

**THE LIABILITY OF THE CROWN AND ITS
INSTRUMENTALITIES UNDER THE
TRADE PRACTICES ACT 1974 (CTH)^{*}**

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I. INTRODUCTION

In enacting the *Trade Practices Act* the Commonwealth has relied to a large extent on the corporations power in s 51(xx) of the Constitution. That section authorises the Commonwealth to make laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth. The Commonwealth also relies on a number of other heads of power which have been invoked in s 6 of the *Trade Practices Act* to extend its reach to the conduct of entities, other than corporations. Subject to this extended operation, an entity (including the Crown) will be subject to the Act only if it is a trading or financial corporation.¹

It is not uncommon for an agency or an instrumentality of the Crown to be established under specific legislation and given corporate status. The application of the Act to that corporate body will depend on whether it can be properly

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1 As this paper deals with entities incorporated in Australia the "foreign" component will not be relevant.

characterised as a trading or financial corporation and if so whether it is nevertheless protected under Crown immunity. The first of those questions has been the subject of many decisions, particularly by the High Court, where the trading and financial character of a corporate body has been examined.²

It is beyond the scope of this paper to review those decisions in any detail. However, the principles that emerge from those cases have been conveniently summarised by Toohey J in *Hughes v Western Australian Cricket Association (Inc)*³ as follows:

1. The mere fact that a corporation trades does not mean that it is a trading corporation.
2. The purpose of incorporation, propounded in the *St George County Council* case, is no longer a valid test. The test is one of the current activities of the corporation.
3. The current activities test is not the sole criterion. Where a corporation has not begun to trade, its character may be found in its constitution. Even when there are current activities, the corporations constitution is not completely irrelevant.
4. Views on the extent of the trading activity have varied. Tests include whether it is "a substantial corporate activity"; "a sufficient proportion of the corporation's overall activities"; "not insubstantial"; "trading activities on a significant scale".
5. Trading denotes the activity of providing for reward goods or services.
6. Although the *Trade Practices Act* draws a distinction between trading and financial corporations, nevertheless, the two classes are not mutually exclusive.

Where a corporate government enterprise, agency or instrumentality satisfies the trading or financial requirement, it will be subject to the Act unless protected by Crown immunity. This paper examines the limits of Crown immunity under the *Trade Practices Act* (particularly in relation to competition law) and the circumstances under which that immunity will attach.

II. CROWN IMMUNITY

The ancient doctrine of Crown immunity continues to insulate the Crown and its instrumentalities from liability in its commercial dealings. The continued use by the Crown of statutory corporations and other instrumentalities in the field of commercial and industrial pursuits has prompted a call for a re-examination of

2 See *R v Trade Practices Tribunal: Ex parte St George County Council* (1974) 130 CLR 533; *R v Federal Court of Australia: Ex parte Western Australian National Football League* (1979) 143 CLR 190; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282; *Fencott v Muller* (1983) 152 CLR 570.

3 (1986) 69 ALR 600 at 671-2.

Crown immunity.⁴ This impetus reflects a growing awareness that, in a climate of competition reform, the retention of ancient concepts which afford immunity to the Crown, when it conducts activities not dissimilar to those carried on by private enterprises, is foreign to competitive principles.

A specific example relates to the conduct of utilities which are traditionally administered by the Crown and its instrumentalities. Current reforms have enabled private enterprises to compete in areas ordinarily reserved to the Crown and it is unlikely that this trend will change in the near future. A level playing field or "competitive neutrality"⁵ requires that private enterprises have the same benefits and be subject to the same restrictions as other sectors. It is in this area that the privilege afforded to the Crown, and particularly its instrumentalities, is least defensible.⁶

The expression "the Crown" is customarily used as a reference to the executive as distinct from the legislative arm of government.⁷ It includes those government departments that discharge functions under ministerial authority and direction.⁸ It is this degree of ministerial control which is one of the most significant factors in determining whether an entity is indeed the Crown or an agent or instrumentality of the Crown to which Crown privilege attaches. In Australia's federal system it is important to distinguish between the Crown in right of the Commonwealth and the Crown in right of each State. Apart from the constitutional and philosophical reasons, there are also practical reasons flowing from the *Trade Practices Act* itself for maintaining the distinction. First, although the "privatisation" of Government enterprises is occurring at both the Federal and State level, nevertheless it is at the State level that significant Government owned businesses, such as utilities, are earmarked for full competition. Secondly, the *Trade Practices Act* and related State laws, such as the *Fair Trading Acts*, provide different degrees of immunity to the Commonwealth Crown and the State Crown respectively.

A. The Crown and Its Instrumentalities Under the *Fair Trading Acts*

Each State and Territory has passed fair trading legislation which mirrors a number of provisions found in the consumer protection part of the *Trade Practices Act* (Part V).⁹

The *Fair Trading Act* 1987 (NSW) contains a provision similar to s 2A of the *Trade Practices Act* and provides that the Act will bind the Crown in right of the State in so far as the Crown in right of the State carries on a business, whether

4 See *Bropho v Western Australia* (1990) 171 CLR 1 at 19.

5 This expression was used in a report by the Independent Committee on Inquiry, *National Competition Policy* (the "Hilmer Committee Report"), AGPS (1993) chapter 13.

6 *Ibid*, chapter 5.

7 PW Hogg, *Liability of the Crown*, Law Book Company Ltd (2nd ed, 1989) p 9.

8 *Ibid*, p 10.

9 *Fair Trading Act* 1987 (NSW); *Fair Trading Act* 1985 (Vic); *Fair Trading Act* 1989 (Qld); *Fair Trading Act* 1987 (SA); *Fair Trading Act* 1987 (WA); *Fair Trading Act* 1990 (Tas); *Consumer Affairs and Fair Trading Act* 1990 (NT); *Fair Trading Act* 1992 (ACT).

directly or by an authority of the State.¹⁰ The Australian Capital Territory legislation simply states that the Act binds the Crown.¹¹ The other States and Territories provide that the Act binds the Crown in right of the State and, to the extent that the legislative power extends, in all its other capacities.¹²

In New South Wales liability will attach to the Crown only if the Crown carries on a business directly or by an authority of the State.¹³ "Business" is defined broadly in s 4 to include a business not carried on for profit and a trade or profession. It is similar to the inclusive Commonwealth definition in the *Trade Practices Act*.¹⁴

There is an express intention in the Fair Trading Acts that the State and Territory Crowns are to be bound. However, the substantive provisions extend principally to consumer protection issues such as misleading or deceptive conduct,¹⁵ implied warranties and unfair business practices. The legislation itself and, consequently, the limits of crown liability do not extend to "competition law"; that is, to those practices regulated by the restrictive trade practices part of the *Trade Practices Act*.¹⁶ Subject to some minor State laws, it is the *Trade Practices Act* alone that regulates competitive behaviour in Australia, and it is in this respect that the liability of the Crown and its instrumentalities is most nebulous.

III. STATE CROWN INSTRUMENTALITIES UNDER THE *TRADE PRACTICES ACT*

In 1976 the Swanson Committee recognised that the Commonwealth should, in its commercial dealings, accept similar restrictions to those imposed on non-governmental businesses.¹⁷ Its recommendation was implemented by the passage of the *Trade Practices Amendment Act 1977* (Cth), which inserted the current s 2A into the *Trade Practices Act*. It provides:

Subject to this section, this Act binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth.

The application of the Act to the Crown in right of the Commonwealth is clear. Where the Crown carries on a business it will be subject to the Act and will be treated as if it were a corporation. In *Thomson Publications (Australia) Pty Limited v Trade Practices Commission*,¹⁸ the Court found that the Trade Practices

10 Section 3.

11 *Fair Trading Act 1992* (ACT), s 4.

12 (Qld) s 7, (SA) s 4, (WA) s 3, (Tas) s 13, (NT) s 3, (ACT) s 4.

13 *Fair Trading Act 1987* (NSW), s 3.

14 Section 4(1).

15 (NSW) s 42, (QLD) s 38, (SA) s 56, (Tas) s 14, (Vic) s 11, (WA) s 10, (NT) s 42, (ACT) s 12.

16 Sections 45-50.

17 Trade Practices Act Review Committee (Swanson Committee), *Report to the Minister for Business and Consumer Affairs*, AGPS (1976) at [10.25].

18 (1979) 40 FLR 257.

Commission (the body charged with administering the *Trade Practices Act*)¹⁹ did not carry on a business.

Although the Crown in right of the Commonwealth will be caught where it carries on a business, the possible future interpretation of “business” may place implied restrictions on the full operation of the section. This aside, there are still questions about the Act’s application to governmental activities. One area of potential dispute relates to intra-governmental activities. Although a government activity may be of a commercial nature, it may cease to take on the character of a “business” when the transaction is between different divisions of the same Government Department.²⁰ The result could be that a number of intra-governmental activities are not in the nature of a “business” as defined and consequently those activities will have the full benefit of the shield of the Crown.

There are also some inherent qualifications in s 2A: (a) the business carried on by the Commonwealth in developing and disposing of interests in land in the Australian Capital Territory is specifically excluded; (b) the Crown in right of the Commonwealth is not liable to be prosecuted for an offence; (c) Section 51(1) permits the Commonwealth to specifically authorise or approve activities that would otherwise breach the Act.

It is an established principle of the common law that an Act will not bind the Crown unless by express reference or by necessary implication.²¹ As far as the Crown in right of the Commonwealth is concerned, s 2A expressly provides that it is to be bound. The question of whether the Crown in right of a State (and its instrumentalities) is bound, is not so clear. Certainly, there is no express reference to the State Crown in s 2A. Whether the State Crown is intended to be bound is a matter of implication only. That implication will be made only “if it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound”.²² In the *Bombay* case the issue was whether an Act that conferred power on an official to lay pipes on land within the City extended to land held by the Crown in right of the City of Bombay. In establishing the test that the Crown will be bound only where it is apparent from the terms of the statute, the Privy Council pointed out that if it were the legislature’s intention to bind the Crown, that intention could have been specifically reflected in the statute.²³

The liability of the State Crown under the *Trade Practices Act* was first canvassed in *Bradken Consolidated Limited v BHP Limited*.²⁴ The question was

19 See *Trade Practices Act* 1974, Part II.

20 Hilmer Committee Report, note 5 *supra*, pp 119-20.

21 *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58. See notes 22 and 23 for further discussion of this case.

22 *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58 at 61; *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143 at 167; *Premchand Nathu & Co Limited v Land Officer* [1963] AC 177 at 188-9; *China Ocean Shipping Co v The State of South Australia* (1979) 145 CLR 172 at 199.

23 *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58 at 63.

24 (1979) 145 CLR 107.

whether the Commissioner for Railways of Queensland which entered into a number of contracts with other respondents to provide steel bogies and other specialised railway equipment was subject to the Act, in particular s 45. The narrower view of the general rule of construction concerning the liability of the Crown suggests that the Crown of the enacting jurisdiction is not bound unless by express reference or necessary implication.²⁵ The wider approach presumes that an Act does not apply to the Crown in whatever capacity it may be represented without an express reference or by necessary implication.²⁶ As s 2A specifically refers to the Crown in right of the Commonwealth but is silent about the Crown in right of the State, on *expressio unius* principles, the Court held that the Crown in right of the State was not bound.²⁷

Despite this conclusion, it has been argued that a provision that proscribed anti-competitive practices should, as a matter of construction, extend to state instrumentalities engaged in business.²⁸

The *Bradken* case was followed in *F Sharkey & Company Pty Limited v Fisher*.²⁹ The Court found that the Metropolitan Water Sewerage and Drainage Board, which controlled the performance of sewerage works in New South Wales, was an emanation of the Crown and entitled to Crown immunity. In *NSW Bar Association v Forbes Macfie Pty Limited*,³⁰ the New South Wales Bar Association and a number of doctors sought an injunction to restrain the New South Wales Government from proceeding with a series of advertisements aimed at explaining and promoting the New South Wales Government Transcover and Workcover legislation. An injunction was also sought against the relevant Ministers and certain commercial contractors who were the advertising agents of the New South Wales Government. The Court had no difficulty in applying the *Bradken* case and the *Sharkey* case and concluded that the Ministers were clearly representatives of the State Crown and entitled to the benefit of Crown immunity. Similar reasoning to that in the *Bradken* case led the Court in *Burgundy Royale Pty Limited v Westpac*³¹ to conclude that the Crown in right of the Northern Territory and its statutory instrumentality were not subject to the Act.

The rule of construction applied in the *Bradken* case has recently come under scrutiny by the High Court itself. The wisdom of maintaining such an "inflexible rule"³² was canvassed by the High Court in *Bropho v Western Australia*.³³ The case involved a claim brought by the applicant under the *Aboriginal Heritage Act 1972 (WA)*. The legislation was designed to protect Aboriginal sites in the State.

25 *Ibid* at 129.

26 *Ibid* at 129 per Stephen J.

27 *Ibid* at 129 per Stephen J; at 136 per Mason and Jacobs JJ.

28 J McLachlan, "The application of the *Trade Practices Act 1974 (Cth)* to State Government Instrumentalities" (1990) 64 *ALJ* 710 at 712.

29 (1980) 50 *FLR* 130.

30 (1988) 18 *FCR* 378.

31 (1987) 18 *FCR* 212 at 215.

32 *Bropho v Western Australia* (1990) 171 *CLR* 1 at 19.

33 *Ibid* at 1.

The applicant sought a declaration that certain land in Perth was situated within an Aboriginal site to which the Act applied and an injunction restraining the respondent from using the land for the erection of buildings and other works. The respondent was the Western Australian Development Corporation. It was a statutory body created by the *Western Australian Development Corporation Act 1983 (WA)* and had as its object the function of promoting the economic development of Western Australia.

The motivation behind the Court's willingness to revisit this rule of construction is apparent from the following comments of the majority:

It is simply to point to the fact that the historical considerations which gave rise to a presumption that the legislature would not have intended that a statute bind the Crown are largely inapplicable to conditions in this country where the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour and where it is a commonplace for governmental commercial, industrial and developmental instrumentalities and their servants and agents which are covered by the shield of the Crown either by reason of their character as such or by reason of specific statutory provision to that effect, to compete and have commercial dealings on the same basis as private enterprise.³⁴

It is in this context that the court doubted whether it was possible to retain a rule of construction which dictates that (absent any express provision) in ascertaining a legislative intent the purpose of the statute may be considered only "if it is possible to affirm that that purpose must be wholly frustrated unless the Crown is bound".³⁵

The High Court's preferred approach is to determine whether there is a legislative intent that the Crown is or is not intended to be bound, unhindered by any canon of construction applied rigidly and without regard to the ultimate purpose of ascertaining Parliament's intention from the statute itself.³⁶

However, the Court was equally concerned not to disregard the established principles altogether:

The effect of the foregoing is not to overturn the settled construction of particular existing legislation. Nor is it to reverse or abolish the presumption that the general words of a statute do not bind the Crown or its instrumentalities or agents. It is simply to recognise that a stringent and rigid test for determining whether the general words of a statute should not be read down so as to exclude the Crown is unacceptable. ... That being so, it may be necessary, in construing a legislative provision enacted before the publication of the decision in the present case, to take account of the fact that those tests were seen as of general application at the time when the particular provision was enacted. *If, however, a legislative intent that the Crown be bound is apparent notwithstanding that those tests are not satisfied, that legislative intent must prevail.*³⁷

There is, therefore, a clear signal from the High Court that it prefers a purposive test to interpretation. The High Court's decision is significant in one other respect. The Court challenged the established wisdom that once the shield of the Crown

³⁴ *Ibid* at 19.

³⁵ *Ibid*.

³⁶ *Ibid* at 22. See also M Mourell, "Bropho v The State of Western Australia - A Case Note" (1991) 7 *Australian Bar Review* 90.

³⁷ *Ibid* at 22-3 (emphasis added).

applies to a legislative provision, the full range of Crown immunities will necessarily follow.³⁸ The Court's preferred approach may be conveniently summarised:

- (a) The question of whether the Crown is bound will depend on the content and purpose of the provision and the identity of the entity. There will be a strong presumption that the sovereign herself or himself in right of the Commonwealth is not intended to be bound.³⁹
- (b) The shield of the Crown will extend to an instrumentality, its employees and agents only if a legislative intent is expressed.⁴⁰
- (c) It is conceivable that an act may disclose a legislative intent that some of its provisions will bind the Crown and/or an instrumentality (and its employees and agents) and that other provisions may not.⁴¹

One is left to speculate whether the *Bradken* case would have been decided differently had the *Bropho* case been considered first. Certainly it is true that the Court in both cases recognised the unsatisfactory nature of the authorities which gave rise to the rigid rule of construction.⁴² Undoubtedly it was this which prompted the Court in the *Bropho* case to revisit that rule. A year later in *E v Australian Red Cross Society*,⁴³ Wilcox J followed the decision in the *Bradken* case and the *Burgundy Royale* case. Subsequent Federal Court decisions have confirmed that the *Bradken* case is still authority for the proposition that the Act does not bind the Crown in right of a State.⁴⁴

IV. STATE BANKING AND STATE INSURANCE

In *Bourke v State Bank of New South Wales*,⁴⁵ the Applicant commenced proceedings against the State Bank of New South Wales under ss 52 and 52A of the *Trade Practices Act*. In its defence, the Bank pleaded that it was entitled to the statutory immunity of the Crown in right of the State of New South Wales. Wilcox J accepted the decisions in the *Bradken* and the *Burgundy Royale* cases.⁴⁶ His Honour placed some reliance on two previous High Court decisions in *Rural Bank of New South Wales v Bland Shire Council*⁴⁷ and *Rural Bank of New South Wales v Hayes*.⁴⁸ It was held that the strength of those authorities combined with

38 Note 7 *supra*, p 240.

39 Note 4 *supra* at 36.

40 *Ibid* at 23-4.

41 *Ibid*.

42 *Bradken Consolidated Ltd v BHP Ltd* (1979) 145 CLR 107 at 116 per Gibbs J.

43 (1991) 27 FCR 310 at 345.

44 See *State Government Insurance Corporation v Government Insurance Office of New South Wales* (1991) 28 FCR 511 at 556; *Hawthorn Pty Limited v State Bank of South Australia* (1993) 112 ALR 691; *Jellyn Pty Limited v Horwath and Horwath (Qld) Pty Limited* (1993) 15 ATPR ¶41-284.

45 (1988) 22 FCR 378.

46 *Ibid* at 390.

47 (1947) 74 CLR 408.

48 (1951) 84 CLR 140.

the functions of the State Bank suggested that the State Bank was not an emanation of the Crown and not entitled to Crown immunity.⁴⁹ The case went on appeal to the High Court,⁵⁰ but it was not necessary for the High Court to consider the Crown immunity issue. Rather, the High Court's decision was based on constitutional constraints on the Commonwealth flowing from s 51(xiii) of the Constitution. That section provides that the Commonwealth Parliament may make laws with respect to:

Banking, other than State banking; also State Banking extending beyond the limits of the State concerned, the incorporation of Banks, and the issue of paper money.

The words "other than State banking" impose a limitation on the Commonwealth's power with respect to banking. It is beyond the power of the Commonwealth to enact laws dealing with intra state banking "except to the extent that any interference with state banking is so incidental as not to affect the character of the law as one with respect to banking other than State banking".⁵¹ A similar limitation applies to State insurance.⁵²

V. THE ATTACHMENT OF CROWN IMMUNITY

The question of whether a State entity is protected by the shield of the Crown will depend on the intention expressed in the legislation, particularly through the substantive provisions. A significant factor is whether the entity is subject to ministerial control or is independent of the government with its own discretionary powers.⁵³ This "control test" follows from the fact that the "Crown" is synonymous with the executive arm of Government.⁵⁴

In *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)*,⁵⁵ the Court had to consider whether the Superannuation Fund Investment Trust, which was established by the *Superannuation Act 1976* (Cth) to manage superannuation benefits for Commonwealth public servants and its instrumentalities, had the protection of the Crown. The decisive factor was the independent function of the Trust and its freedom from government control and statutory guidelines. Stephen J made the following comments:

The importance of the presence or absence of control by the executive government in ascertaining whether or not a statutory corporation possesses a particular immunity or privilege of the Crown is a consequence of the very nature of that inquiry, concerned as it is with the nexus between the corporation and the

49 (1988) 22 FCR 378 at 393.

50 (1990) 170 CLR 276.

51 *Ibid* at 288-9.

52 *Australian Constitution*, s 51(xiv).

53 *Bradken Consolidated Limited v BHP* (1978) 145 CLR at 115; *F Sharkey & Co Pty Limited v Fisher* (1980) 50 FLR 130 at 134; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 308.

54 Note 7 *supra*, pp 9 and 250.

55 (1979) 145 CLR 330.

executive. If a corporation is not more than the passive instrument of the Crown, subject in a high degree to control by the executive, it is appropriate enough that its Acts be viewed as those of its Master and that it be itself treated as the alter ego of the Crown, enjoying accordingly those immunities and privileges with which the Crown is clothed. *If on the contrary a statutory corporation is essentially autonomous, its acts being in no sense the outcome of directions by the executive but truly its own, there will be little reason to clothe it with any of those immunities or privileges.*⁵⁶

In the *State Superannuation Board* case, the Court was influenced by the autonomy of the Board members. In the first instance decision in the *Bourke* case, Wilcox J was also guided by the following factors in concluding that the State Bank of New South Wales was not an emanation of the Crown:

- the primary function of the Bank was not an ordinary function of government;
- the directors and management of the Bank were reposed with wide discretions;
- the directors were substantially independent from ministerial control;
- the funds of the Bank were not public funds.⁵⁷

In applying the same principle, the Court concluded in *E v Australian Red Cross Society*, that a hospital was not subject to such a degree of executive control as to confer on it the benefit of the shield of the Crown.⁵⁸ The principle will apply provided that the intent of the legislation suggests that the entity's functions are subject to ministerial direction. It does not matter that at any given time the entity is in fact subject to little ministerial direction.⁵⁹

There is a presumption, albeit a rebuttable one, that an entity that discharges public functions is an agent of the Crown.⁶⁰ In the *Bradken* case, the conduct of Railways as a traditional function of State Governments played a not insignificant part in the Court's finding that the Commissioner for Railways was acting on behalf of the Crown. Similarly, in the *Sharkey* case, the Court accepted that the functions of providing water and sewerage services were traditional functions of government.⁶¹ Of course, the opposite is also true - there is a presumption that an entity is not an emanation of the Crown if its primary function is not a usual function of government. It is this reasoning that enabled the Court in *Bourke's* case to conclude that the State Bank of New South Wales did not have the benefit of Crown immunity. This presumption of Crown immunity which relates to the "usual functions of Government" had its foundation in the nineteenth century but has since been abandoned in favour of the "control test".⁶² As Gibbs J mentioned in *Townsville Hospitals Board v Townsville City Council*, this presumption is

56 *Ibid* at 348 (emphasis added); see also *Townsville Hospital's Board v Townsville City Council* (1982) 42 ALR 319 at 326.

57 (1988) 22 FCR 378 at 393.

58 (1991) 27 FCR 310 at 349.

59 Note 44 *supra* at 557.

60 Note 42 *supra* at 115.

61 The *Sharkey* case, note 53 *supra* at 134.

62 Note 7 *supra*, pp 249-50.

becoming increasingly unhelpful.⁶³ Nevertheless, as is apparent from more recent High Court and Federal Court decisions, vestiges of that rule continue to survive.

The extent of an entity's investment powers may also be decisive. In *State Superannuation Board v Trade Practices Commission*, the Court attached some importance to the fact that monies held by the Superannuation Board did not become part of the consolidated revenue.⁶⁴

Of course, the legislature may expressly stipulate that Crown immunity will attach. In *Hawthorn Pty Limited v State Bank of South Australia*, the *State Bank Act*, under which the State Bank of Australia was established, provided that the Bank was an instrumentality of the Crown.⁶⁵ It is this factor that enabled the Court to distinguish the *Bourke* case, where no such legislative intent was expressed.

VI. STATUTORY EXEMPTIONS

A State entity that is not entitled to Crown immunity, and which would otherwise be liable under the Act, may be rendered immune from the Act's reach through s 51. That section permits States and Territories through statutes or regulations to specifically authorise or approve conduct that would contravene the Act.⁶⁶ As long as the State enactment *specifically authorises* the proscribed conduct, s 51 will provide an effective and complete immunity to State entities from possible trade practices claims.⁶⁷ The Hilmer Committee in its recent report into competition policy was critical of the lack of transparency inherent in these exemptions and their contribution to distortions in the operation of a national market.⁶⁸ The committee recommended that the provision be repealed⁶⁹ or, if it is to be retained, that it be modified to increase the transparency of the exemptions by including them in specific legislation rather than through regulations.⁷⁰ It also considered that the scope of s 51 should be limited.⁷¹

VII. CONCLUSION

The Hilmer Committee recommendations signal a movement away from the treatment of the State Crown and its instrumentalities in a fundamentally different

63 (1982) 149 CLR 282.

64 The *State Superannuation Board* case, note 53 *supra* at 368.

65 (1993) 15 ATPR ¶41-291. See also *Jellyn Pty Limited v Horwath & Horwath (Qld) Pty Limited* (1993) ATPR 40-284 which followed the *Hawthorn* decision.

66 Section 51(1)(b), (c) and (d).

67 See *Paul Dainty Corporation Pty Limited v National Tennis Centre Trust* (1990) 22 FCR 495.

68 Hilmer Committee Report, note 5 *supra*, p 111.

69 *Ibid*, p 112.

70 *Ibid*, p 113.

71 *Ibid*.

way to the treatment as ordinary business enterprises. It favours the introduction of Commonwealth legislation amending s 2A by specifically stating that the Act is intended to bind the Crown in right of the States and Territories to the same extent as the Crown in right of the Commonwealth is bound.⁷² Recent events suggest that State support will be forthcoming. A communique issued following the Council of Australian Governments' meeting on 25 February 1994 indicated that State Governments endorsed a number of the recommendations of the Hilmer Committee including the recommendation that the protections afforded to the State Crown and State Crown instrumentalities be removed.

In part the doctrine of Crown immunity owes its existence to the vagaries of history.⁷³ The problems of construction associated with determining when an entity will attract Crown privilege are perhaps sufficient in themselves to warrant the abolition of Crown immunity. However, more fundamentally in view of current developments directed at corporatisation and privatisation of Government instrumentalities and in the light of national competition reforms, it is difficult to justify the retention of the doctrine.⁷⁴

72 *Ibid*, p 343. The "business" requirement would be retained.

73 See JR Peden, "The Application of Legislation to the Commercial Dealings of the Crown" (1977) 51 ALJ 756.

74 Of course, a transition period will be required for those State Government enterprises that are currently protected by the Shield of the Crown so that once that protection is removed, they are in an adequate position to compete effectively with non-government business enterprises. See also Trade Practices Commission, *Submission to the National Competition Policy Review Committee*, AGPS (1993).

