By Charles Wilson

FUNCTIONS and DUTIES of PUBLIC AUTHORITIES under the CLAs

Since at least the 1950s, the activity of executive government has expanded beyond a 'truly governmental character into the sphere of trade and commerce' and, for this purpose, created an increasing variety of statutory authorities and state-owned companies. These entities, as the joint judgment in *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)*[1] dryly observed, have been 'not slow to claim that they are agents or servants of the Crown ... and, as such, entitled to the benefit of the prerogatives, privileges and immunities of the Crown'.

The different state and territory responses to the Ipp Report[2] limiting the liability of public authorities widen the principles previously applied at general law in important ways.[3] A key way that they do so is by giving statutory expression to certain general law principles (in some instances without discernibly modifying the content of those principles), and then giving the principles thus enacted a broad application by adopting a wide definition of the pivotal expression, 'public or other authority'. We call this the 'definitional approach' to regulating the breadth of operation of the CLA provisions. Another key way, no less important than the first, sees the state and territory responses give the principles modified in the first way a wider application again, according to whether the principles thus modified apply to actions in negligence only, or to other causes of action as well. The different state and territory responses to the Ipp Report have not been uniform in these respects. We call this the 'case theory' approach to regulating the breadth of operation of the provisions.

This article addresses aspects of these two key ways in which the different state and territory responses have modified the principles limiting the liability of public authorities at general law.

THE DEFINITIONAL APPROACH TO WHAT IS A 'PUBLIC AUTHORITY'

The different states and territories adopt a variety of approaches to the problem of defining what is a public authority. We consider some of these different approaches briefly in turn.

(a) Entities identified by name, prescribed by regulation and constituted under an Act

One approach sees the definition of 'public or other authority' include specific bodies identified by name. NSW adopts this approach, where the definition includes a 'public health organisation within the *Health Services Act* 1997 (NSW)', which includes an 'affiliated health organisation' as prescribed by s62 of that Act, by reference to schedule 3 of the Act, to include a 'private health organisation', and at the end, lists a number of private bodies conducting health services and hospitals, notably St Vincents Hospital Sydney and local arms of Catholic Healthcare Ltd. The same approach is adopted by Western Australia,[4] where the definition of 'public body or officer' includes entities specified in schedules to the *Public Sector Management Act* 1994 (WA), including Edith Cowan University.

Another approach to the problem of classification sees the definition of 'public or other authority' (and variants) include bodies prescribed by regulation for the purposes of the CLA.[5]

(b) Entities 'constituted under an Act'

Still another and numerically the most significant approach, sees the definition include wide generic groups, such as 'authorities constituted under an Act' and 'agencies of the Crown' (and variants).

The definition of 'public or other authority' in NSW includes a 'public or local authority constituted under an Act'.[6] Queensland,[7] Victoria,[8] and Western Australia[9] each enact a variant of this. So, too, does the ACT,[10] where the definition includes a 'territory unit', meaning 'a body established for a public purpose under an Act' (with exceptions).[11] The definition in Tasmania includes 'a statutory authority' defined, more narrowly, as 'a body or authority, whether incorporated or not, that is established or constituted by or under an Act or under the Royal Prerogative, being a body or authority which, or of which the governing authority, wholly or partly comprises a person or persons appointed by the governor, a minister or another statutory authority'[12] (the adjectival clause being unique to Tasmania).

The idea of a 'public authority constituted under an Act' is not free from uncertainty. Guidance in the resolution of what comes within the idea is available from different lines of authority.

One line of authority considers the meaning of 'public authority' in the compound expression 'public authority constituted under an Act'. This line of authority concerns whether a body is entitled to the public authority exemption from income tax extended by s50.25 of the *Income Tax Assessment Act* 1997 (Cth).[13] From this line of authority is derived the understanding that, to come with the meaning of the term 'public authority', 'the body must be one set up to exercise control or execute >>

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a function in the public interest, being a function of government'; 'the body must exercise control, power or command for the public advantage or execute a function in the public interest'; and it will be a private body, not a public authority, if it is 'established not for the purpose of performing a government function but for profit'.[14] Ministerial control of the exercise of powers and functions of the body is an important indicator that the body is established for the purposes of a function of government.

The second line of authority adds the understanding that the idea of what is a public authority 'constituted under an Act' involves more than mere legislative authorisation of the acts that led to the incorporation of the public authority, and requires provisions in the legislation under which the entity was created that relate to the constitution or establishment of the entity.[15]

To date, the question of what is a 'public authority constituted under an Act' has not arisen in the context of the state responses to the Ipp Report, but is bound to do so eventually.

(c) 'Agencies of the Crown'

Another example of the approach to classification of what is a 'public authority' that brings broad generic groups of bodies within the definition is the 'Crown'.

Every state other than Victoria enacts a definition of 'public or other authority' that includes 'the Crown'.[16] NSW, Queensland, Western Australia and Tasmania do so by reference to the meaning in the *Crown Proceedings Acts*.[17] The definition in NSW[18] and Queensland[19] includes a corporation 'representing the Crown' in right of the state. Tasmania[20] includes 'an instrumentality or agency of the Crown'. Victoria[21] does not define the term 'Crown'.[22] As a consequence, the expression in Victoria will not ordinarily include an agency of the Crown. Western Australia[23] (unlike NSW and Queensland) does not expressly include a representative or agency. A 'representative' of the Crown is not the Crown itself unless deemed so by legislative mandate.[24] Accordingly, the meaning of 'Crown' in Victoria and Western Australia is appreciably narrower than NSW and Queensland. The significance of this limitation in any particular case depends on whether the body, though not the 'Crown', falls into another generic group within the definition of 'public authority'.

Residual problems of classification remain in determining when a body is a representative, or an instrumentality or agent, of the Crown. In the absence of an express statutory stipulation, the inquiry is wider than asking whether the body at question is 'governmental'.[25] Legislation creating a statutory corporation will often expressly classify the body as a 'representative of the Crown'. The phrase 'representing the Crown' however 'does not of itself necessarily convey any clear meaning'.[26] As Kitto J stated in *Wynyard Investments Pty Limited v Commissioner for Railways (NSW)*,[27] 'the question is not really one of attribution of the status of Crown representative; it concerns the relationship of the entity in question to the Crown in respect of the particular matter.'[28] Unless parliament has expressly given a statutory corporation the character of the Crown, the courts tend as a matter of general approach to regard 'a statutory corporation formed to carry on public functions as distinct from the Crown'[29] though this approach is excluded by enactment in Victoria.[30]

Where a statutory authority is given the character of an agency of the Crown, most commonly the body will not be constituted as an agency of the Crown for all purposes, but only to a limited extent.[31] More often than not, the legislation creating the body will not contain an express statement of the extent to which the body is to be regarded as an agency of the Crown. In such instances, classifying a statutory corporation as an agency of the Crown will involve examining the degree of control exercised over it by the government,[32] and the purpose and effect of the legislation by which the body is established and any other Acts relating to its corporate functions, duties and powers.[33]

THE CASE THEORY APPROACH

The different state and territory responses to the Ipp Report vary from jurisdiction to jurisdiction in respect of the case theories or causes of action to which they apply.

This observation is important, as it potentially allows claimants the opportunity to avoid the application of enacted provisions that limit the liability of public authorities, according to how they frame their claims. Examples of this are the provisions reinstating a modified 'highway rule' and modifying principles concerning allocation of resources and responsibilities.

(a) The 'highway rule'

NSW,[34] Queensland,[35] South Australia,[36] Western Australia,[37] Tasmania,[38] and ACT[39] each reinstate a modified 'highway rule', enacting a principle that applies more widely than the immunity existing at general law

before it was abolished in 2001 in *Brodie v Singleton Shire Council*.[40]

The general law immunity, at least historically, protected public authorities against liability only in claims in negligence and nuisance. Recent statements indicate that the law of negligence has subsumed the law of nuisance in highway claims,[41] although those statements are probably better understood as confined to cases not affecting rights of landowners. The statutory 'highway authority' rule enacted in NSW and South Australia[42] extends more broadly than its general law counterpart and applies to liability 'in tort'. This encompasses trespass, breach of statutory duty, and misfeasance in public office,[43] as well as negligence and nuisance. Additionally, in NSW (but not South Australia), the enacted rule extends to any other civil liability in a claim that could have been framed in tort.[44] The rule in Western Australia[45] also extends broadly to any claim for 'harm' caused by the 'fault' of another, including claims in contract or any other action.[46] While theoretically wider than the statutory rules enacted in NSW and South Australia, in reality the different phraseology is unlikely to give the rule in Western Australia a wider practical application. Similarly, the rule enacted in the ACT, which extends an immunity in 'a proceeding for harm' arising from a relevant failure by a road authority, is unlikely in practice to apply any more widely, despite being theoretically broader than the rule in NSW and South Australia.

Narrower than NSW, South Australia and Western Australia, the modified 'highway rule' enacted in Tasmania extends to liability resulting from 'breach of duty', and encompasses negligence, breach of statutory duty, and nuisance, but not trespass or misfeasance in public office.

Victoria and Northern Territory did not enact a modified, or any, 'highway rule'.

(b) Principles concerning allocation of resources and responsibilities

NSW,[47] Queensland,[48] Western Australia,[49] Tasmania,[50] and ACT[51] (but not South Australia or the Northern Territory) each enact provisions modifying general law principles relating to the allocation of financial and other resources and responsibilities in determining whether a public authority is liable for harm. At general law, those principles apply to claims in negligence and nuisance only.[52]

The causes of action to which the enacted principles apply in NSW, Queensland, and Tasmania probably are broader than the general law counterparts, and apply to claims that have as an element the existence of a duty of care 'in tort'; a duty of care under a contract that is co-extensive with a duty of care 'in tort'; and another duty under statute or otherwise that is co-extensive with a duty of care 'in tort' or a co-extensive duty in contract.[53] In the ACT, the causes of action to which the principles apply include the existence of a 'duty of care', defined more specifically as a duty 'to take reasonable care or to exercise reasonable skill (or both)',[54] but no other causes of action.[55] In Western Australia, the causes of action include the element of a 'duty of care',[56] without elaboration but, as also seen in the ACT, no other causes of action.

In summary, the causes of action to which the enacted state and territory provisions apply include, uniformly, claims in negligence. Beyond this, the scope of the different state and territory sections is unsettled. However, the provisions in Western Australia, NSW, Queensland, and Tasmania (but not the ACT), arguably, also apply to claims in nuisance.

The provisions in Western Australia, NSW, Queensland, and Tasmania may apply to a claim in nuisance at potentially two different points.

Firstly, the existence of a duty of care in negligence (in the familiar sense of failure to exercise reasonable care) is 'unnecessary' for the tort of nuisance, though fault of some kind, which may be negligence, is essential.[57] Accordingly, the enacted principles in NSW, Queensland, Western Australia, and Tasmania will apply where the claim of nuisance is based on fault that involves negligence.[58]

Secondly, the provisions in Western Australia, NSW, Queensland, and Tasmania may apply to a claim in nuisance against an authority exercising a statutory power and the defence of inevitable nuisance. Recent statements relating to the defence distinguish between absence of reasonable regard and care to avoid creating a nuisance, on the one hand, and >>

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absence of breach of duty of care (or negligence), on the other.[59] The language of the enacted provisions in Western Australia and, possibly, NSW, Queensland, and Tasmania is, very arguably, apt to describe the former. If (as is likely) that view were upheld, then the provisions in those states would apply to the defence of inevitable nuisance. The provisions in the ACT are not apt to apply to the defence.

CONCLUSION

The significance for claimants of the different state and territory responses to the Ipp report limiting the liability of public authorities will depend on whether, and to what extent, the modifications vary the position at general law. In the case of the reinstatement of a modified 'highway rule' and the provisions concerning allocation of resources and responsibilities, the impact can be substantial if not decisive. In that connection, the breadth of meaning of 'public and other authority' and related expressions, and the application of the enacted provisions to some causes of action (but not others), will frequently be important factors deserving the closest consideration. ■

Notes: **1** (1955) 93 CLR 376, 382. **2** *Review of the Law of Negligence Report*, 2 October 2002, Ch 10. **3** The Northern Territory, uniquely among the states and territories, adopted a completely 'hands-off' approach and did not enact provisions modifying general law principles limiting the liability of public authorities. South Australia adopted a minimalist approach, reinstating a modified 'highway rule' only (*Civil Liability Act* 1936 (SA), s42), but did not otherwise modify relevant general law principles. **4** *Civil Liability Act* 2002 (WA), s5U. **5** NSW: s41; Vic: s79; WA: s5U; Tas: s37; ACT: s109. Queensland does not adopt this approach. **6** *Civil Liability Act* 2002 (NSW), s41. **7** *Civil Liability Act* 2003 (QLD), s34. **8** *Wrongs Act* 1958 (VIC), s79 (defn 'public authority'): 'a body, whether corporate or unincorporate [sic], that is established by or under an Act for a public purpose'. **9** WA: s5U (dfn 'public body or officer'): 'a body that is established or continued for a public purpose under a written law'. **10** ACT: s109 (defn 'public or other authority'). **11** *Legislation Act* 2001 (ACT), s144 and dictionary – part 1 (defn 'territory authority'). **12** Tas: s37 (defn 'statutory authority'). **13** See, for example, *Coal Mining Industry Long Service Leave (Funding) Corporation v Commissioner of Taxation* (1998) 85 FCR 401; *Commissioner of Taxation v Bank of Western Australia* (1995) 61 FCR 407. **14** *Coal Mining Industry Long Service Leave (Funding) Corporation v Commissioner of Taxation* (1998) 85 FCR 401, 411. **15** *Davis v City North Infrastructure Pty Ltd* [2011] QSC 285, [22]-[23]. **16** The ACT, in light of its constitutional status, does not include the 'crown'. **17** *Civil Liability Act* 2002 (NSW), s41; *Civil Liability Act* 2003 (Qld), s34; *Civil Liability Act* 2002 (WA), s5U; *Civil Liability Act* 2002 (TAS), s37. **18** *Crown Proceedings Act* 1988 (NSW), s3. **19** *Crown Proceedings Act* 1980 (QLD), s 7. **20** *Crown Proceedings Act* 1993 (TAS), s4. **21** *Wrongs Act* 1958 (VIC), s79. **22** Section 38 of the *Interpretation of Legislation Act* 1984 (VIC) does not alter the position. **23** *Crown Suits Act* 1947 (WA), s3. **24** *State Authorities Superannuation Board v Commissioner of State Taxation* (1996) 189 CLR 253, 280. **25** See *Metropolitan Fire Brigades Board v FCT* (1990) 27 FCR 279; *Mines Rescue Board (NSW) v FCT* (2000) 101 FCR 91; *Ambulance Service of New South Wales v Deputy Commissioner of Taxation* (2003) 22 ALR 218. **26** *Ibid.* **27** (1955) 93 CLR 376, 386. **28** *Ibid.* **29** *Launceston Corporation v Hydro-Electric Commission* (1959) 100 CLR 654, 662; *State Electricity Commission (Vict) v City of South Melbourne* (1968) 118 CLR 504, 510; *Townsville Hospital Board v Townsville City Council* (1982) 149 CLR 282, 291. **30** *Interpretation of Legislation Act* 1984 (Vic), 46A. Cf *Interpretation Act* 1987 (NSW), 13A. **31** cf *Maguire v Simpson* (1977) 139 CLR 362. **32** *Superannuation Fund Investment Trust v Commissioner of Stamps* (1979) 145 CLR 504, 510. **33** *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376, 383. **34** NSW: s40(1), and s45(1). **35** CLA (QLD), s37(1). **36** CLA (SA), s42(1). **37** CLA (WA), s5V and s5Z. **38** CLA (TAS), s36 and s42(1). **39** CL(W)A (ACT), s113(1). **40** (2001) 206 CLR 512. **41** *Brodie v Singleton Shire Council* (2001) 206 CLR 512, [55], [116]-[129], [226]. **42** CLA, s42(1). **43** As to the tort of misfeasance in public office, see *MM Constructions (Australia) Pty Ltd v Port Stephens Council (No. 9)* [2011] NSWSC 1613, [223]. **44** *Sydney Water Corporation v Turano* (2009) 239 CLR 51, 62 [14]. **45** CLA, s5V(1). **46** CLA, s5V(2). **47** CLA (NSW), s42. **48** CLA (QLD), s35. **49** CLA (WA), s5V(1) and (2) and s5W. **50** CLA (TAS), s38. **51** CL(W)A (ACT), s110. **52** *Marcic v Thames Water Utilities Ltd* [2003] 3 WLR 1603. **53** See CLA NSW: s40(1) and s42; QLD: s42 and schedule 2 (dictionary) (defn 'duty'); and TAS: s3 (defn 'duty') and s38. **54** ACT: s109 (defn 'duty of care') and s110. **55** ACT: s108(1) and (2). **56** WA: s5W. **57** *Brodie v Singleton Shire Council* (2001) 206 CLR 512, [126]. **58** *Gales Holdings Pty Ltd v Tweed Shire Council* [2011] NSWSC 1128, [362]. **59** *Melaleuca Estate Pty Ltd v Port Stephens Council* [2006] NSWCA 31, [37]-[61], referring to *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660, [16]. See also *Brodie v Singleton Shire Council* (2001) 206 CLR 512, [123].

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