crown in Canada' (1987) 24 *Osgoode Hall LJ* 379, 391.