

GOVERNMENT LIABILITY 1996

PERSONAL SENIOR PUBLIC SECTOR LIABILITY

Paper Delivered by Mark Robinson, Barrister, at a BLEC Seminar
"Government Liability" in Canberra, 1 November 1996

In this session I will briefly look at the personal liability of senior government officers and members of government boards in New South Wales, Victoria and the Commonwealth in respect of;

1. contract,
2. tort,
3. administrative law, and,
4. criminal law.

I will also look at "corrupt conduct" and the various statutory immunities from personal liability that might be called on in aid from time to time. I will touch on the question of whether personal insurance is appropriate for senior government officers and on what terms.

Before that overview commences, I wish to spend some time examining the broad type and range of responsibilities and liabilities that government board members or public sector directors face nowadays.

As to terminology, I propose in this section to speak of "government officers" or "senior government officers" to include senior officers of the Crown in the right of New South Wales, Victoria, the Commonwealth and all their respective instrumentalities and agents. The term will cover chief executive officers ("CEO") within the Chief Executive Service and senior executive officers ("SEO") within the Senior Executive Service as provided in the Schedules to the *Public Sector Management Act 1988* (NSW) ("the **NSW PSM Act**"). [See also, in Victoria, the *Public Sector Management Act 1992* (Vic) ("Vic **PSM Act**") which commenced in stages on 19, 24 and 27 November 1992 and in the Commonwealth, the *Public Service Act 1922* (Cth) ("the **Cth PS Act**").]

I will tend to concentrate more on the position of government officers and board members in my home jurisdiction, New South Wales. I will make some reference to the position in Victoria and the Commonwealth. Much of what I have to say on the general principles will be applicable in other jurisdictions.

A GOVERNMENT BOARDROOM?

The process of defining a government boardroom could well occupy a small thesis. Many state and federal bodies and legislatures have attempted definition at some stage. One of the most recent is contained in the Administrative Review Council's Report *Government Business Enterprises And Commonwealth Administrative Law*, Report No. 38, February 1995. The ARC decided that three characteristics should be used to identify Government Business Enterprises (GBEs) and they are (for the purposes of administrative law considerations);

- The government controls the body;
- The body is principally involved in commercial activities; and
- The body has a legal personality separate to a department of government (at paragraph 2.5).

Other appropriate ways of classifying GBEs could be derived from introducing further categories or subsets from the above three categories involving, for example;

- Degree and/or type of government control;
- Level, type and extent of commercial activities; and,
- Structure, integration or financial arrangements of the body;

Endless permeations of the above categories are possible. For most intents and purposes, we usually have no difficulty in determining whether a body or entity is a government body.

THE SOURCES OF PERSONAL LIABILITY

Generally speaking, the broad categories of personal liability for public sector directors and senior government officers are significantly wider than those of ordinary company directors and officers. They are also more nebulous and, consequently, more difficult to advise upon.

In addition to personal liability under contract, tort, criminal law and administrative law, there are underlying notions of "public trust" and fiduciary obligations with the public stakeholders being the beneficiaries or the fiduciaries and public sector directors being the trustees. There are also new or newly considered special torts and special common law crimes which apply only to public sector senior officers, for example, the tort of misfeasance in public office, and the common law offence of misbehaviour in public office.

There is also growing scope for personal negligence liability in relation to exercise of statutory duties, particularly in the context of directors' relationships with Ministers, and new duties on an employment nature (but possibly sounding in other areas) arising from Codes or Compacts of Conduct.

THE STANDARD OF CONDUCT FOR PUBLIC SECTOR DIRECTORS AND OFFICERS

One of the most vexed questions for public sector directors today is what is the correct or appropriate standard of conduct for public sector officers? Indeed, in relation to private sector directors, guidance can be obtained from a number of sources and professional bodies and associations. It is not so easy for government officers to seek independent and comprehensive guidance in this regard.

One interesting statement of the standards which must be sought to be achieved or which, in any event, are seen as relatively applicable here is contained in the *Report*

of the Royal Commission into Commercial Activities of Government and Other Matters (WA Inc., 1992) which stated (at Part II pp 4-11):

"The criminal law provides no more than the base level below which officials must not fall. It does not address the standards to which they should aspire even if these must, to some degree, always remain an ideal or counsel of perfection. Nor does it address standards, the breach of which should attract disciplinary action. The required standards can be formulated in the following general terms. Public officials:

- must act under and in accordance with the law;
- must exercise their offices honestly, impartially and disinterestedly and be seen to do so;
- must act fairly and with due regard to the rights and interests of the members of the public and of other public officials with whom they deal;
- must exercise their offices conscientiously and with due care and skill;
- must be scrupulous in their use of their position and of public property and of information to which they have access; and
- must be prudent in their management of public resources."

The above passage was quoted in full with approval by the NSW Independent Commission Against Corruption ("ICAC") in its January 1996 *Report on Southern Mitchell Electricity* ("SME") (at pp 15-16), which added:

"In sum, they must act so as to maintain public confidence in the institutions, the processes and the personnel of government itself."

The ICAC also added, in relation to statutory corporations (at p18):

"In determining whether public officials who have executive or managerial responsibilities have been involved in conduct amounting to a dishonest or partial exercise of official functions or a breach or breaches of public trust amounting to corrupt conduct under the ICAC Act, the nature and extent of their duties as fiduciaries are of central importance.

Directors of statutory corporations, along with those of private corporations, are required to act honestly and with reasonable care and diligence and to exercise the powers vested in them for the purpose for which they were conferred. In the case of SME the directors and managers were bound to act in good faith in the interests of SME and to exercise their powers for proper corporate and statutory objectives."

COMPANY DIRECTORS' STYLE LIABILITY FOR GOVERNMENT OFFICERS

The Corporations Law does not generally relate to government entities, however defined. The definition section of the Corporations Law defines a company so as to exclude many corporations created by specific State or Commonwealth statutes. Similarly, the expression "corporation" is also defined so as to exclude "exempt public authorities" which includes instrumentalities or agencies of the Crown.

It seems then, that the Corporations Law provisions relating to the duties of officers and directors in section 232 of the Corporations Law does not directly apply to many corporate-like government entities.

Section 232 of the Corporations Law provides for the key statutory obligations and duties of corporate officers.

They are:

1. to act honestly;
2. to exercise reasonable care and diligence;
3. not to make improper use of inside information; and
4. not to make improper use of the officer's position to gain a personal advantage or to cause a detriment to the corporation.

Breach of these duties may give rise to civil and criminal liability. As well, an officer who breaches the section is liable to account to the corporation for any profit or to compensate it for any loss or damage the corporation suffers.

There are other common law duties on company directors and officers that are not replaced or altered by the Corporations Law, such as the common law liability to the company founded in negligence [see, *AWA Limited v Daniels* (1992) 7 ACSR 758, Rogers J; and, on appeal, *Daniels v Anderson* (1995) 37 NSWLR 438]

While these duties may not expressly apply to government officers, breach of these and similar duties might well result in the dismissal of the officer and proceedings against him or her by the Crown employer.

One common law duty that has been specifically imposed on statutory board members is a fiduciary duty to act in relation to the affairs of the statutory corporation so as to advance the public purpose for which Parliament has set up the body [*Bennetts v Board of Fire Commissioners of New South Wales* (1967) 87 WN (pt 1) (NSW) 307 at 310, see also *Fouche v The Superannuation Fund Board* (1952) 88 CLR 609; and *Revesz v Commonwealth* (1951) 52 SR(NSW) 63 at 71-72 per Owen J.].

A recent discussion by the High Court on trustee-style duties of statutory office-holders is found in *Registrar of the Accident Compensation Tribunal (Vic) v Federal Commissioner of Taxation* (1993) 178 CLR 145. There, the 7 High Court

judges split 4/3 on the question whether statutory "board" members of a State workers' compensation fund were liable as trustees under general law (the majority held they were so liable) or liable simply under an exhaustive legislative scheme which dictated all aspects of the fund's management. The majority stated (at 162-164),

" The legislative provisions on which the Registrar [of the Tribunal] relies are to be approached, according to the argument, in the light of the principle in *Kinloch v Secretary of State for India* (1882) 7App Cas 619(20) That principle requires clear words before an obligation on the part of the Crown or a servant or agent of the Crown, even if described as a trust obligation, will be treated as a trust according to ordinary principles or, as it is sometimes called, a "true trust" (21) ; rather, in the absence of clear words, the obligation will be characterized as a governmental or political obligation, sometimes referred to in the decided cases as a trust "in the higher sense"(22) or a political trust"(23).

It is convenient to note, at this stage, that *Kinloch* does no more than state a rule of construction to be applied in ascertaining whether an intention to create a trust according to ordinary principles is to be discerned from the language of the instrument involved(24). However, subject-matter and context are also important and, in some cases, may be more revealing of intention than the actual language used(25).

The second matter to be noted in relation to *Kinloch* is that there is no rule of law or equity to prevent the imposition of ordinary trust obligations on a person who is, in other respects, a servant or agent of the Crown(26). Moreover, it is not entirely helpful to approach cases in which it is claimed that there is a trust in the ordinary sense on the basis that the person who owes the obligation in question is a servant or agent of the Crown. As will later be made clear, that is because, in some circumstances, that person may bear that character in relation to some functions, but not those associated with the obligation in question. That may be illustrated by reference to the present case. If the Registrar's duty in relation to the money in the Payne account is merely to invest it and to hold the investments it represents and accrued income until finally distributed to the Abele family, it is difficult to see that that function involves any Crown or governmental interest. And, if that is the case, the function is not easily described as a Crown or governmental function or as a function performed for or on behalf of the Crown, even if, for other purposes, the Registrar is the servant or agent of the Crown(27). It is thus preferable to approach cases such as the present on the basis that the person concerned holds a statutory office and has a number of functions, not all of which are necessarily governmental in nature. And on that basis, little, if any, significance attaches to the fact that the obligation is imposed on a statutory office holder, or, as was put in the course of argument, on a person "in his official capacity".

There is a third matter to be noted in relation to *Kinloch*. The mere fact that the person on whom the obligation is cast is a statutory office holder cannot, of itself, require the question whether he or she is a trustee in the ordinary sense to be approached on the basis of a presumption to the contrary. As with the question whether a person is a servant or agent of the Crown, and leaving aside any question of prerogative power, there can be no basis for an approach of that kind ***unless it appears that there is some governmental interest or function involved.***

Of course, the matters which can be said to involve some governmental interest or function are not confined to closed categories. The question whether a governmental interest is involved depends very much on the law as it stands from time to time(28). Even so, and acknowledging that the administration of compensation moneys awarded to or for the benefit of workers or, in the case of death, their dependants(29) is a matter of considerable public importance, ***it is not a function that is ordinarily perceived as governmental in nature or as involving the interests of government.*** That being so, the question in this case is simply whether or not the relevant provisions of the Workers Compensation Act and the Accident Compensation Act, considered in context and having regard to their subject-matter, reveal an intention that the Registrar be subject to a trust obligation in the ordinary sense. Accordingly, it is unnecessary to consider the extent to which the strength of the presumption recognized in cases such as *Kinloch* has been undermined by altered attitudes to the vulnerability of the Crown to curial proceedings and remedies, including the remedies available in cases of unjust enrichment."(footnotes omitted, my emphasis)

The minority considered that all the rights and duties arose out of the statute's provisions. Of the *Fouche* case mentioned above the minority said (at 188-189):

" His Honour held it was a trust for statutory purposes, having the same character, as the money which was described in *Harmer v Federal Commissioner of Taxation* (81) as being held on a trust for statutory purposes. In *Harmer*, the Court referred to *Fouche v The Superannuation Fund Board* (82) as a precedent for attributing that Character to the fund in question.

In this court, the Commissioner has placed some reliance upon *Fouche* and *Harmer* in order to characterize the compensation payments being administered by the Registrar as trust estate of which the Registrar was the trustee. The notion of a trust for statutory purposes needs some analysis and it gives rise to the question whether the trustee of such a trust is a "trustee of a trust estate" for the purposes of Div.6.

The relevant claim in *Fouche* was a claim by the Superannuation Fund Board against individuals who had previously been members of the

Board and who, in breach of their duty, had authorized the laying out of the Board's money on a hazardous investment. The question was whether the Board could seek an equitable remedy against former members on the footing that the administration of a trust fund was involved. The Court resolved that question in favour of the Board. But the Court said (83):

"We do not think it necessary to consider ... the question whether the individual corporators were, in any sense or for any purpose, to be regarded as trustees. Nor do we think it relevant to inquire whether they owed any and what duty to the contributors to the fund, whom the learned Chief Justice regarded as beneficiaries under the trust. We do not think, indeed, that the contributors are beneficiaries in the proper sense: they have, of course, an interest in the trust fund which would probably give them standing in a court of equity, but they have not such a beneficial interest in the fund as has an ordinary cestui quo trust. The trust is not a trust for persons but for statutory purposes."

In using the term "trust for statutory purposes", their Honours were concerned to identify the terms on which the Board held the Superannuation Fund. The fiduciary duties of the Board were stated in reference to the Fund as an entirety but not in reference to the amounts received from or in respect of individual contributors and paid into the Fund. Although the contributors did not acquire the beneficial interest of a cestui qua trust in the Fund, their Honours thought that the contributors, interest in its proper administration might give them standing to invoke the jurisdiction of equity if the Board misapplied the Fund by disbursing money from it without authority. The Board had a fiduciary duty to perform in administering the Fund, similar to the duty of a trustee. That duty was stated to be "a duty of reasonable care - the care which an ordinary prudent man of business would take"(84)" (footnotes omitted)

There is nothing to say that other common law duties may not be discovered by our courts in time. Directors became subject to new statutory duties relating to insolvent trading from 24 June 1993 with the amendments to the Corporations Law effected by the Corporations Law Reform Act 1993 coming into force. The changes resulted from the Harmer report, the *Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Social and Fiduciary Duties and Obligations of Company Directors*.

Civil penalty orders and criminal penalty orders can now be made against directors for insolvent trading (s 588G) and other breaches of the duties of care, diligence and good faith where there is no dishonesty or intent to deceive, see Parts 5.7B and 9.4B of the Corporations Law. [See, Christopher Bevan, "Directors' Liability for Insolvent Trading - A New Regime in Place" (February 1994) 32 Law Society Journal 55; Ashley Black "Recent Developments in Directors' Duties", paper delivered to State Legal Conference '96, Sydney, 29 March 1996] I see no reason why the principle of

insolvent trading in the context of a public body or authority could not lead to new types of liability for government officers in some circumstances.

PERSONAL LIABILITY FOR DIRECTORS AND BOARD MEMBERS OF GOVERNMENT ENTERPRISES: ISSUES FOR REFORM

In August 1992 in Western Australia a seminal policy discussion paper was released entitled "*Accountability and Responsibility: A Policy Discussion Paper on Personal Liabilities and a Code of Conduct For Directors of Government Enterprises*". The discussion paper was produced by a working party of the Western Australian Government and a final report was expected in 1993. I do not know if a final report did come out.

The conclusions of the WA working party were that government enterprises be grouped into three categories with different areas of responsibilities:

1. those to be fully corporatised with directors fully accountable under the Corporations Law;
2. commercial trading enterprises which should be corporatised and subject to new general legislation enshrining a "Directors' Charter"; and
3. statutory authorities which are highly regulated by government with the Directors' Charter applying.

The Directors' Charter was to have two key elements:

1. a statement of principles and objectives established by Parliament in the enacting legislation and to be observed or achieved by the Board in the performance of the organisation's functions and to be known as a "Statement of Corporate Intent", and
2. a statement of personal accountability provisions, which controls the manner in which individual directors and officers participate in the management of the statutory corporation, ie the personal honesty offences (at page 5).

In New South Wales, the then Premier announced in August 1992 that the Office of Public Management ("OPM"), a division of the Premier's Department will review the responsibilities and the role of all of the government boards and advisory councils with a view to considering whether their members should have the same or similar responsibilities as company directors. A Report was produced in August 1993, but it was not made publicly available.

I understand that a wide-ranging review of the liability and role of senior government officers in NSW was conducted and these matters were considered by Cabinet in 1994. The results of the deliberations have not to my knowledge been made public. It will be interesting to see what solutions the Carr Government proposes and whether

it sees desirable corporate style accountability and liability of board members and non-executive directors of statutory corporations. Options for reform include legislation, or, I suppose, some sort of Code of Conduct, or Compact or perhaps even a contract or Performance Agreement with government Board and authority members. Codes of conduct are now commonplace in some government areas in Australia, and it would be logical to extend the concept to more senior officers.

The OPM has now been disbanded and replaced with a new body.

A valuable insight into the August 1993 OPM report is gained in the ICAC Report on Southern Mitchell Electricity, at pp18-19. In the section on public sector directors generally in New South Wales, the Commissioner stated:

"In August 1993, the Office of Public Management of the Premier's Department produced a report entitled "Review of Roles, Responsibility and Accountabilities of Non-executive Directors and Part-time Members of Public Sector Boards and Committees". That report contains outlines for a practical approach designed to improve the management and operation of boards and committees in the NSW Government. Whilst the recommendations contained therein may require further consideration they do represent a valuable starting point for the implementation of a properly based accountability system. Fundamental to such a system is the relationship between Ministers and the boards of statutory authorities and other public sector organisations.

The present investigation revealed an alarming lack of knowledge amongst the former directors of the provisions of the Electricity Act including, in particular, those governing the procedures for boards of directors (Schedule 8). This is consistent with the finding of the Office of Public Management report:

"There was a general lack of understanding of agreement as to the roles, responsibilities and accountabilities of boards and advisory committees".

In order to overcome the problem, wherever it may exist ***there is clearly a need to ensure briefing and education programs are available for all directors and members of government boards and committees. These should include advice as to the relationship between government boards and Ministers and with the community and any legislative restrictions or requirements.***

It has been suggested that members of government boards and committees should be required to meet the highest standards of conduct and practice and that therefore the Corporations Law standards should be applied to government boards and committees. This is an important issue to which there is no simple answer (see discussion in the above report of the Office of Public Management, Section 5.6 Duties and Responsibilities of

Members.) There is, however, a need to consider the establishment of guidelines on ethical issues and directors' responsibilities. Whilst there have been various attempts to promulgate generic guidelines there may need to be specific guidelines for boards which are largely responsible for corporate governance as well as for those boards which are subject to the control and direction of a Minister. Specific guidelines can incorporate particular statutory requirements that apply to the organisation in question.

Finally there is potential benefit in the recommendation of the Office of Public Management in the establishment of performance agreements for boards which are consistent with, and promote statutory responsibilities as well as outlining the Government's expectations and the power and autonomy vested in them (see discussion of performance agreement generally in the report of the Office of Public Management, Section 5.3)." (my emphasis)

CROSSOVER FROM PUBLIC TO CORPORATE LIFE

Some of the more challenging issues arise when a senior government officer is caught up in the process of commercialisation / managerialism, corporatisation or privatisation. When you look at senior positions at either end of the spectrum, that is, on the one hand, a traditional departmental head, and, on the other, a director of a privatised body - duty and liability can clearly be seen.

But the liability and duties of officers can be blurred when looking at a position between these two extremes. The question must always be asked: to whom is the duty owed?

There may be a "cross-over" of duty when a senior public servant is appointed to a directorship of a company which is not state-owned, but in which the state has some stake or interest.

This was the case for Tony *Lloyd* in Western Australia [(1991) 53 A Crim R 199]. He was a most senior public servant who was urged by members of the Western Australian Government to leave the public service and take up a position as Managing Director of Rothwell merchant bank and a subsidiary company of the bank.

During one of the last attempts to rescue the merchant bank in September 1988, Mr Lloyd used the subsidiary company and his government connections to urgently borrow \$6 million from a State-owned bank to loan it to Rothwell. This loan was soon repaid but did not get Rothwell out of trouble and Rothwell soon sank.

The repaid loan became a preference payment in the liquidation and the State-owned bank settled a claim made by the liquidator by paying the liquidator \$2.5 million.

Mr Lloyd was charged with improper conduct of a director under Companies Code in respect of the subsidiary company. He was sentenced in 1991 to two years gaol.

His sentence was reduced by the Supreme Court to a fine of \$15,000.

In mitigation of his conduct, the Court recognised Mr Lloyd was trying to meet a government guarantee obligation in respect of Rothwell and he was trying to implement a lawful government policy of support for the merchant bank.

While having no duties as a government officer, the Court seemed to recognise he had a certain allegiance to the government and this was a factor mitigating sentence. [See, Elizabeth Harman "*Public and Corporate Duties: The Lloyd Case in Western Australia*" (1922) 51 Aust Jnl of Public Administration 86.]

Identifying the nature and scope of public sector duties in their cross-over to the private sector is very difficult. All of the concepts of duty, liability, tradition and allegiance can be merged. Government business enterprises are about halfway between the two extremes I mentioned earlier. The Administrative Review Council, in its 1993 *Discussion Paper on Administrative Review of Government Business Enterprises* said:

"In effect, GBEs are in a "grey zone", somewhere between what was traditionally considered to be the public sector and what was traditionally considered to be the private sector." [at 44-45]

[See also, the Final Report of the ARC *Government Business Enterprises and Commonwealth Administrative Law*, Report No 38, February 1995.]

At the Commonwealth level, in 1994, 2 Bills were before the Federal Parliament which might have impacted on this area; the *Financial Management and Accountability Bill 1994* (to replace the Audit Act 1901) and the *Commonwealth Authorities and Companies Bill 1994* (to regulate the activities of Government Business and Trading Entities). The former Bill, at the time of writing this paper, was ready to be re-introduced shortly by the Howard Liberal Government.

THE AGE OF THE LEVEL PLAYING FIELD: COMPETITION POLICY REFORM LEGISLATION

Following on from the Hilmer Report published August 1993, (*Report By The Independent Committee Of Inquiry Into National Competition Policy*) which recommended inter alia that government business or trading entities should not have the benefit of the shield of the Crown or of any special government status the various States and Territories have executed with the Commonwealth the Competition Principles Agreement dated 25 February 1994 which provides for inter alia, a competitive neutral policy for the elimination of resource allocation distortions arising out of the public ownership of entities in significant business activities. The principal tenet, in clause 3 of the Agreement, is that "Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership." Respective governments are to adopt an appropriate corporatisation model and impose on the GBEs;

1. full government taxes or an equivalent;
2. debt guarantee fees directed towards offsetting the competitive advantages provided by government guarantees; and,
3. those regulations to which private sector businesses are normally subject, such as those relating to the protection of the environment, and planning and approval processes, an equivalent basis to private sector competitors.

On 11 April 1995, the same parties also entered into the Conduct Code Agreement which has as its object that complementary competition laws and policies apply throughout the country to all businesses irrespective of ownership. The agreement and subsequent legislation requires the said businesses to be subject to the new Competition Code (which is now found at a Schedule to the *Trade Practices Act 1974* (Cth)). As far as I am aware, the provisions applying national competition law to State and Territory businesses commenced on 20 July 1996 - see generally, Russell Miller's book, *Annotated Trade Practices Act*, 17th ed, 1996, where the above agreements and many of the legislative changes are reproduced and explained. As I understand it, the *Competition Policy Reform Act 1995* (Cth) was assented to on 20 July 1995; the *Competition Policy Reform (New South Wales) Act 1995* (NSW) is to become largely operational on 20 July 1996; and the *Competition Policy Reform (Victoria) Act 1995* (Vic) operates on and from the same date.

The implications for senior government officers is obviously enormous. However, just how the various States and Territories will implement the agreements in detail remains to be seen. For example, a newly incorporated entity in New South Wales, Sydney Water Corporation Limited, remains subject to the New South Wales' Ombudsman Act, freedom of information legislation, ICAC and the scrutiny of the Public Accounts Committee. The part that public law will play in all of this remains to be finally considered.

A CASE STUDY: SOUTHERN MITCHELL ELECTRICITY: TAKE THE MONEY & RUN

The ICAC Report I mentioned earlier provides an instructive insight into the innermost sanctum of the government corporatised boardroom. It is replete with lessons of what government directors ought not do. The full title of the report is the Report on the Purported Termination of Employment of Jeffrey Horner and Edwin Chenery by Southern Mitchell Electricity, January 1996. Briefly, the Report involved the general manager and assistant general manager of a State statutory authority seeking termination by agreement of their employment pursuant to employment contracts (which they had drafted) from the authority's board of directors (which they misled with wrong and mistaken legal advice which they had personally requested). In the context of the two men not believing that they would be reappointed in an electricity authority industry rationalisation, the two sought and obtained termination payouts of \$1.4 million.

The SME was described by the ICAC generally in the following terms (at pp 16-17):

"SME was a statutory corporation carrying on a government enterprise on commercial lines. The corporate form of such corporations should not be allowed to conceal the fact that the ultimate owners are the public and that public accountability is essential. In common with other electricity distributors, SME came under Ministerial control as a result of the 1987 amendments to the Act. Its historical origin as a county council was to an extent still reflected in the attitudes of some directors who appeared to resent and, to a degree, were suspicious of the objectives and interventions of central government - in this case the State Government - notwithstanding the ultimate control vested in Government by statute to be exercised through the responsible Minister. The belief by some that county councils were local fiefdoms should be exposed as there is a real danger, as was apparent in the present investigation, of executive and managerial staff acting out of a misplaced sense of loyalty and ownership."

The Report sets out a brief summary of events as follows (at p 2-3):

"The events in question occurred against a background of electricity distribution industry reform, and in particular proposals to group together a number of distributors into larger entities. The details of the reforms are set out in Chapter 1. As General Manager of SME, Mr Horner had been a firm proponent of reform and had reason to hope he would be appointed chief executive officer in any amalgamation involving SME. On 9 June, another was appointed to this position. As a result of this appointment, and the perception that they claimed to have had that the impending legislative changes would diminish their powers, both Mr Horner and Mr Chenery decided to seek legal advice from Mr Patrick Bird, a partner with the Bathurst law firm of Kenny Spring, who normally acted for the Board of SME. They also arranged for the calling of a special SME Board meeting to consider their contractual situation in light of the proposed changes.

Mr Bird completed his advice on 14 June. It contained a number of misleading statements and omitted important points. It is considered in detail in Chapter 4.

A special meeting was called on short notice for 2pm on Wednesday 14 June. [NB The Board was to cease to exist on 14 July 1995] Present at the meeting were Mr Toole, the other Board members, Mr Horner, Mr Chenery, and two other senior staff members, Mr Robert Roach and Mr Kevin Sweeney. Chapter 5 details what occurred at the meeting referring, in particular, to the procedural defects and irregularities which occurred.

The Board had before it the legal opinion prepared by Mr Bird but was unaware he had been retained by Messrs Horner and Chenery on their own behalf. Despite the obvious conflict of interest and the existence of a specific statutory provision that a general manager was not entitled to be

present at a board meeting during any discussion concerning his dismissal, both Mr Horner and Mr Chenery remained present throughout the meeting. Mr Horner actively participated in the meeting, making a number of statements, some of which were misleading, in support of the proposition that the Board should terminate his and Mr Chenery's contract and pay out the balance of their contractual terms. Those statements are of central importance and are examined in Chapter 6.

Despite a legislative requirement to keep the Minister for Energy informed of any significant developments no one forewarned the Minister of what was proposed. An equally significant issue was raised in Mr Bird's advice as to whether the proposed course of action was in fact contrary to ministerial directives which had recently been issued.

The Board, by a majority of four (the chairperson not voting and Messrs Crawford, Orreal and Wardman dissenting) resolved to terminate the employment of Messrs Horner and Chenery under a clause of their employment contracts which entitled them to a payment of a sum equivalent to their entitlement for the balance of the terms of their contracts. In Mr Horner's case that was approximately four years. Mr Chenery had about three years left to run under his contract. The conduct of Mr Toole is considered in Chapter 8, and that of the majority members of the Board in Chapter 9.

Mr Horner's employment was purportedly terminated by the Board despite a legislative requirement that general managers can only be removed from office by the Governor acting on advice of the Minister. No consideration was given to whether there was any proper basis for terminating Mr Chenery's employment.

The Board appointed Mr Roach as Acting General Manager.

The following day the three dissenting Board members sought to have the decision rescinded. They were unsuccessful. Later that day Messrs Horner and Chenery received payments of almost \$1.4 million, of which about \$940,000 represented a payout of the balance of the terms of their contracts. The events of 15 June, and later, are dealt with in Chapter 10.

Following an initial investigation by the Department of Energy, which highlighted a number of irregularities, the Acting Minister for Energy dismissed the entire SME Board on 23 June 1995.

The ICAC decided to undertake its own investigation in order to ascertain if there had been any corrupt conduct associated with the calling and conduct of the special meeting and the decision to terminate the contracts with a balance of term payment.

...

Towards the end of the ICAC hearings, and as a direct result of those hearings, Mr Horner and Mr Chenery subsequently made arrangements to repay to SME the balance term of contract payments - \$941,527.50 in all, together with interest. Upon interrogation as to the basis for their decisions it became clear that both accepted that the Board's decision had been invalid because:

- (a) it had relied on legal advice which it mistakenly thought was from its own solicitors;
- (b) it was procured by misleading statements made or adopted by Mr Horner and Mr Chenery; and
- (c) it was based, in part, on an erroneous legal advice.

Mr Horner also accepted his termination was invalid because he could only be removed from office by the Governor. Mr Chenery accepted his termination was invalid because neither Mr Horner nor SME had any justifiable grounds on which they could dismiss him.

Despite these acceptances however, neither Mr Horner nor Mr Chenery were prepared to accept personal responsibility for misleading the Board."

Mr Horner and Mr Chenery were found to have engaged in corrupt conduct within the meaning of the ICAC Act. The Board was cleared. The solicitor was referred to the Law Society."

ICAC RECOMMENDATIONS FOR PUBLIC SECTOR DIRECTORS

The ICAC made a number of recommendations for statutory authority Boards which are subject to ministerial control. The ICAC set out the "principles of good conduct" which should govern private sector directors (at p 18):

"These may be shortly stated as follows:

- 1 Where a power of ministerial direction and control exists, ultimate authority rests with the Minister.
- 2 The consideration which must govern each individual director is the advancement of the public purpose for which the Parliament has established the organisation.
- 3 Each member of a board has a fiduciary duty to act honestly and in good faith in the exercise of his or her powers and to do so by what each considers to be in fulfilment of the purpose referred to in 2.

- 4 All directors are bound by common law duties to act with reasonable care and diligence.
- 5 In addition to duties arising under the common law, there are duties arising in enabling Acts with which conduct of directors must conform."

THE LEGAL RELATIONSHIP - AN EMPLOYMENT RELATIONSHIP?

The NSW PSM Act prescribes in detail the employment relationship between executive officers of the Crown and their employers. Executive officers means CEOs or SEOs.

Section 42A(2) - NSW PSM Act Section 50(1) - VIC PSM Act

<u>Employee</u>	<u>Employer</u>
Chief Executive Officer	Minister
Senior Executive Officer (Public Service)	Department Head
Senior Executive Officer (Public Authority)	Public Authority

The terms and conditions of employment of a government officer are governed by the contract of employment. There are provisions relating to removal, retirement, conduct, discipline, punishment and special inquiries. [The NSW PSM Act provides that the employment of an executive officer shall be governed by the contract of employment between the officer and the employer (section 42G(1)). The Victorian position is the same, section 55 of the Vic PSM Act. Division 5 of Part 2A of the NSW PSM Act relates to the removal and retirement of executive officers [Parts 5 & 7 of the Vic PSM Act]. Part 5 of the NSW PSM Act relates to discipline and conduct of officers in the Senior Executive Service [a power in the Regulations under s106(2)(d) of the Vic PSM Act] and Part 6 relates to special inquiries for executive officers [Part 7 of the Vic PSM Act].]

I will return to the PSM Acts a little later.

At the Commonwealth level, section 10 of the Cth PS Act divides the Australian Public Service into 4 parts:

- the Secretaries of Departments (in Schedule 3);
- SES officers;

- Other officers, and
- Employees.

SES officers are described in section 26AA and appointed under section 28 of the Cth PS Act. Discipline of Secretaries is covered by Division 8A of Part III of the Act. Secretaries may be dismissed by the Governor-General on advice from the Prime Minister, section 76E. Discipline of SES and other officers is covered by Subdivision C of Division 6 of Part III of the Act, especially sections 56 and 61.

PERSONAL CONTRACT LIABILITY

Senior government officers are in a reasonably secure position when it comes to contracts.

They are generally not a party to a contract or liable under it. They will be liable only if they contract personally, and not as an agent of the employer, or, if they come within the "warranty of authority" rule. This "warranty of authority" rule might make the Crown servant or agent liable to the third party if that person:

- did not have authority to bind the Crown;
- represented expressly that he or she had authority; and
- the third party entered into the contract in reliance on that representation.

There is an 1897 English Court of Appeal decision [Dunn v Macdonald [1897] 1 QB 555] holding that a Crown servant acting on behalf of the Crown could not be held personally liable under an implied warranty of authority. However, that decision has not yet been applied in Australia and was soundly criticised by Peter Hogg in his book Liability of the Crown, second edition, 1989 at page 173.

In any event, the rule does not apply where:

- the agent's lack of authority is clear as a matter of law; and
- the third party should have been aware of this lack of authority. If a government employee enters into a private contract which necessarily or tends directly to interfere with the proper discharge of his or her duties, the contract will be contrary to public policy and void [Wood v Little (1921) 29 CLR 564].

Officers who negotiate or enter into contracts that bind the Crown and who exceed their authority or, by some misconduct, negligence, incompetence, carelessness, impropriety or inefficiency, cause loss or damage to the Crown, may be dealt with under the disciplinary provisions of the various Acts or by a special inquiry. In Australian Broadcasting Corporation v Redmore Pty Ltd (1989) 166 CLR 454 the High Court majority said that failure to observe a statutory directive that Ministerial

consent be obtained by the Australian Broadcasting Corporation before entering into any contract exceeding \$500,000 could (depending on the circumstances) constitute misconduct for the purposes of disciplinary proceedings under the Australian Broadcasting Corporation Act for those officers concerned [at p459]. Even the dissenting judges in that case suggested that the responsible Board members or officers of the ABC might be able to be removed from office for breach of the (in their view, mandatory) section [at p465].

PERSONAL TORT LIABILITY

For conduct to be actionable as a tort, the act or omission complained of must be:

1. harmful, causing proximate loss and damage;
2. committed without legal authority; and
3. a tort, preferably within the recognised heads of tortious liability.

When a government officer commits a tort, that officer is personally liable and can be sued. When in the course of employment, the officer is personally liable as well as the Crown or the statutory authority employing that officer. The employer is vicariously liable. [*Employee's Liability (Indemnification of Employer) Act* 1982 (NSW) and *Employees Liability Act* 1991 (NSW). In Victoria, *Crown Proceedings Act* 1958 (Vic), section 23. In the Commonwealth, *Judiciary Act* 1903, sections 56, 64 and 64B.]

The test to be applied to determine vicarious liability is neatly set out in Glass, McHugh & Douglas, Liability of Employers, 2nd ed, at 93 :

"The vicarious liability of an employer for the torts of his employee extends to those acts or omissions which occur within the scope of his employment. An act or omission is within the scope of employment if it is either:

- (a) An act authorised by the employer, or
- (b) An unauthorised act which is so connected with the authorised acts that it may properly be regarded as a mode although an improper mode of doing them."

[This formulation was last applied in NSW in Canterbury Bankstown Rugby League Football Club Ltd v Rogers, unreported, 23 November 1993, NSW Court of Appeal, per Giles AJA, Handley JA agreeing.]

A senior government officer is not liable for the tort of a subordinate unless he or she ordered the tortious action to be done or was some way involved or personally implicated [Williams v The Commissioner for Main Roads (1940) 40 SR (NSW) 472, 57 WN 169].

It may be that the officer who committed the tort should have cleared the action before undertaking it with a superior officer. Failure to do so may be a disciplinary breach.

A statutory or public corporation that is an agent or servant of the Crown is in the same position as an individual Crown servant. The corporation will be liable if in its own right it commits a tort. Peter Hogg argues (at page 142) that the corporation will not be vicariously liable for the tort of its servants as the corporation itself is a servant of the Crown. This position may be different in New South Wales in that claims against the Crown statutory corporations may not be brought directly against the State of New South Wales under section 5 of the *Crown Proceedings Act 1988* (NSW).

There are two main heads of tort liability I wish to outline. They are:

- negligence; and
- misfeasance in a public office.

Other heads include:

- trespass to property;
- trespass to person;
- nuisance;
- detinue and conversion;
- wrongful arrest and false imprisonment;
- breach of statutory duty;
- promissory estoppel (possibly) (which could be a category of administrative law);
- occupier's liability;
- employer's liability; and
- strict liability.

There might one day be a further head of liability specific for government officers that can be referred to as "constitutional torts". [See Hogg, *Liability of the Crown*, second edition, 1989, Law Book Company pages 112 to 113.] This tort can be committed only by government and government officers. It is a United States development and the cause of action is based on a breach of the Bill of Rights

provisions of the United States constitution. The Canadian Charter of Rights specifically provides for remedies for constitutional torts.

I doubt that this category will ever apply in Australia unless we get our own Bill of Rights. However, should the door be opened to allow damages for misuse of statutory or executive power in the future, the overseas case law will be of some value, particularly in the assessment of damages. I will say more on individual tort liability in the next section.

NEGLIGENCE

Negligence is the most significant head of tortious liability for government officers, as it is for all public and private sector entities.

You know the principal elements of establishing negligence are:

- the existence of a duty of care owed by the defendant to the plaintiff;
- a breach by the defendant of the duty of care;
- proximate damage caused to the plaintiff by the breach; and
- a causal connection between the breach of duty and the damage.

Easily, the biggest hurdle in establishing negligence against government officers is answer to the question - **to whom is the duty owed ?**

There is a lot of authority that says the duty of a government officer is to the Governor General, the Crown or the public entity employing the officer and not to a specific complainant from the public. It has been held, for example:

- A taxation officer's duty is internal to the Department and the Taxation Commissioner. The Commissioner's duty is to the Governor General [Carpenters Investment Trading Company v Commonwealth (1952) 69 WN (NSW) 175 (in appointing servants) or to the Crown [Lucas v O'Reilly (1979) 36 FLR 102 at 108 per Young CJ (statutory duty)].
- Customs officials owe no duty of care to importers [Revesz v Commonwealth [1951] SR (NSW) 63].
- Town Clerks owe a duty to the Council and not to the public [Turner v Cornish (1950) 1 LGR 249 at 251].

Some activities of government officers that have attracted a specific personal duty of care to the public include:

- Teachers are liable to their students for lack of proper supervision. [See generally, G J McCarry, Aspects of Public Sector Employment Law, 1988, Law Book Company, at page 219.]
- Prison authorities may be liable to their prisoners for their safety [Ralph v Strutton [1969] Qd R 348]. Negligent misstatement, for incorrect or misleading advice given or information imparted in circumstances where it was known or should have been known that the information would be relied on to the complainant's detriment; and
- Failure to give information where it is customarily given [Shaddock & Associates Pty Limited v Parramatta City Council (No 1) (1981)150 CLR 225].

The senior or chief executive officer will not be personally liable unless "it can be shown that the act complained of was substantially the act of the head himself - in which case he would be liable as an individual" [Raleigh v Goshen [1897] 2 Ch 73 at 77].

In the High Court decision in Northern Territory of Australia v Mengel, (1995) 129 ALR 1; 69 ALJR 527, the Court made far-reaching comments on the future development of government liability in Australia both in the areas of public law and private law remedies.

The High Court provided a convenient summary of governmental negligence liability and sounded a warning as to a possible new area or category of government liability. The Court said (at page 544B):

“Governments and public officers are liable for their negligent acts in accordance with the same general principles that apply to private individuals and, thus, there may be circumstances, perhaps very many circumstances, where there is a duty of care on governments to avoid foreseeable harm by taking steps to ensure that their officers and employees know and observe the limits of their power. And if the circumstances give rise to a duty of care of that kind, they will usually also give rise to a duty on the part of the officer or employee concerned to ascertain the limits of his or her power. In these circumstances, the basis of liability identified by Angel J. in the Court of Appeal encounters difficulties of much the same kind as those which attend the cause of action recognised by Priestley J. So far as acts involving the intentional infliction of harm are concerned, the personal liability of public officers is covered by misfeasance in public office and there is no principled basis either for its extension or for imposing liability on government if there is neither de facto authority nor a duty of care to ensure that the officer observes the limits of power. In other cases, if there is a duty of care to avoid the harm in question, the principle serves no useful purpose; and if there is not, it would be anomalous to hold either the government or the officer concerned liable for harm that there is no duty to avoid.”

This is a critical passage. It will be tested in the Courts as will its limits.

In negligence law, the same general principles that apply to private individuals apply to government and public officers. So, it follows, that just as it may be said there is a general duty on a private individual to take steps to ascertain and observe the scope or limits of an activity which might or could harm someone, so to, is there a corresponding duty of care on the government (and usually its officers as well) to take steps to ensure that the officers and employees know and observe the limits of the relevant governmental power. Such a duty has never been formulated by a common law Court in this manner. On its face, it sends a formidable warning to government as to the scope of the duty of care if the negligence alleged involves the use by government of or exercise of statutory, personal or prerogative power.

PERSONAL LIABILITY FOR MISFEASANCE IN PUBLIC OFFICE

Misfeasance in public office was given detailed treatment in all of the judgments in Mengel. Without going into the detailed reasoning used by the Court, in summary, the Court said that it was "convenient" to consider whether the principle was "unduly narrow". They said it was not. In doing so, they discarded some of the requirements then needed to establish the tort, eg; that the plaintiff must have been a member of a class to whom the officer owed a duty.

The Court said that the existence of negligence law obviated the need for misfeasance in public office to be any wider than it presently was. However, in reformulating the tort, the High Court introduced the concepts of "reckless indifference" and "reckless disregard" into the tests. While it is not an easy thing to draw from the joint judgment a clear set of principles or tests for the tort, in my opinion, it would be safe to suggest that the main elements needed to establish the tort are:

- there is an intention to cause harm by the public officer; or
- there is reckless indifference to the harm that is likely to ensue; or
- the public officer knowingly acts in excess of his or her power; or
- the public officer recklessly disregards the means of ascertaining the extent of his or her power (pp 539-541).

The Court would not extend the principle to include cases where the officer "ought to have known" that he or she did not have the power. They implied that this was too close to negligence law and was not called for as a separate principle.

The Court said it should be borne in mind that misfeasance in public office is a personal tort. It is personal to the officer who commits the tort and liability will "ordinarily only be personal liability". Normally, the Crown employer will not be vicariously liable. The Crown employer will be liable in two circumstances, the Court said: one; in circumstances of "de facto authority", the meaning of which is explained by Dixon J in James v Commonwealth (1939) 62 CLR at 359-360;

secondly, in some cases it might be considered that the Crown employee was impliedly authorised to commit the act causing loss, as in Racz v Home Office [1994] 2 WLR 23 at 25-28.

The situation is different in New South Wales and the Crown will probably be vicariously liable in cases of misfeasance in public office because of the operation of sections 7 and 8 of the Law Reform (Vicarious Liability) Act (1983) (NSW).

Justice Brennan (as he was then) formulated misfeasance in public office as follows:

"It is the absence of an honest attempt to perform the functions of the office that constitutes the abuse of the office. Misfeasance in public office consists of a purported exercise of some power or authority by a public officer otherwise than in an honest attempt to perform the functions of his or her office whereby loss is caused to a plaintiff. Malice, knowledge and reckless indifference are states of mind that stamp on a purported but invalid exercise of power the character of abuse of or misfeasance in public office. If the impugned conduct then causes injury, the cause of action is complete." (at p 547B)

Justice Deane held, in summary, (at p 554C) that there were five essential elements which constituted the tort, namely:

- an invalid or unauthorised act;
- done maliciously;
- by a public officer;
- in the purported discharge of his or her public duties; and;
- which causes loss to the plaintiff.

The critical element discussed in Mengel's Case was malice. Deane J said malice will exist if there was:

- . Actual intention to cause such injury; or,
- . Knowledge of invalidity and lack of power and that it would cause or likely cause such injury; or,
- . The act was done with reckless indifference or deliberate blindness to that invalidity or lack of power or that likely injury.

See the most recent House of Lords case on misfeasance in a public office, RACZ v Home Office [1994] 2 WLR 23, where it was held that the question of whether unauthorised acts of police officers were so unconnected with their authorised duties as to be quite independent of and outside these duties is one of fact and should be determined at trial.

There is even Canadian authority that may have applied the tort to the Premier of Quebec for maliciously cancelling a restaurant liquor licence [Roncarelli v Duplessis [1959] SCR 121, see comments of Hogg, op cit at page 112, note 162].

PERSONAL LIABILITY FOR INDEPENDENT ACTS

If a government officer is granted an independent power or duty, the exercise of which is not subject to the supervision or direction of anyone, that officer is personally liable for any consequences flowing from an independent act. The Crown, or Crown employer of that officer is not vicariously liable at common law for such acts. The rationale for the principle is that the person is not a servant or agent of his or her employer in relation to the exercise of these independent, and usually statutory, powers. [See, Enever v The King (1906) 3 CLR 969; Baume v Commonwealth (1906) 4 CLR 97; and Little v Commonwealth (1947) 75 CLR 94.]

The application of this common law rule to Australia was reaffirmed (though not applied in the case) by the High Court in 1986 [Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Limited (1986) 160 CLR 626, regarding liability of a harbour pilot]. The leading cases concern police officers. However, there are a broad range of government officers who exercise independent discretions and duties every day. This common law rule places them in a exposed position. [See, generally, Susan Kneebone "The Independent Discretionary Function Principle and Public Officers" (1990) 16 Monash Uni LR 184].

The rule was modified generally in 1983 in New South Wales by the Law Reform (Vicarious Liability) Act 1983 (NSW). Independent government officers remain personally liable for their independent acts, but now the Crown employer is also liable.

The Act implemented part of a New South Wales Law Reform Commission report of 1975 [Report on Proceedings by and Against the Crown, LRC Report No 24, 1975] and provides that [in section 7 and 8] that the Crown is vicariously liable:

- in respect of a tort;
- by a person in the service of the Crown (including office holders);
- in the performance or purported performance of a
 - function or independent function, where that function is
 - in the course of, or an incident of, his or her service with the Crown [even if the officer was not appointed to perform that function]; or

- directed to or incidental to the carrying on of any business enterprise, undertaking or activity of the Crown.

New South Wales thus effectively reduced the personal exposure of government officers for their independent acts. But where did this legislation leave the victims of government torts where the government officer concerned had the benefit of a separate statutory immunity for their actions? I will come to that question shortly.

New South Wales is the only Australian jurisdiction of which I am aware that has modified the impact of the principle generally so as to allow tort proceedings to lie against the Crown. The Commonwealth, Queensland, South Australia and the Northern Territory each have Acts that specifically permit the Crown to be vicariously liable in respect of independent acts of police officers.

The position in Victoria and the Commonwealth is largely left to the common law. Vicarious liability applies to Crown employees or servants, but not when they exercise an independent statutory discretion.

In Victoria, section 23(1)(b) of the *Crown Proceedings Act 1958* provides:

"the Crown shall be liable for the torts of any servant or agent of the Crown or independent contractor employed by the Crown as nearly as possible in the same manner as a subject is liable for the torts of his servant or agent or of an independent contractor employed by him."

An officer exercising independent discretionary power is not necessarily a "servant" or "agent" of the Crown and so, that officer might be personally liable for independent acts. It would depend on whether the officer was considered by the courts to be an "agent" of the Crown. There is some doubt because a definition section that would have abolished the independent discretionary principle was dropped in the Victorian Parliament when the Crown Proceedings Bill was being debated in 1955 [Kneebone, op cit p203].

At the Commonwealth level, the only statute of which I am aware that deals with the independent discretion principle is *Commonwealth Motor Vehicles (Liability) Act 1959* which deems as an agent of the Crown any driver of a Commonwealth vehicle that is uninsured and causes personal injury.

In all other Commonwealth matters, the principle is addressed in delegated legislation in such a way as to allow the Commonwealth to pick up the tab for an officer's damages and legal costs but only in certain circumstances. This legislation, or quasi-legislation, may be found in the Finance Directions made under the authority of Guidelines made under the authority of the *Finance Regulations* (No. 127A) made under the authority of the *Audit Act 1901* (Cth) (section 72).

Section 21/5 of the Finance Guidelines provides that, except in cases involving firearms, which is dealt with separately (in Section 21/25):

"In the case of civil proceedings for damages, the Commonwealth will normally undertake to the officer to arrange for his defence at Commonwealth expense and to meet any damages awarded against him or agreed to in a negotiated settlement, provided the claim arose:

- (a) in circumstances in which the Commonwealth is vicariously liable for the acts of the officer; or
- (b) in circumstances in which the Commonwealth would not be vicariously liable but:
 - (i) the officer was exercising an independent discretion conferred upon him as the holder of an office and he acted reasonably and responsibly in all the circumstances; or
 - (ii) the officer acted reasonably and responsibly and the act giving rise to the claim was a reasonable means of performing his duties in the interest of the Commonwealth." (emphasis mine)

The Guideline goes on to state that the Commonwealth will not give any undertaking where the claim involves driving a private vehicle on Commonwealth business (Direction 21/18(c)) or:

"where the claim arose in circumstances where the Commonwealth may seek from the officer contribution or indemnity in respect of the damages for which the Commonwealth is or might be liable."

Further, a decision to seek contribution or indemnity will normally only be made where the officer:

"acted irresponsibly or maliciously or with culpable negligence or in disregard of the Commonwealth's interest or otherwise in such a way as to make it proper for the Commonwealth to seek such contribution or indemnity...".

The provision goes on to state that in some cases a Commonwealth undertaking to pick up the tab cannot be made before the court case and reimbursement of expenses may be made after the litigation (depending, of course, on what findings are made in relation to the officer's conduct).

All of this does not create any right for a tort victim of a Commonwealth officer exercising independent power to sue the Commonwealth. It simply means that

the Commonwealth will pay the legal costs of the defendant and any damages awarded or agreed, subject to the widely drafted qualifications and exceptions contained in the Guideline.

EMPLOYERS SEEKING INDEMNITY OR CONTRIBUTION

If a government officer and the Crown are successfully sued for the tortious conduct of the officer in the course of employment, can the Crown recover the damages paid to the plaintiff from the Crown officer responsible?

While it did not happen in practice up until December 1989 in New South Wales it was open for the Crown to seek such an indemnity from its officers [see, the *Employees Liability Act 1991*].

The Crown now pays the damages in New South Wales and cannot look to its officers for reimbursement or contribution. However, the Crown may do so if the conduct of the officer who committed the tort constituted serious and wilful misconduct [section 5(a) *Employees Liability Act 1991*].

What is the position if a negligent government officer is the only one successfully sued and not the Crown? Obviously one would try to join the Crown as a defendant, but if one could not, the officer would have to pay. This exposure was remedied for both private and public sector employees by legislation in New South Wales having effect in August 1991.

Under the *Employees Liability Act 1991* (NSW) [section 31(1)(b)] where the tort victim recovers damages directly from an employee, the employee is entitled to an indemnity from the employer. Again this does not apply to serious and wilful misconduct [See, second reading speech, New South Wales Assembly, 6 September 1990, page 6777; and brief debate on 20 March 1991, page 1482].

In the Commonwealth, I have already referred to Section 21/5 of the Finance Guidelines which talks about preserving the contribution or indemnity against the officer in tort proceedings except in certain circumstances. I note generally that employers seeking indemnity from their employees through the employer's insurer is limited to cases where there was serious and wilful misconduct by the employee in s 66 of the *Insurance Contracts Act 1983* (Cth). Further, there may be provisions in certain State or Federal industrial awards setting out the circumstances which might give rise to employers seeking indemnity or contribution.

There is no equivalent legislation in Victoria of which I am aware.

PERSONAL STATUTORY IMMUNITY

Many senior government officers have the personal protection of a widely expressed statutory immunity which is found in the specific legislation under which they operate. There are several variations of the wording of the immunity.

In New South Wales, one version may be found in section 98 of the *Grain Marketing Act 1991* (NSW). [The current version used by Parliamentary Counsel in New South Wales may be found in, for example, section 26 of the *Government Pricing Tribunal Act 1992* (NSW), section 17 of the *Internal Audit Bureau Act 1992* (NSW), section 151 of the *Casino Control Act 1992* (NSW), section 24 of the *Parking Space Levy Act 1992* (NSW) and section 362 of the *Mining Act 1992* (NSW). See also the new *Local Government Act 1993* (NSW), ss 731, 732 and 733 giving statutory protection to councillors, council employees, public servants and "persons acting under the direction of a council".]

It often applies to:

- the chief and senior officers of departmental and statutory bodies; and
- the staff of those bodies.

The immunity is sometimes extended to the Crown and the Minister in the case of particular bodies which are not intended to represent the Crown such as the New South Wales Grains Board [constituted under the *Grain Marketing Act 1991* (NSW)].

The current standard wording of the personal immunity provision in New South Wales is:

- "a matter or thing:
- done by the person or body:
- that was done in good faith for the purposes of executing this or any other Act;
- does not subject the person so acting personally to any:
 - action,
 - liability,
 - claim, or
 - demand."

It is quite widely expressed, and as far as I am aware, no court has yet considered the current NSW version.

An example of a Victorian immunity provision is contained in s 127 of the *Building Act 1993* (Vic) which gives the relevant Commissioner, staff and

members of public authorities (but not councils) wide immunity in relation to government involvement in construction work in Victoria.

These provisions are normally found in the enabling legislation of particular bodies, authorities or offices. The only general immunity statute in Australia of which I am aware is the *Statutory Authorities (Protection of Members) Act 1993* (Tas). The Act applies to members of statutory authorities in Tasmania and came into effect in November 1993. [See also the *Doubts Removal (Water Authorities) Act 1951* (Tas) an Act that provides immunity where damage is caused by the failure of a water supply.]

The personal immunity provisions are strictly construed by the Courts and probably do not apply to criminal prosecutions. [See, generally, Aronson & Whitmore, *Public Torts and Contract* (1982), pages 162-173; McCarry, *op cit*, pages 223-225; Hogg, *op cit*, pages 144-146; Paper by Ian Ellis-Jones "Indemnity for Councils & Council Members & Staff Acting Bona Fide", delivered at Calcutt Watson Seminar NSW Local Government: Reform Agenda, Hilton Hotel, Sydney, November 1991].

If the conduct complained of could have been authorised by some other law or authority, the immunity may not apply [*Minister for Youth & Community Services v Health & Research Employees' Assn of Aust. NSW Branch* (1987) 10 NSWLR 543].

With an effective personal statutory immunity in place, there is no cause of action in tort against the government officer. The Crown could therefore not be vicariously liable [*Cowell v Corrective Services Commission of NSW* (1988) 13 NSWLR 714 (Governor not vicariously liable for prison administration)]. Tort victims were then at risk of being statute barred.

It was not until December 1989 in New South Wales that Parliament rectified the situation by providing that any personal statutory immunity "is to be disregarded" in respect of vicarious liability for a tort. [Section 10, *Law Reform (Vicarious Liability) Act 1983* (NSW), inserted by Act No 188 of 1989, assented 19 December 1989; see second reading speech, NSW Assembly, 12 October 1989 at page 11024].

There are no Victorian or Commonwealth equivalents to this reform of which I am aware.

[For further material on the scope of and history relating to "good faith" clauses which were first used in New South Wales, see Stephen Churches "'Bona Fide' Police Torts and Crown Immunity: A Paradigm of the Case for Judge Made Law" (1978-80) 6 *Uni Tas L Rev* 294; and, for example, *Minister for Youth & Community Services v Health and Research Employees' Association of Australia, NSW Branch* (1987) 10 NSWLR 543. There is a good discussion of the cases at para 1-880 of Volume 1 of CCH's Australian Torts Reporter.]

It is useful to have a look at some recent decisions on "good faith" clauses. In Mid Density Development Pty Ltd v Rockdale Municipal Council (1992) 39 FCR 579, Justice Davies of the Federal Court considered a certificate that was issued by a council employee which failed to include updated Council information about the risk of flooding to a property the applicant purchased for around \$2 million. The council pleaded the "good faith" clause as a successful defence. Davies J held (at 593) that the council officer was negligent, but he had "turned his mind to the task and answered the questions [on the certificate] as he thought proper" and the certificates were therefore issued in good faith. He cited a passage from the House of Lords decision in Roberts v Hopwood [1925] AC 578 concerning the "bona fide" exercise of a statutory discretion to set wages and salaries and where the Court stated a bona fide exercise of powers:

...must mean that they are giving their minds to the comprehension and their wills to the discharge of their duty towards that public, whose money and local businesses they administer." (at 603-604)

The decision in the council's favour was overturned by the Full Federal Court in Mid Density Developments Pty Ltd v Rockdale Municipal Council (1993) 44 FCR 290. The Court held that what was significant was that the council employee made no attempt to check or examine the Council's records upon the receipt of the request for the certificate. The statute called for more than an honest exercise of power when no real attempt had been made by the officer to look at the very records that contained the information. The officer had simply relied on his memory to fill in the section of the certificate relating to flooding. Further, the Council had no proper system to deal with requests for information of the type in question.

It was held that in some particular statutory contexts, the criterion of "good faith" may go beyond personal honesty and the absence of malice and require something else of the officer.

The question of who bears the onus of proof in cases where a statutory immunity or "good faith" clause is invoked was recently considered by the High Court in Webster v Lampard (1993) 177 CLR 598. In that case, damage occurred when a West Australian policeman evicted a person from a motel and roadhouse in the context of a landlord and tenant dispute. The policeman was personally sued and he sought to rely on the defences of acting "in pursuance or execution or intended execution" of an Act [for which no action lies under the Limitation Act 1935 (WA)] and the "good faith" clause of the Police Act 1892 (WA).

On an interlocutory application where the policeman had tried to strike out the proceedings on the ground that by reason of the defences pleaded, the action was hopeless, the High Court held:

- the general onus of establishing a connection with one's official duties or of "acting in pursuance of" or "executing" an Act lies on the defendant who invokes the defence; and

- where the prima facie inference from conceded or proven facts is that the defendant was genuinely, albeit mistakenly, purporting or intending to act in pursuance of statutory authority or duty but the plaintiff alleges some impermissible purpose or motive, the onus lies on the plaintiff to establish that purpose or motive. [pp550-551]

See also, RACZ v Home Office [1994] 2 WLR 23.

PERSONAL CRIMINAL LIABILITY

The Crown, in all its capacities, can be subject to criminal liability by express words or implication in a statute. Of course, the Crown cannot be imprisoned, but fines and other penalties can be imposed. [See, generally, Hogg, op cit, pages 232 to 235.]

It may be that the relaxation of the rules relating to Crown immunity from statute by the High Court in Bropho's case [*Bropho v Western Australia* (1990) 171 CLR 1] might see the Crown becoming increasingly criminally liable in the future. In Bropho's case it was the employees of the Western Australian Development Corporation, and not the Corporation itself, who were said by the Court to have been criminally responsible for the destruction of a sacred aboriginal site at the Swan Brewery.

The Crown can only act through its officers and agents. If the Crown is immune from a criminal provision by express words or implication, so too might the Crown officer or agent be immune.

In Bropho's case the High Court said that from now on it will be more difficult for Crown officers, and those of crown instrumentalities, to hide under the shield of the Crown exempting them from the operation of general criminal law. Each statute applicable to a given or proposed set of facts will now have to be examined specifically to ascertain the potential and scope for the possible allocation of personal criminal responsibility.

With the proliferation of strict liability offences in recent years, particularly in the environmental area, government officers must re-examine their potential liability in all areas in which they operate.

As to the extent to which government officers may share the immunity of the Crown, a lot depends on whether the criminal conduct was undertaken in the course of employment and whether the application of the provision would prejudice the interests of the Crown. If there is no prejudice to the Crown the officer may be liable.

If there is prejudice, the officer will be protected. [See, generally, Hogg, op cit, pages 232-235.]

In New South Wales, there was a long standing policy, since 1959, that State departments and authorities would not prosecute each other for criminal offences. As I understand it, this policy, which had become almost a constitutional convention, only applied to the Crown itself and not to individual officers. That convention was revoked in June 1990 by the then Greiner Government and a preliminary procedural mechanism was set up involving discussions between the relevant ministers to allow the State in one capacity to prosecute the State in another capacity. Prosecutions have been commenced, particularly within the pollution control area.

With each of these new Crown prosecutions, further scope is created for the examination of, and prosecution for, conduct of individual government officers.

PERSONAL LIABILITY IN ADMINISTRATIVE LAW

In administrative law, invalid administrative decisions do not give rise to liability in damages. [See, for example, A-G(NSW) v Quin (1990) 64 ALJR 327 at 346; Park Oh Ho v Minister for Immigration and Ethnic Affairs (1989) 64 ALJR 34 at 37 and in Full Federal Court, (1988) 81 ALR 288 at 309-310 and 318; Macksville District Hospital v Mayze (1987) 10 NSWLR 708 at 724-726, and 371-372; see also: G P Barton "Damages in Administrative Law" - Taggart, ed, (1986) Judicial Review of Administrative Action in the 1980's p123, Margaret Allars, Introduction to Australian Administrative Law, 1990, pp324-325.]

Decisions of government officers, particularly those exercising independent decision-making power, are open to be declared invalid for being, or being found to be, ultra vires. 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 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.

Put together, the two areas of ultra vires concern the following grounds of judicial review under the relevant Acts or the common law:

- denial of procedural fairness (natural justice) including, inter alia, the right to a hearing and actual or perceived bias (in the legal sense);
- 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;
- 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").

Even though damages are not available to an aggrieved person in administrative law, a senior government officer might still be sued in judicial review proceedings and be required to defend the action in costly proceedings.

Remedies the applicant may seek include orders:

- invalidating or setting aside the decision;
- requiring the officer to do something; or
- not to do something.

New Developments in Administrative Law?

Watch out for applications of the High Court's decision in Northern Territory v Mengel which I noted earlier. It will have enormous implications for the future development of public law and private law damages for government bodies.

What about the legal costs?

If the government officer is sued, the officer can rest assured that it is traditional Crown practice for the officer's employer to pick up the tab for the legal expenses incurred.

If the officer is in a public authority, it will be the Board making that decision.

If the officer is in the New South Wales public service, then he or she will have to make a submission to the NSW Attorney-General providing details of the action and arguing the reasons why the government should pick up the tab. The Attorney-General will exercise his discretion as to whether or not to pay the legal costs or offer the services of the Crown Solicitor's department. I understand that no applicant to the Attorney-General in recent memory has been refused assistance and that the position is broadly similar in Victoria and at the Commonwealth level.

Of course, different principles apply if a government officer (or a parliamentary backbencher) is summonsed to appear before a special or parliamentary inquiry, the ICAC or a Royal Commission.

No one denies that the right to proper legal representation is fundamental to the officer concerned. The crucial question is - who pays? The answer is not always clear cut, as New South Wales backbencher Brad Hazzard found out in 1992 when he made 4 unsuccessful applications to the Attorney-General to cover his legal costs of appearing at the ICAC in the Metherell inquiry. [*ICAC Report on Investigation into the Metherell Resignation and Appointment*, June 1992, and, Sydney Morning Herald, 30/6/92, p 1 regarding Hazzard's costs.]

LIABILITY FOR CORRUPT CONDUCT

Another area of potential personal liability in New South Wales is in "corrupt conduct". We have had much occasion to consider the concept in recent years in New South Wales due to the activities of the Independent Commission Against Corruption [ICAC].

There is much public confusion in NSW when there is heard a public official has been found corrupt under section 8 and 9 of the *Independent Commission Against Corruption Act 1988 (NSW)* ("ICAC Act"), but that the corruption is only "technical corruption". The public has its own understanding of the meaning of corruption. It involves bribes, fraud, secret commissions, and serious abuses of power and trust. This is also corruption in the common law sense.

However, as many are now aware, there is a chasm in New South Wales between the public or common law concept of corruption and the true meaning of corrupt conduct under the ICAC Act.

The ICAC Act provides that corrupt conduct is:

- the conduct of any person (whether or not a public official)
- that adversely affects or could adversely affect
- either directly or indirectly

- the honest or impartial exercise of
- official functions.

It constitutes or involves:

- a breach of public trust
- a misuse of information or material acquired in the course of official functions
- fraud
- treating
- tax or revenue evasion
- embezzlement
- secret commissions
- bribery
- blackmail, and
- official misconduct.[See more categories of corrupt conduct in s8(2) of the ICAC Act.]

Official misconduct includes:

- fraud in office
- breach of trust
- nonfeasance
- misfeasance
- oppression
- extortion or
- imposition.

The ICAC asserts it is supposed to be confined to consideration of "serious matters" [ICAC Report, op cit, p11], because conduct is not corrupt unless it could constitute or involve:

- a criminal offence;
- a disciplinary offence; or
- reasonable grounds for dismissal.

However, the circumstances that could attract these provisions are very wide and in my view, do not limit the Commission to investigating only serious matters.

Consider this: Senior government officers (not chief executive officers) are guilty of a breach of discipline under section 66 of the NSW PSM if they:

- contravene the PSM Act or regulations
- engage in any misconduct
- consume alcohol or use drugs to excess
- intentionally disobey or disregard a superior's lawful order
- are negligent,
 - careless,
 - inefficient, or
 - incompetent
 in the discharge of their duties; or
- engage in any disgraceful or improper conduct.

Any of these actions will bring the officer concerned within the ICAC concept of "disciplinary offence".

Any of these offences may also give rise to punishment of the officer under the NSW PSM Act. The relevant department head can:

- caution
- reprimand; or
- fine the officer; or
- reduce the salary or demote the officer (not SEOs); or
- dismiss the officer or

- direct that he or she resign with no compensation payable.

The reality is that it is improbable that a senior officer will be dismissed or fined for inefficiency or carelessness, but the powers are there in black and white. Such powers are certainly used from time to time; see, for example, Preston v Carmody, (1993) 44 FCR 1, Federal Court, Wilcox J, a judicial review case where it was held that the respondents had not erred in making decisions effecting the termination of the employment of the applicant with the Family Court following consideration of his "efficiency" within the meaning of Division 8C of Part III of the Cth PS Act; and Panagopoulos v Secretary, Department of Veterans Affairs, unreported, Federal Court, dated 6 November 1995, Tamberlin J. where the Federal Court quashed a decision of the Department to retire an Administrative Service Officer, Class 2, on the ground of inefficiency. The Court decided that there was a denial of procedural fairness or, natural justice in the making of the decision. The Court was also concerned that the appropriate **standard** by which an employee's conduct or actions must be measured should be spelt out to the employee. The Court was also concerned that the employee was given three months within which to improve herself, after which, she would be subject to an assessment. The assessment was not undertaken by the Department for sum three and a half months latter and no decision was made on it for a further three and a half months!: See also: Dr Bart James v Brian McDonald, Unreported, Federal Court, dated 21 October 1994, Sackville J. on the importance of the distinction between inefficiency and disciplinary proceedings.

In Victoria, the disciplinary powers are included in the Regulations made under section 106(2)(d) of the Vic PSM Act.

Commonwealth SEOs are subject to similar duties under sections 56 and 60A-63G of the Cth PS Act. [As to the Court of Appeal decision on the Metherell Report, see Greiner v ICAC, (1992) 28 NSWLR 125, and Margaret Allars' paper "In Search of Legal Objective Standards: The Meaning of Greiner v ICAC" presented at a Public Interest Law Conference 1992 University of NSW, Sydney, 9 October 1992. See also the ICAC Second Report on Investigation into the Metherell Resignation and Appointment, September 1992, and the 3rd Metherell Report Integrity in Public Sector Recruitment, March 1993.]

IN SUMMARY

A government officer is generally not liable:

- in tort because of a personal statutory immunity or the Crown/employer is vicariously liable and will generally indemnify the officer;
- in contract; and
- in New South Wales for exercising independent discretionary statutory or prerogative power;

A government officer is liable:

- for criminal offences including common law and statutory offences;
- for breaches of the contract of employment such as serious and wilful misconduct and duty of fidelity to the employer;
- for the exercise of an independent discretionary statutory or prerogative power in Victoria and the Commonwealth; and
- for legal costs incurred in defence or in representation before tribunals and commissions.

PROTECTION FROM PERSONAL EXPOSURE - "GOOD FAITH" OR INSURANCE?

Government officers do enjoy some special privileges by reason of their legal connection with the Crown, the "good faith" immunity provisions, the concept of vicarious liability and, perhaps their association with an entity which some regard as having the deepest pocket of all and which traditionally shields and protects those who participate in public administration. However, there are a number of limitations to these privileges and I have sought to touch on some of them today.

Other matters to consider when government officers come to examine their personal exposure include becoming aware the entire range of possible exposure at both statute and common law, and determining whether any additional protection from that exposure is called for in the form of personal insurance.

Covering the field of statutory exposure is an intensely individualised task for the department, board or authority concerned. For example, in NSW, most public servants at any level should be aware (at a minimum) of the following Acts:

- Public Sector Management Act 1987
- Crimes Act 1900
- Anti-Discrimination Act 1977
- Occupational Health and Safety Act 1983
- Public Finance and Audit Act 1983
- Freedom of Information Act 1989
- Independent Commission Against Corruption Act 1988 and the
- Ombudsman Act 1974

Added to these will be the special Acts that could apply to the specific government body or activity of that body. Those Acts could include the Fair Trading Act 1987 (NSW) and the environmental protection legislation.

Consideration should be given to creating a compliance/procedure manual or series of manuals for even the most senior of government officers together with a periodic review of those manuals. Note, however, that those manuals may become public under freedom of information legislation and may be discoverable in legal proceedings. Further, and particularly in the case of wide discretionary powers, adoption of the procedures in the manuals could create a legitimate expectation that natural justice or procedural fairness will apply when the procedures contained in the manual are departed from in any way.

I should sound a word of caution to those compiling lists of relevant Acts. Be careful to ascertain the precise date of the enactment and coming into force of the Acts. I am aware of one government body in NSW whose senior officers were sheltered by a very wide "good faith" provision in the body's enabling legislation. Then, another State Act was passed which created new civil and criminal penalties which could apply to those government officers. That new Act listed the only defences available to the new offences. Could the officers seek to rely on the "good faith" indemnity contained in their own, older Act?

The general principle on the subject is stated by Griffiths J in Goodwin v Phillips (1908) 7 CLR 1 at 7:

"... where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provision of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. It is immaterial whether both Acts are penal Acts or both refer to civil rights. The former must be taken to be repealed by implication. Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act."

Further, as O'Connor J said in the same case, at 14:

"Where there is a general provision which, if applied in its entirety, would neutralise a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply."

One would have to look at the question very carefully, and by close reference to the precise terms and context of the provisions in the later Act.

As to whether personal insurance is called for, senior government officers are at least generally not restricted by s 241 of the Corporations Law which prohibits company officers from having indemnity insurance paid for by the company. The premium must come out of the officers' own pocket [see, Rani John "*Relieving Directors from the Liabilities of Office: The Case for Reform of Section 241, Corporations Law*" (February 1992) *Company and Securities Law Journal* 6].

If I were in the shoes of a government board member, I would seriously consider a personal insurance policy akin to a standard "directors and officers liability policy" offered by many companies. Members of statutory authorities should do this because many of the various crown proceedings Acts do not allow separate proceedings against the State if an authority is involved and a statutory authority is often completely on its own in the legal sense.

I should note that most directors and indemnity policies have an exemption clause exempting the insurer from liability if the insured person is found (in a judgment or final adjudication) to have been dishonest or have acted with a dishonest purpose or intent in respect of the relevant action.

I would negotiate a special premium that took into account the "good faith" indemnity provision in my enabling Act. Further, I would negotiate for inclusion in the policy specific cover for the legal costs of appearing before arbitrators, mediators, the ICAC, Royal Commissions, the Administrative Appeals Tribunal and other tribunals in addition to Court costs.

Thank you.

1 November 1996