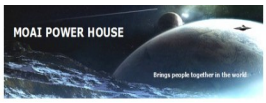










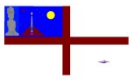

Federal Law Review

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Selway, Bradley --- "Of Kings and Officers - The Judicial Development of Public Law" [2005] FedLawRw 8; (2005) 33(2) Federal Law Review 187

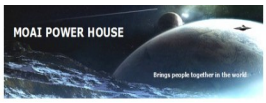
OF KINGS AND OFFICERS — THE JUDICIAL DEVELOPMENT OF PUBLIC LAW

Bradley Selway[*]

INTRODUCTION

The relationship of the King to the persons who actually perform the work of government has changed profoundly over the last 250 years. The purpose of this article is to analyse those changes and to analyse how the common law reacted (or failed to react) to them.

For this purpose I propose first to consider the structure of English government in about 1750. Although the structure was already evolving into a more modern form, in 1750 it was still a relatively simple governmental structure based upon a sovereign Monarch and upon public officers, many of them in regional areas.

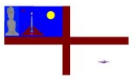










At that time the common law clearly distinguished between the Monarch and his officers. Although the extent and importance of the various legal powers and immunities of the Monarch are now often overstated, the Monarch did possess special powers and immunities which reflected or, at least, were derived from his sovereignty. The public officer on the other hand had various powers, duties and entitlements related to the concept of a 'public office', but few immunities. Indeed, the public officer was subject to a significant range of legal obligations, whether imposed by the criminal law, the law of torts, of property, of trust, by the prerogative writs or otherwise. The result was that there were a variety of legal mechanisms available to prevent breaches of public duty and to require their performance.

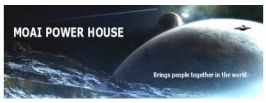
The paper will next proceed to consider the significant changes to the structure of English government, particularly during the period around 1850. Essentially the former regional public officer was replaced by a bureaucrat employed within a hierarchical system centred at Westminster and answerable not to the Monarch, but to the Cabinet. To adopt a Weberian analysis, government was substantially restructured from a traditional model[1] based upon property, relationships and discretionary powers, to one more closely resembling the Weberian 'ideal-typical bureaucracy'[2] involving a hierarchical organisation of tasks ('offices') with limited individual autonomy and based upon detailed rules.

It was necessary that the common law adapt to these changes and it did so. The paper will argue that these changes occurred in a context where the courts sought to adapt and apply the law relating to the pre-existing institutions, particularly 'the King' and the 'public officer' to the new government structure. In doing so the courts fell into the logical error described by Professor Stone — 'the transposition of legal conceptions or propositions from an old subject-matter to a new one, from one part of the law to another, or even one period to another, and the assumption that the result represents without more, the law for the new subject-matter'.[3]

It will be argued that the common law, by treating 'the Crown' as a corporation aggregate, ascribed the historical attributes of the King to the new government structure. The result was that the whole of government, not just the King, came to enjoy the powers and immunities historically derived from the King's sovereignty. Similarly, the new civil servant was treated as if he or she held a historic public office, notwithstanding that his or her duties and responsibilities were very different from those of historic public officers.

In addition there were other changes in the common law relating to government, particularly in the development or, at least, the evolution of a new 'public law', being a specialised body of law relevant and applicable to the exercise of government powers and duties. The paper will seek to analyse these changes to show that the developing common law placed relatively less emphasis upon the criminal law, the law of property, of trust, and of tort in controlling the exercise of public power, whilst placing relatively greater emphasis upon the prerogative writs for this purpose. It will be argued that the common law came to treat the prerogative writs as the primary if not the sole remedies in public law. This has resulted in the development of those writs, but the writs themselves have affected the development of public law. It will be argued that the reliance on the prerogative writs has resulted in confusion between procedural and substantive issues in public law.

Based upon this analysis I will argue that the failure by the courts to revisit the common law concepts that they purported to apply to the new government structure has resulted in a failure by the common law to develop a coherent understanding of the nature of 'the State' or of the relationship of the State to the

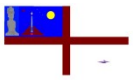










citizen. That understanding, it seems to me, was and is an essential precondition to the orderly development of public law by the common law.

ENGLISH GOVERNMENT, 1750

The sovereignty of the English Monarch was affirmed in Article XXXVII of the Articles of Religion agreed upon by the Clergy of the Church of England in 1562: 'The King's Majesty hath the chief power in this realm of England and other his Dominions, unto whom the chief Government of all Estates of this Realm, whether they be Ecclesiastical or Civil, in all causes doth appertain.' By the early 18th century it was well accepted that that sovereignty was limited, particularly in relation to legislative power by the constitutional powers of the Houses of the Parliament.[4] Nevertheless, at least in relation to the executive arm of government, the sovereignty of the Monarch[5] remained broadly true in fact. As Blackstone put it, 'The king of England is... not only the chief, but properly the sole, magistrate of the nation; all others acting by commission from, and in due subordination to him'.[6]

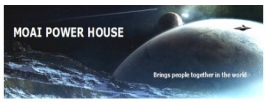
At that time the relatively rigid distinction now made between central and regional government did not exist. In both legal theory and largely in practice all executive government was derived from the King. Regional government in the counties was as much part of the King's administration as was the central government in London.

Central executive government was largely carried on by a relatively small body of officials who were personal advisers to the Monarch and who acted with the Monarch's direct authority. They performed a variety of functions defined by their office. The powers exercised by them were directly derived from the Monarch both in law and in fact.

During the course of the 18th century, many of these high officers became separate from the King's personal household[7] and came to manage their own separate departments.[8] Their powers were still perceived as being derivative from the Monarch. For example, Blackstone declined to discuss their powers at all because legally they had none.[9] As it was put by Maitland: 'the powers that they in fact exercised were the King's powers'.[10]

On the other hand, the functions of these high officers formally limited the manner in which the Monarch could exercise his power.[11] Acts and decisions of the King had to be correctly recorded in accordance with the complex common law rules relating to the use of the Royal seals in order for those acts or decisions to have legal effect. The custody and the right to use the seals was the formal basis for the administrative power of the high officers of State and, through them, their various employees engaged in the business of the central administration.[12]

In addition to the central administration based upon Westminster, a system of regional administration had been established (or, at least, continued) by the Norman Kings to administer the English counties without the need to rely upon the nobles, or at least to balance their powers. That regional system was administered by officers whose powers were also derived from the Monarch. Even during the 18th century most government administration was regional and was performed by unpaid (or largely unpaid) public officers, particularly Justices of the Peace. As Sir Norman Chester has explained, [13]

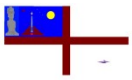










The essence of the system lay in the diffusion of authority. The concentration by historians on North, Pitt, and other major figures is inclined to give the impression that the administrative system was completely in the hands of a small group of powerful politicians. The situation was completely different in reality. Instead it was in the hands of a large number of more or less independent legal entities or officers. To state this is not to say that the First Lord of the Treasury and the Principal Secretaries of State were not very powerful men particularly when they had the king's full support. But in themselves they possessed few legal powers so far as domestic affairs were concerned and had little direct control over most of those who administered the laws.

This regional government was supervised by a number of 'subordinate magistrates' who were public officers performing a variety of duties.[14] These included the sheriff[15] (and his officers and servants — the bailiffs and jailers); the coroner;[16] the Justices of the Peace;[17] the constables;[18] the surveyors of highways and the overseers of the poor[19] and others. Each of these had separate and distinct modes of appointment, duties and entitlements.

By the mid to late 18th century the most important and powerful of these officers were the Justices of the Peace. Blackstone described the duties of a Justice of the Peace as follows:[20]

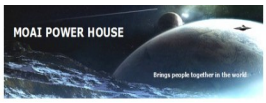
The power, office, and duty of a justice of the peace depend on his commission, and on the several statutes which have created objects of his jurisdiction. His commission, first, empowers him singly to conserve the peace; and thereby gives him all the power of the ancient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals. It also empowers any two or more to hear and determine all felonies and other offenses; which is the ground of their jurisdiction at sessions, of which more will be said in its proper place. And as to the powers given to one, two, or more justices by the several statutes, which from time to time have heaped upon them such an infinite variety of business, that few care to undertake, and fewer understand, the office; they are such and of so great importance to the public, that the country is greatly obliged to any worthy magistrate, that without sinister views of his own will engage in this troublesome service.

The Justices retained many of these powers until the reforms of local government in 1888.[21]

In addition to these 'subordinate magistrates' with supervisory responsibilities there was also an active system of local government, based upon the counties, towns and parishes. In theory at least, the powers and functions of these local government bodies were also derived from the King, although in reality many of the more ancient of their powers and functions were customary and derived from Saxon times.[22]

The bodies responsible for the administration of the towns and cities were usually corporations established by royal charter.[23] Those charters conferred privileges and imposed various duties.[24] Typically, they would create a number of public offices — the mayor, aldermen, sheriff(s), justices, constables etc — and provide for the method of their appointment. The charter would customarily grant various privileges — such as the right for the town to have its own courts or appoint its own justices and to be exempt from any obligations that might otherwise be imposed by the county. Duties might also be imposed upon the officers and/or the corporation (such as the duty to maintain roads).

Other ancient administrative and ecclesiastical local government structures included the counties,[25] the boroughs, the hundreds and the parishes.[26] Some onerous duties were imposed on these bodies. For example, the parish was responsible, by statute, for maintaining highways within its area.[27] Justices of the Peace were responsible for supervising the performance by the parish of its responsibilities in this regard.

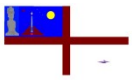










One of the advantages of this system of regional public offices and local government was that it was relatively inexpensive to the King, at least during peacetime. As Macaulay explained: [28]

> Of the expenses of civil government only a small proportion was defrayed by the crown. The great majority of the functionaries whose business was to administer justice and preserve order either gave their services to the public gratuitously, or were remunerated in a manner which caused no drain on the revenue of the State. The sheriffs, mayors and aldermen of the towns, the country gentlemen who were in the commission of the police, the headboroughs, bailiffs and petty constables, cost the King nothing. The superior courts of law were chiefly supported by fees.

PUBLIC OFFICERS

The core feature of the system of executive government as it existed in England prior to the 19th century was the public office.[29]

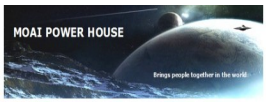
The creation of public offices and the appointment to them was a prerogative of the Monarch, although there were a number of statutory and common law exceptions.[30] In the absence of some special procedure an appointment to public office usually involved an exercise by the King of the prerogative of grants, similar in form and effect to the prerogative to make grants of land or of a franchise.[31] So, for example, an appointment to an office in fee or for life or in reversion[32] was usually made personally by the Monarch and effected by charter or letters patent made under the Great Seal and then enrolled.[33] An appointment for a term or at pleasure was usually effected by warrant or commission under the sign manual.

In the absence of very clear terms to the contrary it was presumed that an appointment by commission was at the pleasure of the King[34] and that the office holder was dismissible by the King without cause.[35] Other means by which an appointment to a public office could be terminated included for abuse of office or neglect of duty[36] or by appointment to an incompatible office[37] or by destruction of the subject matter of the office[38] or pursuant to the terms of appointment.[39] The holder of a public office could also be 'amoved' by order of the House of Lords upon the accusation or 'impeachment' of the House of Commons.[40]

A public office was associated with various powers, duties and emoluments (usually fees and charges)[41] which were strictly defined. In principle, the powers and duties attaching to the office depended upon the terms of the appointment or the relevant statute creating the office, although in practice relevant terms were often implied from the nature of the office or from customary practice.

The imposition of a 'public' duty together with the receipt of compensation served to define the public office. As it was put by Best CJ in *Henly v The Mayor of Lyme*:[42]

> Then, what constitutes a public officer? In my opinion, every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer ... It seems to me that all these cases establish the principle, that if a man takes a reward, — whatever be the nature of that reward, whether it be in money from the crown, whether it be in land from the crown, whether it be in lands or money from any individual, — for the discharge of a public duty, that instant he becomes a public officer; and if by any act of negligence or any act of abuse in his office, any individual sustains an injury, that individual is entitled to redress in a civil action.

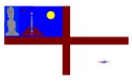










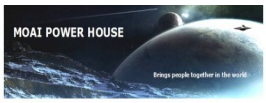



There are similar definitions in other cases.[43] They highlight that the performance of a public duty or duties was integral to the concept of the public office.[44]

However, the performance of a public duty for compensation was not the only attribute of the traditional public office. The individual office holder was subject to very little direction and the office was treated as a property right.[45] Indeed, at common law some public offices, particularly those held in fee, could be sold or assigned.[46] The office holder could appoint a deputy and delegate the duties of the office to that deputy[47] unless the appointment of a deputy was expressly or impliedly excluded by the duties of the relevant office or by the terms of appointment.[48] Subject to the terms of appointment, the public officer could also engage employees to assist in the performance of his duties.[49]

Although an office holder acted on behalf of the Crown he or she was usually independent of direction other than such as was required by the duties of the office.[50] This independence included the independent power to control what today would be considered 'public funds'. The case of *Harrison v Dormer*[51] argued before the House of Lords in 1720 provides a good practical example. The issue in that case was whether the appellant (who at the relevant time was the colonel of his regiment) had the authority to enter into a contract for the supply of regimental uniforms and to assign the relevant funds for that purpose after he had been informed that he would be replaced by the respondent but before the respondent took up his office. Their Lordships held that he did have that authority. However, for present purposes the importance of the case is what it reveals about the operation of government. The 'government' was not a party to the litigation. The dispute was between the respective public officers (and their respective contractors) and concerned the right to control the relevant funds and the patronage that was associated with that right. The Monarch had no interest in that dispute. The Monarch's interest was that someone provided the uniforms. The obligations upon the officers to provide the uniforms (and to expend the funds for that purpose) were fiduciary and trust obligations. As we shall see, there were procedures available to the Monarch to enforce those obligations.

The administration of the Fleet Street prison provides a good practical example of the proprietary nature of a public office and of the independent public duties arising from it.[52] In 1561 by letters patent Queen Elizabeth I granted the freehold of the wardenship of the Fleet prison to Sir Jeremy Whitcot and his heirs in return for him rebuilding the prison. The office of warden was entitled to various fees and charges payable by prisoners and others. Being a freehold the office could be, and was, transferred. In due course the duties were not adequately performed and the original patent was set aside. Instead a patent for life was issued by King Charles II in 1679 to a Mr Leighton. Upon his death a further grant was made to John Huggins for his own and his son's life. Huggins paid £5000 for the grant.[53] Subsequently Huggins appointed a person named Barnes as Deputy Warden and left the management of the prison largely in his hands. It was alleged that Barnes had caused the death of at least three prisoners by not properly looking after them. Barnes and Huggins were both tried for murder in 1729. Barnes was found guilty. Huggins was eventually found not guilty. The Full Bench of the Court of Kings Bench held that Barnes was not the deputy to the office held by Huggins (in which case Huggins would have been guilty), but rather that Barnes held a separate office of 'deputy' created by the Monarch (for which Huggins was not responsible).[54]

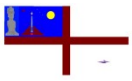










LEGAL LIABILITY OF PUBLIC OFFICERS

As Professor Finn (as he then was) pointed out, '[t]hroughout the eighteenth and early nineteenth centuries a comprehensive body of law — civil and criminal — controlled official conduct and misconduct.' [55] Although much of that body of law was in areas that would now be considered to be 'private law' (such as the general law of torts), the law was applied to enforce public duties. Much of that body of law has subsequently been forgotten or misunderstood. It is necessary to discuss it shortly in order to explain how that body of law related to the system of government as it then existed.

CRIMINAL LAW

As the example of the mismanagement of the Fleet Street prison shows, public officers enjoyed no immunity from the criminal law.[56] Indeed, the very opposite was the case — the criminal law was the principal mechanism used to enforce the duties and responsibilities of public officers. As it was put by Lord Mansfield in *R v Bembridge*:[57]

> [F]irst, a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office; this is true, by whomever and in whatever way the officer is appointed. ... Secondly, where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. That such should be the rule is essential to the existence of the country.

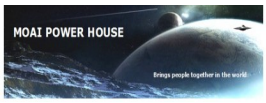
There were a number of specific common law offences which were applicable only to public officers. The most important of these offences were described by Matthew Goode as follows:[58]

> A public officer commits a misdemeanour at common law if they do an act, legal or illegal, while exercising the duties of office (or, more technically 'under colour of office'), or abuses any discretion granted by law, with an improper motive. If the act consists of taking money or other valuable it is extortion. ...
> A public officer commits a misdemeanour at common law if, in the course of their public office, they commit a fraud or breach of trust on the public, whether or not that fraud or breach of trust would have been criminal if committed by a private person.
> A public officer commits a misdemeanour if they wilfully neglect to perform a public duty which they are obliged by statute or common law to perform.

At least in relation to the failure to perform a public duty, the public officer was criminally liable whether it was the officer or the officer's deputy or employee who actually failed to perform the relevant duty. The obligation upon the public officer was for the performance of the duty — he or she was answerable for any failure in that regard, no matter whose failure it actually was.

TORT

To talk of 'tort' before the 19th century is misleading, even if convenient. Instead of the distinct categorisation of torts as we now understand them there were instead two forms of action — trespass and the action on the case. The former was the appropriate form of action in instances where there was a breach of duty which was wilful and involved the application of force.[59] The action on the case, on the other hand, was an 'elastic' form of action used in relation to a miscellany of wrongs that might now be described as separate torts, but which at the time were seen as separate aspects of the one action. So, for example, the present torts of slander, libel, deceit, nuisance and negligence can all be traced to various claims that could be made in the 18th and 19th centuries by an action on the case.

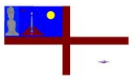










In contrast to the immunity of the Monarch (see below) public officers enjoyed no immunity from tort liability[60]

including vicarious liability. They were also liable for the acts of their deputies,[61] at least unless the office of deputy was itself an office created by the Crown. Employees and deputies of public officers were liable personally for their own acts,[62] whether or not anyone else was vicariously liable.

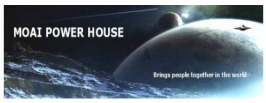
Not only did public officers not enjoy any immunity, they were subject to special liabilities sounding in damages. Historically, damages could be obtained on an action on the case for a breach of duty by a public officer in a variety of circumstances. The characterisation of these circumstances included, for example, actions against public officers for deceit, or for misfeasance or for negligence.[63] There were also a number of instances where liability was imposed simply upon proof of a breach of public duty. This was particularly so in relation to the duties of sheriffs, bailiffs and gaolers. So, for example, where a sheriff had a duty to execute a writ[64] and seize property or goods, but failed to do so then the person at whose direction the sheriff was acting had an action in tort for any damage suffered as a result.[65] Similarly, where a sheriff had a duty to a private litigant to hold a person in custody, but the person escaped then the sheriff was liable to the private litigant for any damage he or she might suffer as a result.[66]

During the 18th century these various separate bases for liability came to be viewed as aspects of a more general principle that a person who suffered special damage by reason of the failure of another to execute a 'ministerial' public duty could obtain damages by an action on the case.[67] For the purpose of this article I will describe this general principle of liability as a tort which I will call 'breach of public duty'.[68] The case of *Ashby v White*[69] provides a celebrated example of the tort. Mr Ashby was entitled to vote in parliamentary elections. The sheriff, who performed the functions of returning officer, refused to accept Mr White's vote. It was accepted that if Mr White had voted his vote would not have made any difference to the ultimate result. Mr White sued upon an action on the case seeking damages. For various reasons the majority of the Court of Queen's Bench held that no action would lie. Chief Justice Holt dissented. He held that the function performed by the sheriff was ministerial. That being the case, and the elector having a right to vote, Holt CJ held that the elector had a good action against the sheriff for his denial of the right.[70] The case then proceeded on writ of error to the House of Lords, where the judgment of the majority of the Court of Queen's Bench was overturned by 50 Lords against 16,[71] a result generally seen as vindicating the approach of Holt CJ and confirming the existence of the tort.

The tort was described by Best CJ in *Henly v The Mayor of Lyme* as follows:[72]

> Now I take it to be perfectly clear, that if a public officer abuses his office, either by an act or omission or commission, and the consequence of that, is an injury to an individual, an action may be maintained against such public officer. The instances of this are so numerous, that it would be a waste of time to refer to them.

There were some exceptions to the general principle of liability for breach of public duty. Most obviously, the action had to be one that could be enforced by an action for damages — it was necessary to be able to identify someone who could be sued.[73] There was an exception in relation to persons acting judicially (such as members of inferior courts, members of tribunals and arbitrators) who were immune at common law from liability for things said and done by them within their jurisdiction.[74] Members of a superior

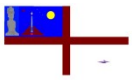










court were immune from liability for anything said or done by them in the exercise of their judicial functions, at least so long as he or she bona fide believed that he or she was acting within jurisdiction.[75]

By analogy with the judicial exception, there was also an exception where the relevant duty included a discretionary power. Where the duty was discretionary (in contrast to 'ministerial') it was necessary to establish malice.[76]

Professor Finn (as he then was) has suggested that in some circumstances the liability of a public officer for failure to perform a purely ministerial duty required proof of negligence[77] in addition to proof of breach of duty. True it is that the courts, on occasion, construed the duty of a public officer as being a duty to act reasonably.[78] However, properly understood it seems to me that these cases are merely instances where the courts construed the relevant duty of the public officer as a duty to act reasonably. In order to show a breach of that duty it was necessary to show negligence. On the other hand, if the duty was absolute (as it was, for example, in relation to many of the duties of the sheriff) then all that needed to be proved was that the duty had not been performed.

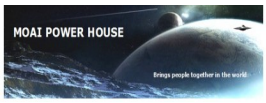
THE PREROGATIVE WRITS

The use of the word 'prerogative'[79] to describe the writs of habeas corpus, quo warranto, prohibition, certiorari and mandamus has the potential to mislead both by suggesting that the writs were necessarily associated with the Crown and by suggesting some homogeneity in their nature.[80] The writs developed independently, at different times and for different purposes.[81] Apart from the fact that at least from the 17th century all of the writs were issued by King's Bench,[82] it is not immediately obvious that they formed a class. Nevertheless, as Professor Pfander has pointed out,[83]

> [B]y [1760] the supervisory writs of King's Bench had taken a definite shape. The writ of mandamus issued by King's Bench directed inferior courts and administrative officials to take action clearly required of them by law. *Habeas corpus ad sujiciendum*, the 'Great Writ' of freedom, directed the 'jailer' before the court for an adjudication of the legality of further confinement. Prohibition directed a lower court that it refrain from exercising authority over a matter beyond its jurisdiction. Certiorari effected the removal of a judicial order or cause (often an indictment) from a local court for trial or other disposition in King's Bench. *Quo warranto* tested the title of an individual to royal office and supplied the means of ousting those who held office unlawfully.
>
> These writs shared many characteristics ... First, the writs were closely associated with the exercise of royal authority and with King's Bench... Second, the prerogative writs were issued by the court after reviewing the sufficiency of the petition. Third, the prerogative writs were seen as 'suppletory means of substantive justice'... Fourth, the writs were adjudicated by way of summary proceedings, and were enforceable through contempt sanctions.

In the 18th century the writs of mandamus, prohibition and certiorari did not have the same importance that they have subsequently had. In the 18th century only mandamus and, to a lesser extent, habeas corpus could be viewed as writs directed to the control of administrative public duties, and neither of them was limited to public officers. Prohibition and certiorari were primarily directed to the exercise of judicial power.

By the 18th century mandamus was used to compel the performance of a wide range of public or quasi-public duties whether by public officers, or private individuals,[84] although where the duty was of a private nature the remedy was discretionary.[85] Persons seeking mandamus had to show an interest in

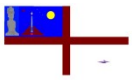










the performance of the duty sought to be enforced.[86] Lord Mansfield's statement that the writ was available in order 'that justice may be done' in any instance where there was no other specific remedy available[87] was probably too broad. On the other hand, the remedy was not limited to public officers or even to 'public' duties. Given the breadth of the writ it was treated by Blackstone as a private remedy.[88] Consequently, like a mandatory injunction, it would not be granted if the effect of doing so was to require the expenditure of public moneys, at least unless the law required such expenditure.[89]

Prohibition was a remedy developed by the common law courts to control the exercise of jurisdiction by other courts. Given the history of the writ, it was initially thought to be available only in respect of inferior courts,[90] but had been extended by the 19th century to cover those required by law to act 'judicially'.[91] The remedy was available as of right to private parties affected by judicial proceedings where they had no other remedy, but was discretionary if some other remedy was available.[92] Blackstone treated prohibition, like mandamus, as a private remedy.[93]

Certiorari was originally a mechanism by which an inferior official or court could be required to certify the record before him or her and then forward it to a superior court (initially Chancery) for further consideration. De Smith has explained that the original use of the writ was (a) to supervise the proceedings of inferior, specialised courts;[94] (b) to obtain information for administrative purposes; (c) to bring before Chancery or the common law courts judicial and other records; and (d) to remove coroners' inquisitions and records into the Court of King's Bench.[95] However, after the decision of the Court of King's Bench in *Commins v Massam*[96] certiorari came to be used by the Court of King's Bench to take over or review ('quash') the original proceedings instituted before inferior courts[97] on their merits,[98] particularly in relation to criminal matters. A prosecutor on a criminal information was entitled to demand certiorari as a matter of right at least before conviction. However, if a defendant in the inferior court sought certiorari the remedy was discretionary.[99]

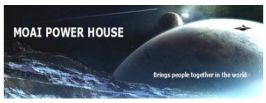
Historically neither prohibition nor certiorari were available from King's Bench against administrative officers.

The prerogative writs, particularly mandamus, provided a mechanism by which the Monarch[100] and members of the public could ultimately control public officials performing administrative functions so as to require them to perform their duty.

CHANCERY

It is generally thought that equity in general, and the Court of Chancery in particular, had little application to public administration until at least the 1930s.[101] Consequently the accepted wisdom was that, historically, an injunction could not be obtained against a public officer when acting in an official capacity.[102]

This would seem to be a misunderstanding of the historical position.[103] It is true that there were simpler procedures and remedies available to enforce public duties than those available from Chancery. In most instances where an equitable remedy was sought against a public officer the proceedings would normally be brought in the Court of Exchequer, rather than Chancery (see below). Nevertheless, injunctions were

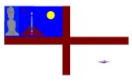










available in Chancery against public officers who were in breach of their public duties.[104] This was so even before the equity jurisdiction of the Court of Exchequer was transferred to the Court of Chancery in 1842.[105] For example, in the 1830 case of *Rankin v Huskisson*[106] an injunction was sought against the Commissioners of Woods and Forests in respect of a lease agreement they had entered into with the plaintiff which they had breached by permitting the Crown and those authorised by the Crown to use the land. It was argued that the Commissioners were not liable to an injunction in their official capacity. The injunction was granted.

The correct principle would seem to be as stated by Lord Davey for the Privy Council in *Nireaha Tamaki v Baker*: 'Their Lordships hold that an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority.'[107] Although injunctions may have been available, a mandatory injunction would not be granted against an officer if the effect of it was to require the expenditure of 'public' moneys (in distinction from moneys owned by the officer).

It is probably incorrect to view declarations as equitable remedies.[108] Nevertheless, if I can be forgiven for discussing declarations in this context, it would seem that in the 18th and even in the 19th centuries declarations were rarely granted even as consequential relief.[109] They do not seem to have been used to control the unlawful exercise of official duties at least before the 20th century.

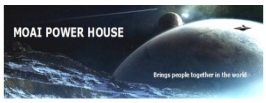
THE COURT OF EXCHEQUER

The powers and jurisdiction once exercised by the Court of Exchequer are often now overlooked, but prior to its abolition in 1842 that Court had a vital role in the control and accountability of public officers.

The primary function of the Court of Exchequer was to protect, enforce and administer the collection of public revenues.[110] It had three heads of jurisdiction: it was a common law court, it was a court of equity and it decided disputes affecting the revenues.[111] Such disputes affecting the revenues included disputes between the Monarch (or public officers responsible for the collection of revenues) and those liable to pay; between the Crown and those that collected or handled revenues for the Crown[112] and between government officials as to their respective rights and duties in relation to the receipt of revenues or other property held on trust for a governmental purpose.[113] Over time the jurisdiction of the Court was much expanded through the use of various fictions involving the presumed effect of the alleged act upon the capacity of the parties to pay their debts to the King.[114]

The Court of Exchequer had various specialised procedures many of which benefited the revenues. For example, the writ of extent was available to enforce the payment of debts to the King[115] and the Latin information enabled the King to establish his right to land or other property (including penalties) — the onus resting on the defendant.

There were also various procedures available in the Court of Exchequer to require a public officer to account for money or entitlements due to the Monarch and to enforce any duties in that regard.[116] The most important of these was the English (or Crown) information.[117] One of the purposes of the English information was to enable the Monarch to obtain an account or other equitable relief (including

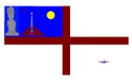










injunctions) from public officers and others.[118] Issues such as whether an officer had properly paid under-officers from money received from or on behalf of the Crown for that purpose could be determined by use of the English information.[119] So too could the question whether the use of 'public' property or monies had been properly authorised.[120] So too could the question of whether officers had properly discharged their duty in collecting moneys belonging to the Monarch.[121] The procedure was onerous and oppressive. For example, the officer was required to answer interrogatories upon pain of imprisonment or default judgment. Any moneys ultimately due could be traced to the officer's executors and creditors.[122]

The jurisdiction of the Court of Exchequer over public officers was not limited to actions by the Crown. Where a private individual had a sufficient interest, that individual could also seek relief (including injunctive relief) in the Court of Exchequer against revenue officers in relation to a breach by such officer of his or her duties.[123]

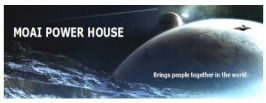
Holdsworth suggests that the law administered by the Court of Exchequer came to resemble a body of administrative law.[124] This probably overstates the case. The jurisdiction of the Court of Exchequer was limited by its focus on the revenues. Nevertheless, it did provide a means at least to ensure that officers responsible for public moneys and property were accountable in relation to their actions involving them. The equitable jurisdiction of the Court of Exchequer is also important in explanation of why the Court of Chancery did not develop a significant equitable jurisdiction in relation to public officers.

LEGAL LIABILITY OF THE MONARCH

As we have seen there was a significant body of law available to enforce the duties of public officers. However, one of the features of this traditional administrative system was that the Monarch (even in his or her 'official'[125] capacity) was separate and distinct from the public officers that carried out the day to day administration of government. As we shall see, the legal liability of the Monarch was very different from that of public officers. On the other hand, the legal liability of the Monarch needs to be understood in the context of the legal duties imposed upon public officers.

The Monarch enjoyed various special immunities or preferences when sued before the courts.[126] These immunities were derived from the Monarch's historical sovereignty, including his or her fictional perfection[127] or ubiquity.[128] For example, the Monarch could not be sued or made a party to legal proceedings in his or her own courts without his or her consent,[129] time did not run against the Monarch,[130] no execution or distress could be made against the property of the Monarch,[131] the Monarch was not liable to discovery[132] and the Monarch neither received nor paid costs.[133] Importantly, the Monarch was not liable in tort (see below). There were a number of others.

The Monarch's immunities were not absolute. The most significant of the procedural immunities was the restriction on suit. Although not insuperable, this imposed a significant impediment on those instituting proceedings against the Monarch.[134] Nevertheless, there were a number of procedures available to ameliorate the effect of the immunity. The most important was the petition of right.[135] Initially the petition could not be brought without the express consent of the Monarch. Over time, however, the requirement for consent became a mere procedural step. Although the writ still recited the request for such consent and it still contained an endorsement that it had been granted,[136] Professor Pfander

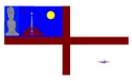










suggests that, '[e]ither a fictional consent was substituted for a genuine consent, or the authority to give consent passed from the Crown to the courts'.[137] The procedure was nevertheless cumbersome and other remedies proved more attractive in the 19th century until the petition of right procedure was significantly reformed in 1860.[138]

One of these other remedies available against the Monarch was the *monstrans de droit*. At least initially, this was a defence to an action for an 'inquest of office' brought by the Monarch to establish his or her right to property.[139] There was no requirement for the Monarch's consent.[140] In the *Banker's Case*[141] Holt CJ, after stating '[w]e are all agreed that they have a right; and if so they must have some remedy to come at it too' went on to hold that the monstrans de droit was a common law remedy which was available where the party's title could be established by the record (in this case by letters patent granted by the King).[142] Holt CJ also seemed to be of the view that a petition of right could have been brought for the same purpose.[143] The result was that the monstrans de droit and (probably) the petition of right were both available to enforce legal rights against the Monarch without the need for the Monarch's consent.

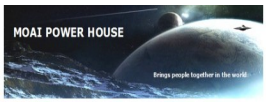
By the end of the 17th century it had also been accepted that equitable remedies such as injunctions could be granted against the Monarch even without his or her consent,[144] providing that they were not 'mandatory'. It would also seem to be clear by the mid 19th century that a declaration could be made against the King whether upon a petition of right or by proceedings instituted against the Attorney General.[145]

The availability of these procedures and remedies certainly did not mean that the Monarch was in the same position as other litigants. One significant limitation was that executory, mandatory remedies could not be obtained against the King. Chancery, for example, would not grant a mandatory injunction, specific performance[146] or discovery[147] against the King. Similarly, King's Bench would not grant mandamus against the King.[148] One of the reasons for this was that these mandatory remedies could not be enforced against him — execution was not available against the property of the King.[149] Only those remedies that did not impose a mandatory executory obligation were available against the Monarch.

The Monarch also enjoyed an immunity from liability in tort reflected in the maxim 'the King can do no wrong'. There were two possible views of that immunity. The first was that any immunity was simply an aspect of the Crown's broader immunity from suit.[150]

The other was that the maxim had the effect that the Crown could not legally commit a tort.[151]

Somewhat surprisingly the meaning and application of the immunity did not arise for detailed consideration until 1843 in the case of *Viscount Canterbury v AG*[152] where it was held that the Crown could not be liable in tort, including vicariously.[153] The Court treated the Monarch not as an abstraction personifying the whole of the government, but as a person, albeit a person having sovereign power and immunities. It will be necessary to return to this aspect of the case in due course.

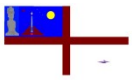










These immunities enjoyed historically by the Monarch may not have been as broad as they are now sometimes assumed to be. As already remarked, they need to be understood in the context of the liability of public officers discussed above. As Sir William Wade has commented:[154]

The immunity of the Crown was only tolerable because it did not extend to ministers or Crown officers, who were liable personally in law for anything unlawful that they did; and it made no difference that they were acting in an official capacity ... If they committed torts they could be sued for damages (and occasionally for injunctions). If they abused their powers, they were liable to certiorari and prohibition. If they failed in their duty, they could be compelled to perform it by mandamus. No immunity, not even the orders of the Crown itself, could absolve them from obeying the law.

CHANGES TO GOVERNMENT ADMINISTRATION FROM 1750-1900

This traditional system of government administration was changed fundamentally over the next 150 years. In the period from 1750–1850 England fought large and expensive wars, it lost its American colonies and it developed a new Empire. Its economy changed rapidly as a result of industrialisation. The cities, particularly London, grew very quickly. The countryside became less important to the social and to the governmental structures of England. These changes and pressures impacted upon the size, organisation and focus of government administration.

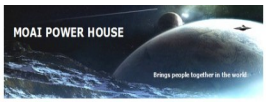
One major change in government involved the increase in the constitutional and political power of the House of Commons. At the time of Charles II the House of Commons had only limited powers to control government administration.[155] However, in the period from Pitt's Cabinet in 1784 to the early 19th century the convention became established that membership of Cabinet was restricted to ministers with administrative duties and to the presidents of various boards,[156] including the Board of Control and that these were required to be members of the Parliament. By the mid 19th century, the power of the Commons clearly included the power to control the Executive through its power to control its own members and its increasing control over public finances (see below).

There were related constitutional reforms to the relationship between the senior officers of government and the King.[157] The role of the Privy Council as the primary source of advice to the King was largely supplanted by the Cabinet. The Cabinet, in turn, became more powerful in its relationship with the King.[158]

The civil service came to be organised in ministerial departments[159] which came to replace many of the boards and committees that had previously supervised much government activity.[160] Over time the membership of the Cabinet came to comprise the administrators of the great departments of government, particularly those who had authority for the affixing of the seals of State.[161]

These developments are well understood and do not require detailed discussion here. However, related to them were various functional reforms which may not be quite so well known.

One of those reforms involved the management of government finances. Historically the King's revenues had been largely derived from fees, charges and fines whether imposed under the prerogative or pursuant to statute; from the prerogative rights of the Crown such as bona vacantia; from the sale or lease of Crown land and from the sale of rights derived from the Crown, such as offices, monopolies and so on.[162] These

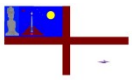










various revenues are referred to in this article as the 'hereditary' revenues of the Crown. They are to be distinguished from 'taxation' revenues which were imposed by statute.[163]

Hereditary and taxation revenues were collected by public officers pursuant to various duties and powers they possessed for the purpose. Receipts were usually held by public officers in accounts established by them for that purpose. Prior to the late 18th century most public officers were paid directly by fee or commission.[164] These payments were deducted before payments (if any) were made to the Monarch through the Exchequer. As already discussed, where such payments were required the relevant officers were accountable to the Exchequer for the amount of them.

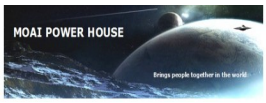
'Official' expenditure by the Monarch was made either in accordance with a parliamentary appropriation (if payable from taxation revenues) or in accordance with a royal authority (usually a warrant issued by the Treasury Commissioners). Payments made by the central government were paid by the Exchequer to accounting officers (who held the money in their accounts) and then to other public officers (who held the money in their accounts).[165]

This system was considerably changed by the introduction of the Consolidated Fund in 1787 as a mechanism by which Treasury could exercise control over Government expenditure.[166] The result, at least as more and more sources of revenue were required to be paid into the Consolidated Fund, was that individual officers lost personal discretionary control over the revenues that they received or that they disbursed. All revenues had to be paid into the Fund without deduction[167] and no moneys could be paid from the Fund without an appropriation.

An associated reform was the introduction of the civil list.[168] It was confirmed in 1689 by the *Bill of Rights*[169] that only Parliament had the power to authorise the expenditure of taxation revenues. As already mentioned, other hereditary revenues remained under the control of the King. In 1760 the King 'surrendered' the bulk of his hereditary revenues in return for a civil list annuity.[170] Over time that list came to be limited to the household expenses of the Monarch and the royal family.[171] The development of the civil list not only increased the power of the Commons to control government expenditure, it also increased the powers of the Cabinet as against the King.[172] Following the introduction of the civil list there was an obvious and clear distinction between the personal moneys of the King and the 'official' moneys of the government.[173] Whatever may have been the previous position the introduction of the civil list in England meant that the income and assets of the King in his personal capacity were quite separate and distinct from those of the government.

There was also considerable development and reform of the structure and internal organisation of government administration. At least initially that reform involved the central agencies and departments of government. For convenience I will call this central government the 'civil service'[174] although it should be understood that the development of the 'civil service' as we would now understand it was itself a consequence of these reforms.

Prior to 1850 there had been extensive reforms of some government agencies particularly those involved in the collection of the revenues (Customs, Excise, Post Office etc) and in the administration of defence

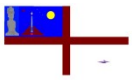










(War Office, Admiralty, Ordinance).[175] These agencies were relatively large (at least for the period). They began to be organised along more modern 'bureaucratic' lines.

Some more limited reforms were more widespread. For example, as at 1750 central government was 'largely oiled with fees and perquisites rather than salaries.'[176] However, the worst excesses of that system were gradually removed from about 1780 onwards,[177] so that by 1850 most public officers in central government were remunerated by realistic (or, at least, more realistic) salaries[178] rather than fees. During the same period the sale of public officers was further restricted.[179]

Nevertheless, the extent of the changes to the formative civil service during the period up to around 1850, should not be overstated. The changes were evolutionary and occurred at different rates in different government agencies. Much of 'the Civil Service remained essentially unchanged'.[180] Most of the civil service was small and limited in scope.[181] Government in England in the early 19th century was 'an intimate business, close to the governed, small in scale, conducted from buildings which were essentially private houses.'[182]

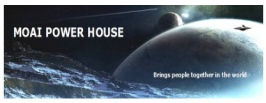
In 1850 the structure of the civil service was still based upon appointment to public office — by and large junior officers were either deputies of superior officers or they held their own public office with inferior duties. Many of the more senior public officers employed their own clerks and secretaries,[183] although in some agencies the clerks and secretaries were themselves public officers. Appointment and promotion still operated largely by patronage.[184]

The reform of the English civil service was vastly accelerated from around 1850, largely due to pressure from the Treasury for the creation of a more efficient service. In the course of about 30 years from 1850 a new governmental administrative structure was created involving a centralised, hierarchical administration staffed by salaried public servants and answerable to a corporate and political Cabinet.[185] Most of the changes were effected in England by the use of the prerogative, usually by order in council[186] rather than by statute (as was done in Australia).

The *Northcote & Trevelyan* Report of 1854[187] is generally seen as the watershed in the process of reform of government administration in England. It dealt with the process of appointment to the civil service, but indirectly it also led to the creation of a more cohesive 'civil service'. The Report was critical of the service as it existed. It found that the service '[suffered] both in internal efficiency and in public estimation'. The Report recommended three reforms:[188] (a) appointments (other than 'staff appointments') to be made upon examination by a Central Examination Board; (b) promotion based upon merit; and (c) promotion in all Departments to be opened up to applicants across the civil service.

The proposed reforms were largely effected during the period 1850–1871. Entry into the civil service by patronage, the purchase of army commissions and the imposition of religious tests were finally abolished.[189] Following that process, the civil service could be and was viewed as a single service. Transfer and promotion between agencies was not only possible but also expected.[190]

The result of these processes was that central executive government in England was changed from a system whereby government administration was performed by independent public officers with

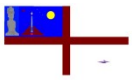










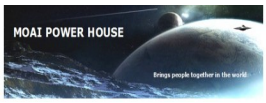
independent powers and discretions to a system where the administration was supervised by politicians having the support of the House of Commons and carried on by salaried public servants organised in a hierarchical bureaucracy. Civil servants still held an 'office', but it was very different from the traditional 'public office' described above. The bureaucratic office did not 'belong' to the appointee, it belonged to the organisation; the officer had no significant discretions, but had specified functions within a defined hierarchy of functions and the bureaucracy was staffed by employees, not by independent trustees.[191]

These major changes from 1850–1880 occurred primarily in 'central' government. Changes also occurred to local or regional government, although these proceeded somewhat later than in the civil service. There were two aspects of these reforms. First, many functions formerly the sole concern of regional officials were brought under the supervision, if not the management, of the centralised civil service.[192] For example, the management of the poor laws[193] and of public health[194] and of police,[195] were made subject to central control either directly or by means of financial control.[196]

The second aspect was the reform of the structure of local government. In 1835 the *Municipal Corporations Act*[197] was passed replacing some existing chartered town corporations (and their rights, privileges, immunities and so on) with 'municipal corporations' governed by a council elected by ratepayers. The new corporations were given broad powers to make bye-laws and to appoint such officials as were necessary for them to discharge their functions. One effect of the Act was that those chartered corporations that had the power to appoint their own Justices of the Peace lost that power — henceforth all Justices were appointed by the King in accordance with the procedure described above. However, the Act did nothing to reform county government which still remained under the control of the local justices appointed for the relevant county.[198] Finally in 1888 the *Local Government Act* replaced the administrative powers of the Justices of the Peace in the counties with those of elected county councils.[199]

One consequence of these reforms was to create a legal separation between central and local government. For practical purposes administrative functions even at local government level were thereafter exercised either by elected officials or by employees working in a bureaucracy answerable to a self governing local body. With some qualification (discussed below), the feudal public officer holding an independent proprietary office was no more.

As might be expected, the transition from government by independent officers to government by central and regional bureaucracies created some legal problems. One interesting example involved the question of which level of government 'owned' property held by public officers as trustees. In *Coomber v Justices of the County of Berks*[200] the House of Lords had to consider whether property purchased by authority of Justices of the Peace for the purpose of erecting an assize court was liable to income tax. The title of the land upon which the court was erected was held by the clerk of the Court as trustee, but on behalf of what level of government? The House of Lords held that the land was in fact held for 'the Crown' meaning the central government. That may be contrasted with *Bray v Justices of Lancashire*.[201] In that case Justices of the Peace had authorised the establishment of a lunatic asylum pursuant to a statutory duty. The Queen's Bench Division held that the Justices were not acting for the benefit of the central government ('the Crown') but for the benefit of county government which was consequently the beneficial owner of the asylum.[202] The Court recognised the factual reality that different and distinct levels of government had

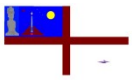










developed. With it had developed the need to identify (retrospectively) for what level of government the relevant Justices had been acting as trustee.

These developments in government administration in England were substantially followed in the Australian colonies, but with some variations. Two may be mentioned in this context.

Since first settlement government in Australia had been much more centralised than in England.[203] It was centralised around the points of initial settlement which remained the main ports in the new colonies. Professor Finn (as he then was) has traced the history of the development of government administration in the Australian colonies in the 19th century, or at least that on the eastern mainland.[204] It is unnecessary to repeat it. The introduction of responsible government in the Australian colonies from 1850–1900 merely accentuated an already existing process of central control. This involved not merely a reduced role for regional administration compared to that in England. It also involved much more focussed and centralised control within the government itself. Ministers and departments in Australian governments had less independence from Cabinet control (and from control by the central agencies, particularly Treasury) than was usual in England at least during that period.

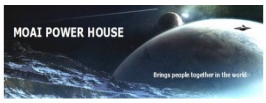
Another important difference was the greater use in Australia of statutory bodies to perform government functions. The role of the unincorporated boards in government administration in England in the 18th century and their gradual replacement in the 19th century by ministerial departments has already been noted. The statutory bodies that were established in England during the 19th century generally operated at local government level. It was not until the large scale privatisations of the 20th century that English courts have had to grapple with the issues raised by statutory authorities forming part of central government.

In the Australian colonies and subsequently the Australian States, on the other hand, the lack of private capital for development combined with the emphasis on central, rather than regional, government meant that central governments became involved in a significant number of commercial or service activities which, in England, were performed by the private sector or by local government. These activities were performed by single purpose corporations established by statute — the statutory authority. These were largely an Australian invention — in any event their large scale use served to distinguish government administration in Australia from that in England, at least during the 19th century.[205] As discussed below, these variations in the structure of government administration in Australia would seem to have had some effect upon the development of the Australian common law.

'THE CROWN' AS CORPORATION AGGREGATE

These reforms to the civil service resulted in a (relatively) efficient, cohesive and bureaucratic central government. It was no longer true that all government activity was derived from or ascribed to the Monarch personally. The new civil servants were not the equivalent to, or even the successors of, the former public officers.

Such changes necessitated changes in the common law. One of these changes was the development of the concept of 'the Crown' as a 'corporation aggregate'. In order to understand that development I propose to consider the developments in the common law in relation to the liability of the government and of public officers and employees in tort.

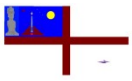










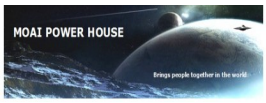
As already mentioned, one of the government agencies that was first organised along bureaucratic lines was the post office. On the face of it the duty of the Post-Masters General included a duty to deliver the post, being a 'ministerial' duty involving little or no discretion. It might be expected that the Post-Masters General would be liable for breach of public duty if the mail was not delivered. In *Lane v Cotton*[206] the Post-Masters General were sued for the loss of an Exchequer bill that had been sent through the post. It was held by the majority of King's Bench that the Post-Masters General were not liable. Three bases for that result can be identified in the majority reasoning: that the letters patent establishing the office expressly provided that they should not be liable except for their own default;[207] that they were paid by salary, rather than by fees,[208] and finally that the error was that of inferior officers who were independently responsible to the King, not to the Post-Masters General,[209] notwithstanding that they were appointed by the Post-Masters General. Holt CJ dissented on the basis that the Post-Masters General held public office with ministerial duties and were liable for the failure to discharge of the same. It would seem that the analysis by Holt CJ best accorded with existing authority in relation to the tort of breach of public duty as described above. On the other hand, the imposition of such a liability may well have precluded the further commercial development of the post office.

The distinction made by the majority in *Lane v Cotton* between the acts of the Post-Masters General and inferior officers suggests some confusion between primary and vicarious liability. It was the duty of the Post-Masters General to deliver the mail — their liability (if any) was for the breach of their own duty, not that of the officers engaged in the relevant work. Consequently their liability (if any) was primary liability, not vicarious liability. It should not have mattered whose 'officer' the junior officers were.

The same confusion between primary and secondary liability was repeated nearly 200 years later in *Bainbridge v Post-Master General*.[210] An employee in the post office was negligent in repairing a trench for a telegraph line. The plaintiff tripped over the trench and suffered injury. She sued the Post-Master General alleging that he was liable for the damage arising from her injury. The basis of the suit was the alleged statutory liability of the Post-Master General for any injuries or accident through any act or default in the operations conducted and performed by him.[211] The Court largely ignored the relevant statute, relying instead on the common law principle that the Post-Master General was not liable for the acts of inferior officers. Mathew LJ remarked that '[i]t is incredible' that the Legislature could have considered the Post-Master General liable for the acts of his subordinates — 'the effect of which would be to transform a public officer, the head of a great department of the State, into the manager of a commercial undertaking.'[212] The practical result, however, was that senior officers were not responsible for the acts of their subordinates.

Whether or not the reasoning in these cases is confused it does show that the courts were concerned to limit the potential liability that might otherwise be imposed upon superior officers. It also highlights the developing perception that 'the Monarch' was the 'superior officer' responsible for inferior officers.

What, then, of the Monarch? Was the Monarch liable?[213] It will be recalled that in 1843 in *Viscount Canterbury v AG*[214] it was held that the Crown could not be liable in tort on the basis that 'the King could do no wrong' and that, in any event, the King could not be liable for the torts of inferior officers. In the subsequent case of *Tobin v R*[215] the court attempted to explain why the Monarch could not be liable for the act of an inferior officer whereas a sheriff plainly could. The court explained that, by reason of the maxim 'the King can do no wrong', the Monarch could never authorise a wrong. So, it was said, it could

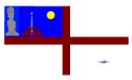










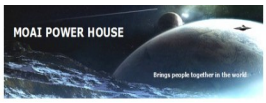



never be within the scope of an officer's authority for that officer to commit a wrong.[216] The Monarch could not be vicariously liable because any tort by the employee was not authorised. The Court seemed to think that this was a sufficient basis to distinguish the liability of the Crown from that of a sheriff, apparently without realising that sheriffs also held an office derived from the Crown — presumably (on this reasoning) a sheriff also should have been unable to authorise their inferior officers to commit a wrong.

In the *Viscount Canterbury Case* and in *Tobin* the courts treated 'the Crown' as an individual person or officer or (perhaps) as a corporation sole, separate and distinct from the other officers in government. Public officers were also treated as independent persons with independent liabilities. Plainly enough it would be unfair, or at least inconvenient, to impose personal liability upon these independent public officers. Similarly, it would be inappropriate to find that the King was personally liable. In the absence of any concept of 'government' to explain the relationships between the various parties involved, the resultant judicial analysis was necessarily confused.

The approach taken in *Tobin v R* should be contrasted with that in *Feather v R*.[217] In that case the court did adopt a corporate approach to government, at least in one aspect of its reasoning. This also was an action for damages commenced by petition of right. The plaintiff had a monopoly right granted to him by letters patent for the use of a particular process in ship-building. The patent had been breached by the 'Commissioners for executing the office of Lord High Admiral of the United Kingdom, in the exercise of their office and on behalf of the Crown'. The Court dismissed the action. It gave two reasons for doing so. First, the Court held that the patent should be construed as not extending to 'the Crown' because of the general principle that any ambiguity in Crown grants were to be construed in favour of the Crown[218] and the related rule that grants of monopolies were to be construed as exempting the Crown. The effect of these special rules in favour of the Crown was that 'the Crown' could use the relevant process without breaching any rights of the plaintiff. The question that needed to be considered (but was not) was what 'the Crown' meant in this context. Clearly enough Queen Victoria herself did not use the relevant process of manufacture — it was the Commissioners who did so. Yet the Court treated the acts of the Commissioners as acts of 'the Crown', presumably because the government obtained the benefit from those acts. The Court was obviously using the term 'the Crown' to refer to a 'metaphysical abstraction' — a corporation aggregate including the Commissioners. This is to be contrasted with the second reason given by the Court for dismissing the action. The Court also held that even if the patent had bound the Crown any breach of the patent had been by civil servants and the Crown was not vicariously liable for any such breach[219]. The acts of the Commissioners were acts of 'the Crown' for the purpose of determining whether there had been any breach of the patent, but not for the purpose of immunity in tort.

The reasoning of the House of Lords in *Feather* as to the nature of 'the Crown' can be contrasted with that of their Lordships in *Dixon v London Small Arms Co*.[220] The facts in *Dixon* were similar to those in *Feather* save that the breach of the relevant patent was by contractors of the government, rather than by its servants or officers. Although the patent again did not bind 'the Crown' the Court held that the contractors were liable for breach of the patent. Presumably 'the Crown' (however defined) received the same benefit from the (mis)use of the invention as it had received in *Feather* no matter whether the invention was used by an employee, an officer or a contractor of government. However, in *Dixon* their Lordships had to address the question that was overlooked in *Feather*. Did the immunity enjoyed by 'the Crown' by virtue of its prerogative only apply personally to the Monarch? If not, who could enjoy it? Their Lordships accepted that the decision in *Feather* meant that the exemption of the Crown from the

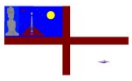










monopoly was an exemption of 'the Crown' including its employees and agents, but they held that it did not include government contractors.[221] As it was expressly stated by Lord Penzance, '[w]e all know that the Crown is an abstraction'.[222]

As *Feather* and *Dixon* show, during the late 19th century the courts were treating 'the Crown' as a corporation aggregate comprising the whole of government (although whether they understood that that was what they were doing may be more doubtful). In treating the Crown this way the common law began to reflect the practical reality of the re-organised government administration discussed above.

Maitland, writing in 1901,[223] seems to have been the first commentator to identify the process we have been discussing, although by then it was already well advanced. He drew attention to the need for the common law to develop some notion of 'the State' and referred to historical examples, particularly during the period of Cromwell's Protectorate, when the words 'the Commonwealth', 'the Republic' or 'the 'people' were used for this purpose. He also drew attention to the use of the word 'the Crown' in cases such as *Dixon* in an apparently new, but undefined sense. He referred to the creation of a new government structure, divorced from the Monarch's person, but with a Consolidated Fund; of a bureaucratic structure with servants and agents that were not answerable to the Monarch; and of an imperial structure with colonies each with the same King but with separate governments and separate treasuries.[224] Maitland concluded:

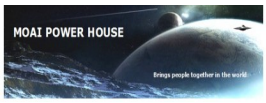
> The suggestion that 'the Crown' is very often a suppressed or partially recognized corporation aggregate is forced upon us as we begin to attend with care to the language which is used by judges when they are freely reasoning about modern matters and are not feeling the pressure of old theories. ... [It] is evident that King Edward is not (though Louis XIV may have been) the State ... The way out of this mess, for mess it is, lies in a perception of the fact, for fact it is, that our sovereign lord is not a 'corporation sole', but is a head of a complex and highly organized 'corporation aggregate of many' — of very many. I see no great harm in calling this corporation a Crown. But a better word has lately returned to the statute book. That word is Commonwealth.

Following Maitland's article it became generally accepted that 'the Crown' was to be treated as a corporation aggregate. This was finally confirmed by the House of Lords in *Town Investments Ltd v Department of Environment*.[225] The question arose in that case whether the tenant under a lease was 'the Crown' or was the relevant Minister who had entered into the lease in the name of his own office 'on behalf of her Majesty'. It was argued by the plaintiff that the Minister was the lessee subject to a trust in favour of her Majesty. This was rejected by their Lordships. They did so on the basis that 'the Crown' was a corporation aggregate comprising 'the government'. They held that the relationships between the members of that corporation aggregate were governed by public law and constitutional principles, not by private law obligations including the law of trusts. Lord Simon commented:

> [T]he legal concept which seems to me to fit best the contemporary situation is to consider the Crown as a corporation aggregate headed by the Queen. The departments of state including the ministers at their head (whether or not either the department or the minister has been incorporated) are then themselves members of the corporation aggregate of the Crown.

By this means the common law adapted the feudal concept of 'the Crown' as a synonym for 'the government' or 'the State'.[226]

One obvious problem arising from the use of the Crown as a 'corporation aggregate' is to identify the extent and nature of the corporation. In *Town Investments* 'the Crown' included the Monarch, the Cabinet,

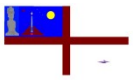










Ministers and statutory authorities which were subject to the control and direction of the ministry or a minister. In *Watson v WA*[227] the Western Australian Full Court held that it included the Cabinet. In the statutory definitions (where they exist) the terms invariably include ministers and statutory authorities subject to ministerial direction. It often does not include mere employees,[228] although some of the discussion in the cases would be broad enough to do so. There remains no generally understood meaning of the concept 'the Crown'.

Another problem in the utilisation of 'the Crown' as a synonym for government is the resultant confusion as to the applicability of Crown immunities.[229] This issue was identified soon after Maitland identified the development of the corporate Crown. Pitt Cobbett,[230] for example, drew attention to the problems arising from the 'attempt to utilise the king, who is really only one factor in the government of the State as the legal representative of the whole State'. Those problems included the risk that the King's fictional perfection would come to be ascribed to the whole of government.[231]

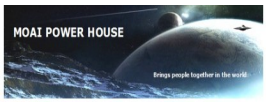
Not all of the King's immunities have been applied to 'the Crown' in the sense of the whole of government. The historical immunity of the Crown in tort has not been extended to Crown servants,[232] although it is not altogether obvious why not. The description of the Crown as a corporation aggregate was adopted and applied by Harrison Moore in an influential article, 'Liability for Acts of Public Servants'[233]

which assumed that 'the Crown' included civil servants and that they were entitled to all of the historical immunities of the Monarch. In 1948 Glanville Williams argued that the immunities of the Crown included the immunity from tort with the effect that at least statutory authorities subject to ministerial direction should not be liable in tort.[234]

Against this background, Shearman J in *Roper v Public Works Commissioners*[235] may be forgiven for his view that 'the whole current of authority tends to the conclusion that servants of the Crown are not liable to be sued in their official capacity for torts'.

Where liability has been imposed by statute the courts have been more prepared to extend the Crown's immunity from that liability to senior civil servants and Ministers. The case of *Bainbridge* has already been discussed. Reference may also be made to the case of *Minister of Supply v British Thomson-Houston Co*.[236] In that case the Court of Appeal held that the incorporation of the Minister of Supply with power to 'sue and be sued' was a matter of form and not of substance, with the effect that the Minister could not be sued in relation to a contract entered into by him; nor could he be sued for the torts of members of his department. Where the Minister was acting in an official capacity, his acts were those of 'the Crown' — not his own. Similarly, in *The Brabo*[237] a harbour authority had incurred expense in clearing a wreck from its harbour. It sought to recover these expenses from the Minister of Supply. The Minister was the owner of goods on the wreck and there was a statutory entitlement to recover such expenses from the owner of the goods. The Court of Appeal relied upon *British Thomson-Houston* for the proposition that 'the Minister has all the privileges and immunity which inhere in the Crown',[238] a position that was confirmed by the House of Lords on appeal.[239]

In other contexts the courts have also been prepared to extend the Crown's historical immunities to senior civil servants and to Ministers. As already discussed, historically the Monarch was not liable to mandamus.

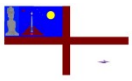










There is no doubt that public officers were. However, in a number of cases in the late 19th and early 20th century it was held that mandamus did not lie against senior public officials because of the immunity of the Crown. The correctness of the previous authority holding that public officers were liable to mandamus was doubted.[240] In *The King v The Governor of the State of South Australia*[241] the High Court held that mandamus would not lie against an officer of the Crown to compel him to do an act which he was required to do as agent for the Crown with the result that mandamus would not go to a State Governor.[242] The immunity of senior government officials from mandamus was finally rejected in England in 1994.[243] It may still persist in Australia, but is restricted to Governors and (perhaps) Ministers of the Crown.[244]

The English courts have generally treated statutory authorities answerable to central government as equivalent to Crown employees — they are also liable for their own torts and for those of their employees for which they are vicariously liable.[245] However, for other purposes they are usually treated by the English courts as 'the Crown' — for example, as to whether they are liable pursuant to a statute.[246]

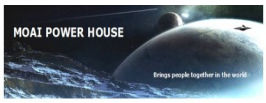
Australian courts, on the other hand, have taken a different view of how such authorities should be characterised. This may reflect their greater experience of statutory authorities performing commercial and service functions (discussed above). They have been more ready to treat statutes establishing statutory authorities with the capacity to 'sue and be sued' as evincing an intention that such bodies should not share in the King's immunities whereas English courts have treated such provisions as going to form rather than substance. The result of this difference is that the problems and issues with extending the King's immunities to statutory authorities seem to have been more closely considered in Australia than in England.[247] The Australian courts have recognised that it may be inappropriate to confer on such bodies operating within the 'new' governmental structures the historical immunities and presumptions that were peculiar to the King.[248]

These difficulties arising from treating all of government as entitled to the rights and immunities historically derived from the Monarch reinforce the concerns raised by Pitt Cobbett over a century ago. The common law has not been able to divorce the modern conception of 'the Crown' from its medieval origins. The result, as Martin Loughlin observed, is that '[t]he manner in which the concept [of the Crown] has been utilised borders on the incoherent'.[249]

The fundamental cause of these difficulties is that the common law failed to develop a concept of government or of 'the State' based upon the centralised, cohesive administration that was created in the 18th and 19th centuries.[250]

As was said by Gleeson CJ with Gummow and Hayne JJ in *Sue v Hill*:[251]

'We all know', Lord Penzance had said in 1876, 'that the Crown is an abstraction', and Maitland, Harrison Moore, Inglis Clark and Pitt Cobbett, amongst many distinguished constitutional lawyers, took up the point. The first use of the expression 'the Crown' was to identify the body politic. Writing in 1903, Professor Pitt Cobbett identified this as involving a 'defective conception' which was 'the outcome of an attempt on the part of English law to dispense with the recognition of the State as a juristic person, and to make the Crown do service in its stead'. [footnotes omitted]

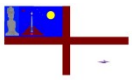










It is not surprising that these problems in the use of the concept of 'the Crown' as a synonym for 'the State' have been more obvious to Australian judges than they appear to have been to their English counterparts. As Maitland realised, the existence within the former Empire of an indivisible imperial Crown but with separate colonial governments necessitated some conception of 'the State' distinct from the Monarch herself. Those issues were exacerbated within a federal structure.[252] The creation of separate treasuries, separate property and separate rights within the same constitutional structure necessarily meant that the different polities within it had to be differentiated at least within the federal legal system.[253]

In Australia the legal separation of state and federal polities within the context of an indivisible Crown was dealt with in Chapter III of the *Commonwealth Constitution*.[254] This treated 'the States' and 'the Commonwealth' as juristic entities capable of suing and being sued.[255] These entities are not necessarily synonymous with the common law conception of the Crown as a corporation aggregate. As McHugh and Gummow JJ commented in *State Authorities Superannuation Board v Commissioner of State Taxation (WA):*[256]

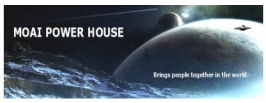
> the *Constitution* does not identify the polities which are components of the federal system as the Crown in any one or other right. It speaks of the Commonwealth and of the States. … In such a setting, to speak of the Crown in right of the Commonwealth is to give inadequate recognition to the structure of the *Constitution*.

As discussed below, the constitutional context has provided a basis for the Australian High Court to take a different approach from the English courts to the development of the common law and to reconsider some of the traditional immunities of 'the Crown'. Nevertheless, it has not been prepared to make a complete break with the past. In *Commononwealth v Mewett*,[257] for example, the Court proceeded on the basis that the common law in Australia was that 'the State' was not liable to suit, notwithstanding that it varied the previous common law rule that 'the State' could not commit a tort (discussed below). Undoubtedly, this was the correct approach. The *Commonwealth Constitution* assumes the applicability to the States and to the Commonwealth of at least some of the immunities of the Monarch. Reference may be made, for example, to s 78 of the *Commonwealth Constitution*. Plainly enough the drafters assumed, at the very least, that the Commonwealth and the States were entitled to the historic immunities of the sovereign King in litigation, including the immunity from tort. The Convention debates confirm this understanding.[258]

Similarly, the common law understanding of the powers and immunities of 'the Crown' may also inform the understanding of other provisions within the *Commonwealth Constitution*. The meaning and extent of the 'executive power' conferred by s 61 is an obvious example.[259] And I have argued elsewhere that the role of the Monarch in the Australian constitutional system informs our understanding of the nature of the Australian federation.[260]

CIVIL SERVANTS

Not only did the changes in the organisation of government administration mean that the King no longer had responsibility for public administration. It also fundamentally changed the organisational arrangements as to how the work of administration was done and who did it. Government was no longer administered by traditional, independent public officers, but instead was administered by employees operating within hierarchical bureaucracies. I have previously summarised this process as follows:[261]

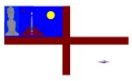










This structure of office holding was greatly altered in the 19th century, primarily because of the inefficiency and corruption of the previous system. Instead a system of public administration was developed, under which 'the predominant characteristics were 'contract', and hierarchy and subservience'. This organisational structure still involved identifying the duties and role of each member of the hierarchy. The relevant duties and role still attached to the position or office rather than the individual. Notwithstanding that the relationship had fundamentally altered from that of an individual having an independent function, to that of an employer/employee, the law relating to public offices which had been developed before the 19th century was applied to the new public offices in the hierarchical system. [footnotes omitted]

Notwithstanding the changes in the nature of public employment, many of those involved in the current civil service were and still are treated by the common law as being the holders of a 'public office'. For this purpose the broad definition of 'public office' as applied in the early cases (although in a context where those using the term well knew what a 'public office' was) has been rigidly applied to the new government structures. In consequence 'members of Parliament, Ministers of the Crown, public servants temporary and permanent, the holders of judicial office, members of the armed forces, members of the police force, local councillors and public trustees'[262] have all been treated as holding 'public office'.

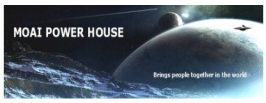
The primary consequence of treating civil servants as public officers has been to incorporate many of the features of the law relating to public officers into the terms and conditions of their employment.[263] Consequently, subject to statute,[264] it has been accepted generally that the government can terminate the appointment of a civil servant at will (the 'dismissal at pleasure' rule) even if the employment purports to be for a fixed term.[265] Similarly, subject to statute, the salary of a civil servant can be reduced at pleasure[266] and the civil servant can be transferred at pleasure.[267] In each instance the civil servant is treated as being in the same position as a public officer (such as military officers) appointed on commission.

Even where the relevant employment was regulated by a statute, the courts traditionally construed the relevant legislation as incorporating the common law in relation to public officers.[268]

However, the judicial approach to these issues has changed or, at least, is changing. In *Suttling v Director General of Education*[269] a teacher had accepted a temporary promotion to a specified position for a specified period, but prior to the expiration of that period he was reassigned to another position at his substantive, lower salary. The High Court treated the issue as one of interpretation of the relevant statute, which it interpreted as expressly providing for appointment for a term which could only be varied by compliance with the statutory preconditions.

In 1992 it was finally accepted in England that the employment of civil servants could be based on contract.[270] The Australian High Court left the question open in *Suttling*.

There remains a live question as to whether some of those engaged in government service are 'employees' at all. This question has arisen most directly in the context of vicarious liability. There were a number of cases at the turn of the 20th century which held that an 'employer' of a public officer was not vicariously liable for the consequences of the exercise of an independent discretion ('the independent discretion rule').[271] Some of the cases applying that rule would seem to distinguish officers with independent discretions from employees. However, whatever justification there may be for the continued existence of this rule, it is no longer based upon the proposition that persons with independent discretions are not employees.[272]

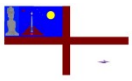










Whatever might be said about treating civil servants as public officers or about ascribing the common law relating to public officers to them, there are nevertheless some positions within the public sector for which there is no obvious employment analogy in the private sector and where the relevant relationship between the position holder and the government cannot easily be described as that of an employee and employer. These include judicial officers[273] and officers in the legislature such as Parliamentarians and the Clerks of Parliament. Even within the Executive there are some, such as Ministers of the Crown, whose role and responsibilities are different from those of an employee.[274] The group probably also includes those officers who, pursuant to statute, cannot be dismissed by the government, but only by the Parliament.[275] The closest private sector analogies might be directors of company boards.[276] This is not to suggest that any or all of these should be considered to be 'public officers' in the traditional sense. None of them, for example, are entitled to appoint a deputy to perform their duties. However, most of them could not be considered to be employees either.

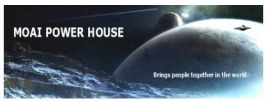
Notwithstanding these limited exceptions, most of those employed in government administration are employees, although they are still characterised as 'public officers'. That characterisation has other consequences beyond its effect upon their employment status and conditions. As discussed below these include the continued application of some torts (in particular, the tort of misfeasance in public office) and the continued application of the various criminal offences relating to public officers. The characterisation of these employees as public officers, like the characterisation of government itself as 'the Crown' is plainly inappropriate. As discussed above, the fundamental attributes of the historic public office have disappeared. However, the courts have been unable to discern that these changes mean that the previous common law applicable to public officers is no longer applicable to civil servants.

THE DEVELOPMENT OF 'PUBLIC LAW'

The failure of the common law to develop a concept of 'the State' in order to describe the new government structure or to appreciate the difference between a civil servant and a 'public officer' did not mean that the common law did not evolve and develop in response to the practical changes that occurred. As we shall see, it plainly did so. The formative 'public law' discussed above, based as it was largely upon the criminal law and the law of torts, of property and of trusts was replaced by a new 'public law' based primarily on the prerogative writs.

Some evolution and development of common law to reflect the changes that had occurred was undoubtedly necessary and desirable. Historically the public duties of public officers were enforced by imposing personal liabilities on those officers. Some have argued that such personal liabilities should continue to be applicable to modern government operations.[277] I cannot agree. The personal duties and liabilities of the traditional public officer reflected a very different governmental structure and a very different system of accountability and control than that of modern government. The legal regime of the 18th century is not necessarily appropriate now. To the extent it may still be applicable it should be justified in relation to current realities, not historical analogies. So, for example, if the obligations of the modern civil servant are to be characterised as those of a trustee it must be because the current relationship is such that the law of trust is properly attracted; not because it was attracted to public officers 250 years ago.[278]

Given the historical changes that have occurred, it might be expected that the personal liabilities at common law of civil servants today would be considerably less than what they were in the 18th century. It

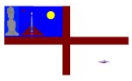










might be expected that their liabilities would be broadly similar to those of other employees. As we shall see in relation both to criminal and tortious liability, that expectation has largely been realised.

It might also be expected that the creation of a centralised bureaucracy with very broad statutory powers would result in the development of legal mechanisms to control the exercise of institutional (rather than personal) governmental power.[279] That has also occurred, although, in light of the failure of the common law to develop any coherent theory of 'the State' government it would not be surprising if those developments are inadequately explained by or justified by principle. As we shall see in relation to the development of the use of the prerogative writs, that is also true.

The development of the new public law is discussed in detail in the standard texts. It is unnecessary in this context to repeat much of that discussion. However, at least for completeness it is useful to outline the broad parameters of the current law and to place its development within the historical context considered above.

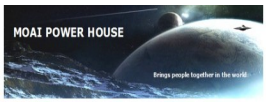
The common law criminal offences for misconduct in public office (described above) continue to exist,[280]

except where they have been supplanted by statute. However, mere breach of duty is no longer a sufficient basis itself for criminal liability — there must also be an 'element of culpability' such that it is appropriate to treat the behaviour as criminal.[281] The obvious evidentiary difficulty in establishing such an element and the availability of industrial and disciplinary remedies for most breaches of duty by government employees mean that the use of these criminal offences to enforce the public duties of civil servants has, to some extent, withered.[282]

The tort of breach of public duty discussed above effectively disappeared[283] in the mid 19th century at least in England and Australia.[284] In *Beaudesert Shire Council v Smith*[285] the High Court of Australia created a new tort for damage caused as an inevitable consequence of an unlawful, intentional and positive act.[286] That new tort differed from the tort of breach of public duty, but some of the cases relied upon by the High Court in justifying it were cases of liability for breach of public duty[287] as discussed above. The reasoning in *Beaudesert* was much criticised.[288] It was finally rejected by the High Court in *Northern Territory v Mengel*.[289]

The tort liability of governments and public officers, particularly in light of the Crown Proceedings Acts, is now broadly similar to that of members of the public. This is the point made by the High Court in *Northern Territory v Mengel*: 'in this country governments and public officers are liable in negligence according to the same general principles that apply to individuals.'[290] The result and reasoning in *Mengel* confirm that the emphasis of the law of torts in relation to government administration is no longer whether or not there has been a breach of some public duty. The focus is now upon whether or not the act or omission that caused loss or damage was deliberate or negligent.[291]

The surviving tort which is, perhaps, most similar to breach of public duty is the tort of breach of statutory duty. It is clear that that tort has a different source[292] and a different justification from the former tort. The justification is that the statute itself imposes the private right of action for damages — the task of the court in any particular case (at least in theory) is to ascertain whether the Parliament intended that there

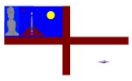










be a private right of action for breach of the relevant statutory duty.[293] Given the nature of the relevant inquiry, it is relatively rare for such a private right of action to be inferred.[294] Attempts to extend the tort to all breaches of statutory duty,[295] or even to an award of damages for breaches of a general statutory duty where the plaintiff has suffered special damage[296] have proven unsuccessful. The tort is not limited to civil servants, or even to those exercising a public duty.

There are also some torts which are particularly applicable to civil servants. One is the tort of misfeasance in public office. There is considerable authority that that tort developed from the former tort of breach of public duty.[297] However, it is an element of misfeasance in public office that the public officer acted 'maliciously' in breaching his or her duty.[298]

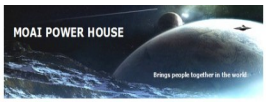
Another current tort particularly applicable to civil servants is the tort of malicious prosecution.[299] Another (possibly) is the tort of official intimidation.[300] Each of these torts require proof of malice or of an intention to cause harm.

Finally, it should be noted that some of the exemptions and qualifications applicable to the 18th century tort of breach of public duty have continued to apply to the new tort of negligence. The most obvious and entrenched of these is the immunity in the performance of judicial functions discussed above. In addition there is a general immunity for those involved in civil or criminal litigation (including litigation before tribunals).[301] These various immunities relating to judicial proceedings were historically justified in relation to the tort of breach of public duty by policy factors relating to the judicial process. The immunities are similarly justified in relation to liability in negligence.

There have been recent developments in Australia relating to the tort liability of 'the State' based upon the *Commonwealth Constitution*. The previous common law rule was that the King was not liable in tort because 'the King can do no wrong'. In *Commonwealth v Mewett*[302] the High Court rejected that rule in Australia. Instead the High Court held that the common law for Australia was that 'the Commonwealth' is liable in tort at common law, but had 'an immunity from liability'. That limited immunity was abrogated by any legislation evincing an intention to do so. The Court held that ss 75(iii) and (iv) of the *Commonwealth Constitution* (which made express provision for jurisdiction in relation to 'the Commonwealth') and the relevant provisions of the *Judiciary Act 1903* (Cth) evinced such an intention in relation to the Commonwealth. Consequently, in the absence of any statute specifically creating an immunity, the Commonwealth was liable in tort.[303] The same reasoning was applied to the Australian States in *British American Tobacco v WA*.[304]

There have also been recent constitutional developments in England, particularly the commencement in 2000 of the *Human Rights Act 1998* (UK), which have affected the development of the English common law of torts as it relates to government and its officers and employees.[305] These developments have reinforced the general trend that government and its officers should be treated the same as the private citizen in terms of tort liability.

The common law of torts no longer performs an important role in the judicial supervision of the civil service. In particular the availability of damages in relation to the exercise of public powers has largely been restricted to instances of deliberate or negligent acts and omissions. With some qualifications the tortious liability of government employees is now broadly the same as that of private citizens. Even the

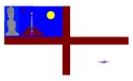










practical disadvantage that at common law the Crown, as their employer, was not vicariously liable for an employee's torts may no longer be applicable at least in Australia. In any event, that practical disadvantage has largely been removed by statute.

Equitable remedies, on the other hand, have come to have a significant role in the judicial enforcement of public duties, particularly in Australia. As discussed above, historically equitable remedies were available in Chancery against both public officers and the Monarch and were available at least against public officers in the Court of Exchequer. Much of this history would seem to have been forgotten in the course of the 19th century. Instead it seems to have been assumed that equitable remedies were not available against civil servants. When the courts did begin to grant these remedies against civil servants in the mid 20th century it was treated as some radical departure from the past. Indeed, as late as 1994 in *M v Home Office*[306] it was still argued that Ministers were not subject to equitable jurisdiction, both because they had not been so liable historically, and also because their membership of the corporate Crown had the necessary consequence that injunctions could not be made against Ministers acting in their 'official' capacity. Their Lordships held that injunctions would lie against Ministers and civil servants, although not against the Crown itself.

In Australia, of course, injunctions were available against 'officers of the Commonwealth' pursuant to s 75(v) of the *Commonwealth Constitution* and, by statute, were also available against 'the Crown' at least in some circumstances.[307]

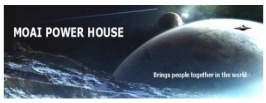
Whatever might have been said about the availability of injunctions, it was clearly accepted during the 20th century that declarations were available directly against a civil servant in relation to the unlawful exercise of his or her official duties.[308]

Once it is accepted that injunctions and declarations can be made against Ministers, civil servants and statutory authorities then plainly these remedies can be used not merely to impose a personal liability, but as a means of ensuring that public duties are performed. In recent times the broad use of equitable remedies to enforce legal duties against government and government employees and authorities has become a feature of Australian jurisprudence.[309] Given the potential breadth of the equitable remedies, particularly declarations, the greater use of these remedies in Australia has provided a means of avoiding whatever technical limitations there might be on the availability of the prerogative writs[310] (discussed below).

Nevertheless, there remain significant limitations upon the use and availability of equitable remedies in a public law context. A proper case for equitable remedies must still be made out. So, for example, there must be a justiciable controversy.[311] The party seeking the remedy must have standing to do so.[312]

An injunction cannot be obtained against a Minister or civil servant where the effect of it is to require the government to spend public moneys — in such a case it is the government, not the relevant officer who is the proper party to which the injunction should be directed.[313]

Notwithstanding that there may be other rights and remedies available, for most of the period since 1850 the enforcement of public duties by the courts has been achieved through the use of the prerogative writs, particularly mandamus, prohibition and certiorari.[314] These writs have consequently had a pervasive

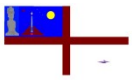










impact on the development of public law to the extent that they have virtually become synonymous with it.[315] The result has been that procedural developments in these writs have been treated as directly affecting substantive public law. Similarly, the procedural limitations of these writs, particularly certiorari, have restrained the orderly development of that substantive law.

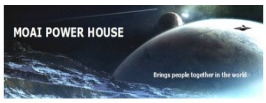
It will be recalled that mandamus was a general remedy to require the performance of a duty; prohibition was a more limited and specialised remedy to prevent a judicial body exceeding its jurisdiction and certiorari (at least as applied by King's Bench) was an even more specialised remedy to remove into a superior court the record of an inferior court.

As certiorari and prohibition were limited to judicial decisions, public law in relation to non-judicial decisions in the late 19th and early 20th centuries largely relied upon the availability of mandamus. Mandamus came to be viewed as a 'public law' remedy, although historically it was also available for the enforcement of 'quasi-public' rights owed by private railway and canal companies pursuant to private statute (see above). These historic cases involving 'quasi-public' rights are still referred to on occasion. If nothing else they have the effect of blurring any possible distinction between public and private law.[316]

Mandamus was directed to the enforcement of duties. It was not generally available to control the exercise of discretionary power unless the exercise of power was ultra vires.[317] The emphasis on ultra vires caused the courts to focus on whether the relevant error by the decision maker was a 'jurisdictional error' — that is, an error that exceeded the limits of the power conferred upon the decision maker (including the power to make an error).

Although the initial focus was on mandamus, the scope of certiorari and prohibition have been considerably expanded and those writs have come to be at least as important as mandamus in the development of public law. They were extended in the 19th century to cases involving the exercise of quasi-judicial administrative power.[318] Even during that period there was at least some dicta suggesting that the writs would go to all statutory bodies acting beyond their statutory powers.[319] In the 1964 decision of the House of Lords in *Ridge v Baldwin*[320] it was held that the obligation to afford natural justice was not limited to 'judicial' decisions. It seems to have been generally accepted that this decision had the consequence that certiorari and prohibition were no longer limited to judicial or even quasi-judicial decisions.[321]

Historically certiorari was available for error on the face of the record. This merely reflected its purpose and role as a mechanism for the review on the merits of the decisions of inferior courts. An error on the face of the record did not need to be a jurisdictional error.[322] Consequently, once the English courts had freed certiorari from its historical limits in relation to judicial functions then it was plain that certiorari, at least, could not be limited to jurisdictional error.[323] In *Anisminic Ltd v Foreign Compensation Commission*[324] the House of Lords held that the courts could intervene by declaration (or presumably, by prerogative writ) even where there was an error of law made within jurisdiction. This was the necessary consequence, according to their Lordships, of the undoubted fact that certiorari was available for an error of law on the face of the record.

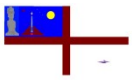










Following that decision administrative law in England could no longer be explained on the basis of any theory of ultra vires. The currently favoured explanation seems to be based on the existence of a broad power in the English judiciary to prevent abuses of power,[325]

a view which seems to have been reinforced by the enactment of the *Human Rights Act 1988* (UK) giving effect in English domestic law to the *European Convention on Human Rights*.[326]

The Australian courts, on the other hand, have declined to follow *Anisminic*.[327] In part this would seem to involve a fundamental disagreement as to the proper development of the common law. But even if this fundamental disagreement did not exist, federal courts in Australia are limited by the constitutional principle of separation of powers inherent in Chapter III of the *Commonwealth Constitution*. I have argued elsewhere that this necessarily limits judicial review by federal courts to the identification of 'jurisdictional errors'.[328]

This means, of course, that the availability of certiorari for error on the face of the record potentially raises constitutional issues if applied to non-judicial decisions of the federal government. Those problems have not received any detailed analysis by Australian courts.

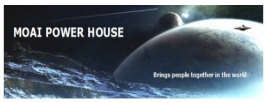
There have also been some suggestions in some cases that the express terms of s 75(v) of the *Commonwealth Constitution* conferring jurisdiction on the High Court in matters where a 'writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth' has affected the development of the Australian common law in relation those writs and remedies.[329] Whether or not it has any such effect, the 'constitutional writs' are available in circumstances where the common law writs may not be, such as prohibition in relation to non-judicial functions[330] or the application of the writs to superior federal courts.

Similarly, in relation to suits in federal jurisdiction there is a necessity for a 'matter'. This may limit the availability of various remedies which might otherwise be available at least within federal jurisdiction. In addition, the separation of federal judicial power which is implicit in the constitutional structure may mean that the Australian courts must continue to recognise the principle of jurisdictional error within administrative law.

The question of the availability and extent of the prerogative writs has become confused with the substantive question of whether the civil servant or public authority has a legally enforceable public duty. In part this is the result of the failure of the courts to develop any cohesive theory of 'government' or 'the State' as a means of explaining the development of public law principles. In part it is the result of the traditional preoccupation of the common law with procedure rather than substance.[331]

CONCLUSION

Over the last 250 years executive government in England and, consequently, in Australia, has been transformed beyond recognition. In 1750 government consisted of a sovereign Monarch acting through public officers who had proprietary rights to their various powers, duties and emoluments of their office. The legal system reflected that administrative structure. The Monarch enjoyed various immunities derived from his or her sovereignty. On the other hand, the rights of public officers were protected by the

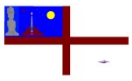










law of property. They were subject to significant personal liabilities if they failed to perform the duties of their office.

Government is now administered by employees in a bureaucratic hierarchy, ultimately answerable to a democratically elected Parliament.

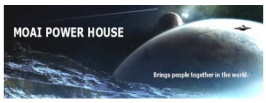
Clearly the common law needed to evolve and adapt in response to these political and administrative changes. As we have seen, it did so. The personal liabilities of government employees have been reduced compared to those of the traditional public officer. In order to control the exercise of power by the new governmental institutions a new system of administrative law was developed based upon the prerogative writs.

However, the changes made by the common law have been unfocussed and are incomplete. As Maitland remarked, the common law needed to develop a concept of the administrative 'State' in order to understand the new governmental structures and to analyse how the common law should change to give effect to them. Instead the common law adopted and adapted the existing institutions of 'the Crown' and the public office. In doing so the courts failed to distinguish between the historical institutions and the new governmental structures that replaced them. The analogy between new corporate government and the sovereign Monarch was not apposite. Nor was the analogy drawn between the new civil servant and the traditional public officer.

By failing to perceive the extent and consequences of the change that had occurred the common law failed to respond adequately to it. So, for example, the immunities enjoyed historically by the sovereign King were applied to the new 'Crown' although it was not at all obvious that this was necessary or desirable. Similarly some of the previous law in relation to public officers continued to apply to civil servants, notwithstanding that the new bureaucratic offices bore little relationship to the historical public office. Most importantly, the failure of the common law to develop any theory of 'the State', combined with its reliance upon the prerogative writs in the development of public law, has had the consequence that it is now not possible to identify any satisfactory principles to explain the development and the current ambit of public law. The mere adaptation of the pre-existing institutions of the Monarchy and the public office and the utilisation of pre-existing remedies have proven to be an inadequate response to the practical changes that occurred.

What was required was the development of a concept of 'the State' as an administrative entity, including an understanding of the responsibility and obligations of that entity to the public. The application of private and public law to that entity and to its servants could then have developed in accordance with that understanding, rather than in the haphazard way that it has.

It may be much too late now to develop such an understanding. Many would argue that the concept of 'the State' is itself increasingly becoming irrelevant in explaining modern government.[332] But even without entering into that debate, there are obvious limitations upon the extent to which the courts can modify the common law consistent with their proper role within a democratic constitution. This is particularly so in Australia where the relevant concepts are reflected in the written *Commonwealth Constitution*. I suspect that it is now virtually impossible for the courts to develop the common law so as to extract 'the Crown' out of 'the State'.

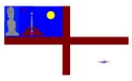










A better and preferable solution may be for the Parliaments to legislate as to the relationship between members of the public and the administrative state. To a significant extent this has already occurred. In large part this is the reason why, at least in Australia, some of the problems that might be expected to have arisen from the failures of the common law, have been avoided. For example, the immunity of the Crown both from suit and in tort has been ameliorated by the provisions of the *Judiciary Act 1903* (Cth) and the respective Crown Proceedings Acts.[333] The questions of the validity or otherwise of governmental acts and of the jurisdiction of courts to deal with such issues has also been dealt with by statute in a number of Australian jurisdictions.[334] Some have even gone further and introduced administrative merit review.[335]

These various statutory provisions, together with the regulatory framework for the employment of public servants and other government employees[336] mean that many of the potential problems in the development of the common law can often be ignored.

On the other hand, much of this legislation assumes or is based upon the common law that we have been considering. For example, much of the legislation dealing with judicial review adopts the common law in significant aspects.[337] In any event it could hardly be argued that all of this legislation dealing with liability, judicial review, public employment and so on, is evidence that parliaments have adopted and applied a coherent theory of 'the State' which can be applied consistently in the further development of public law.[338]

The problems discussed above are not limited to the development of public law. They also point to a broader question relating generally to the methodology and processes of the common law. It is the question to which Gummow J has drawn attention[339] — the lack, in and by the common law, of any established taxonomy to regulate the use of history in the formulation of legal norms. The common law develops from case to case by analogy. That process requires that courts and those appearing before them be able to understand, analyse and use historical facts. It is only in that context that an appropriate analogy can be distinguished from one that is inappropriate. However, the common law has not developed any process for reaching a correct understanding of the past.

The failure of the courts to appreciate and understand the extent and consequences of the changes to government administration in England and Australia over the last 250 years provides an example of this broader concern — the problem of correctly analysing, understanding and using history (including the history of the common law) in judicial reasoning.[340]

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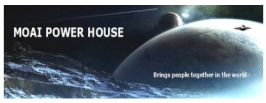
[*] Justice of the Federal Court of Australia; Adjunct Professor of Law, University of Adelaide. I acknowledge the assistance of my Associate, Su Hamsanathan in checking the accuracy of citations. I also thank Justice Paul Finn of the Federal Court for his helpful comments and the anonymous reviewer for his or her constructive and useful suggestions.

[1] Talcott Parsons (ed), *Max Weber*: *The Theory of Social and Economic Organization* (1947) 341 ff: 'Obedience is not owed to enacted rules, but to the person who occupies a position of authority by

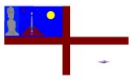










tradition or who has been chosen for such a position on a traditional basis. What determines the relations of administrative staff to the chief is not the impersonal obligations of office, but personal loyalty. '

[2] Parsons, above n 1, 329-41; George Ritzer, *Sociological Theory* (4th ed, 1996) 127–8.

[3] Julius Stone, *The Province and Function of Law* (1946) 197.

[4] Jeffrey Goldsworthy, *The Sovereignty of Parliament* (1999); John Allison, *A Continental Distinction in the Common Law* (rev'd ed; 2000) 75–6; H T Dickinson, 'The Eighteenth Century Debate on the Sovereignty of Parliament' (1976) 26 *Transactions of the Royal Historical Society* (5th Series) 198. Interestingly, the supremacy of the Parliament over the King after 1688 was not accepted in the American colonies, where it was argued, relying upon *Calvin's Case* (1608) 7 Co Rep 2a; 77 ER 377 that they were governed by the King personally (rather than by 'the Crown' of England) and that consequently they were not subject to laws (particularly taxation) made by the English Parliament: see Charles McIlwain, *The American Revolution: A Constitutional Interpretation* (1923); Barbara Black, 'The Constitution of Empire: The Case for the Colonists' (1976) 124 *University of Pennsylvania Law Review* 1157; Daniel Hulseboch, 'The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence' (2003) 21 *Law & History Review* 439.

[5] The Monarch in his or her ''official'' capacity was perceived as a corporation sole with perpetual succession: see Sir William Blackstone, *Commentaries on the Laws of England*, Vol 1 (1783 ed) 469; contrast Frederic Maitland, 'The Crown as Corporation' (1901) 17 *Law Quarterly Review* 131, 134–5; Pitt Cobbett, '"The Crown" as representing "The State"' (1903) 1 *Commonwealth Law Review* 23, 25–7; Sir Norman Chester, *The English Administrative System 1780–1870* (1981) 93–6. Historically the dual capacities of the Monarch — one personal and the other official – was of some constitutional significance: see Martin Loughlin, 'The State, the Crown and the Law' in Maurice Sunkin and Sebastian Payne, *The Nature of the Crown* (1999) 33, 55–9 and see above n 4 re the American colonies. The concept of the Crown as a 'corporation sole' involved an early attempt to deal with this issue. It was largely resolved by the introduction of the Civil List (see below). In any event, in most of the Monarch's realms, and certainly Australia, the Monarch's functions were almost entirely 'official': see *China Ocean Shipping v South Australia* [1979] HCA 57; (1979) 145 CLR 172, 220.

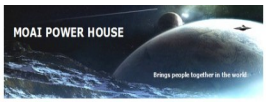
[6] Blackstone, above n 5, 250; see also at 190; Chester, above n 5, 3.

[7] A number of public offices (particularly hereditary ones) did not separate from the Royal Household and still remain associated with it. Some continue to exist and to have ceremonial functions or functions relating to the management of the Queen's household or the personal prerogatives, particularly relating to Honours. Examples include the Lord Chamberlain, the Earl Marshall and the Keeper of the Privy Purse.

[8] See *Town Investments v Department of Environment* [1977] UKHL 2; [1978] AC 359, 398.

[9] Blackstone, above n 5, 338.

[10] Frederic Maitland, *The Constitutional History of England* (1908) 416.

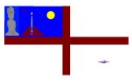










[11] Michael J Braddick, *State Formation in Early Modern England c 1550–1700* (2000) 21; Sir William Blackstone, *Commentaries on the Laws of England*, Vol 2 (1783 ed) 346–7; see also *Lanes Case* [1596] EngR 9; (1586) 2 Co Rep 16b; 76 ER 423; Butterworths *Halsbury's Laws of England Vol 7* (3rd ed) [661].

[12] William Holdsworth, *A History of English Law Vol 10* (1938) 494–5; Chester, above n 5, 8–11.

[13] Chester, above n 5, 67. See also Paul Finn, *Law and Government in Colonial Australia* (1987) 8, 11.

[14] Blackstone, above n 5, 338 ff.

[15] As to the office of the Sheriff, see Braddick, above n 11, 30; William Holdsworth, *A History of English Law Vol 1* (7th ed, 1956) 67–8; Maitland, above n 10, 232–4, 485–9; Cameron Churchill, *The Law of the Office and Duties of the Sheriff* (2nd ed, 1882); Blackstone, above n 5, 339–44; James Parker, *Conductor Generalis Or the Office Duty and Authority of Justices of the Peace &c* (1722) 235 ff.

[16] As to the office of Coroner, see Holdsworth, above n 15, 85; Ann Lyon, *Constitutional History of the United Kingdom* (2003) 43–4; Blackstone, above n 5, 348–9.

[17] As to the modes of appointment of Justices of the Peace, see Joseph Chitty, *Prerogatives of the Crown* (1820) 79–80; Holdsworth, above n 15, 290–1; Butterworths *Halsbury's Laws of England Vol 21* (2nd edition, 1932) 515.

[18] As to the duties of constables, see *R v Wyatt* [1790] EngR 1514; (1705) 2 Ld Raym 1189, 1192–1193; [1790] EngR 1514; 92 ER 286, 288; Edith Henderson, *Foundations of English Administrative Law* (1963) 12–8; Parker, above n 15, 53–67.

[19] James Stephen, *Mr Sergeant Stephen's New Commentaries on the Laws of England* (8th ed, 1880) Vol III 43 ff.

[20] Blackstone, above n 5, 354. As to the office and powers of the Justices of the Peace see generally Charles Beard, *The Office of Justice of the Peace in England* (1904); Parker, above n 15.

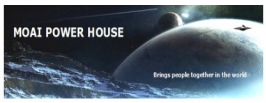
[21] See *Local Government Act 1888* (UK) 51 & 52 Vict c 41; *Local Government Act 1894* (UK) 56 & 57 Vict c 73; Lyon, above n 16, 154–5, 360; Finn, above n 13, 8–9.

[22] Maitland, above n 10, 39–54.

[23] Blackstone, above n 5, 120; John Wade, *The Extraordinary Black Book: An Exposition of Abuses in Church and State, Courts of Law Etc* (3rd ed, 1832) 454–5, 464–75.

[24] Henderson, above n 18, 35–45.

[25] Blackstone, above n 5, 116–120.

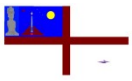










[26] Ibid 111–114. The established church in England had the practical result that the church performed a variety of administrative tasks: see Wade, above n 23, 1–137; H J Hanham, *The Nineteenth Century Constitution 1815–1914* (1969) 417 ff.

[27] Holdsworth, above n 12, 154, 171–2; Parker, above n 15, 122–9. As to the duty of parishes and corporations to maintain roads and bridges, see Henderson, above n 18, 18–20. In the late 18th and the early 19th centuries many of these responsibilities were conferred upon some town corporations or upon Turnpike Trustees pursuant to a variety of specific statutes.

[28] Thomas Macaulay, *History of England from the Accession of James II* (1957) vol 1 ch 3(2); Herbert Fisher, *A History of Europe* (1935) vol 2, 787–8.

[29] Braddick, above n 11, 11, 45 describes the English 'State' in 1700 as being a 'network of offices'. This would seem to be an apt description at least if this network is understood as including the monarchy itself.

[30] See Chitty, above n 17, 80–1. For example, the King could not create a public office inconsistent with one already in existence: see *King v Amery* (1790) 2 Br 336, 360–5; [1790] EngR 2328; 1 ER 981, 997–1000.

[31] As to the manner of appointment, see generally Chester, above n 5, 13–4; Chitty, above n 17, 84–5.

[32] See *R v Kempe* [1792] EngR 1919; (1695) 1 Ld Raym 49; 91 ER 929; Henderson, above n 18, 76–9.

[33] Chitty, above n 17, 80–1.

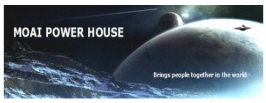
[34] The presumption was inapplicable if the appointment was made by someone other than the King: see *R v Richardson* [1758] EngR 158; (1758) 1 Burr 517; 97 ER 426; *R v The Mayor, Aldermen and Burgesses of Doncaster* (1729) 2 Ld Raym 1564; 92 ER 513. It was also inapplicable if the appointment was otherwise than by commission eg by letters patent: see Henry Parris, *Constitutional Bureaucracy* (1969) 22–3.

[35] *Dickson v Combermere* [1863] EngR 21; (1863) 3 F&F 527; 176 ER 236. There is authority that the Crown lacked the capacity to make an appointment other than at pleasure: see *Dunn v R* [1896] 1 QB 116, 118–9. This would seem to be contrary to other and better authority: see, eg, *Anonymous* 3 Salked 806; [1795] EngR 3030; 91 ER 806; *Young v Adams* [1898] AC 469, 473; *Shenton v Smith* [1898] AC 229; see Chitty, above n 17, 82–3.

[36] Chitty, above n 17, 85–6; Matthew Bacon, *The New Abridgement of the Law* (7th ed, 1832) vol 8, 41–4.

[37] *Hutchins, Sergeants Case* (1694) 3 Salked 252; [1795] EngR 2119; 91 ER 807; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [1996] HCA 18; (1996) 189 CLR 1, 15; Chitty, above n 17, 87–8; Comyns, above n 46, 137; Bacon, above n 36, 35–7.

[38] Chitty, above n 17, 88.

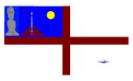










[39] For example, for proven misbehaviour where the appointment was during good behaviour: see Christine Wheeler, 'The Removal of Judges from Office in Western Australia' (1979– 1982) 14 *University of Western Australia Law Review* 305.

[40] Maitland, above n 10, 317–8; Holdsworth, above n 15, 379–84.

[41] Blackstone, above n 11, 37; *Cockerell v Fry* (1967) 15 LGRA 164, 177; Finn, above n 13, 9–10. See, for example, the fees that could be charged by Justices of the Peace out of the fines they imposed: Beard, above n 20, 150–1. In some circumstances the right to fees could be assigned: see notes to *Stuart v Tucker* [1746] EngR 506; (1777) 2 Black W 1137, 1140; [1746] EngR 506; 96 ER 671, 672.

[42] [1828] EngR 701; (1828) 5 Bing 92; 130 ER 995, 107–9; 1001–2.

[43] See, for example, *R v Bembridge* (1783) 3 Dougl 327, 332; 99 ER 679, 681.

[44] Bacon, above n 36, 2.

[45] Described by Finn, above n 13, 14 as 'property and individual autonomy and responsibility'. See also Chester, above n 5, 18–21; *Greiner v ICAC* (1992) 28 NSWLR 125, 159; *Marks v Commonwealth* [1964] HCA 45; (1964) 111 CLR 549, 567–8.

[46] John Comyns, *A Digest of the Laws of England* (4th ed, 1800) vol 5, 139; Bacon, above n 36, 29–30. The sale of certain public offices relating to the administration of justice or the collection of revenues was prohibited by the *Sale of Offices Act, 1551* (UK) 5–6 Edw VI, c 16. See Bacon, above n 36, 13–28. However, the Act only applied to specified offices. See, eg, *Ellis v Earl Grey* [1833] EngR 703; (1833) 6 Sim 214; 55 ER 574 involving property rights in the office of Side Clerk of Exchequer.

[47] Comyns, above n 46, 139; Bacon, above n 36, 37–41.

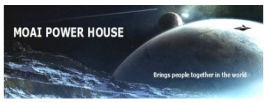
[48] Chester, above n 5, 17–8; Holdsworth, above n 12, 501–6; *Hunkin v Siebert* [1934] HCA 43; (1934) 51 CLR 538, 541. For example, if the office was one of 'trust and knowledge' (which included judicial offices) it was implicit that the duties had to be exercised personally: see *Barker v Kent* (1702) 3 Salked 124; [1795] EngR 409; 91 ER 730.

[49] It was a question of fact whether the relevant staff were public officers in their own right or, if employees, were those of the King or those of the relevant public officer. As to appointments by Secretaries of State see *Viscount Canterbury v AG* (1842) 1 Ph 306, 324 contrast *The Mersey Docks Trustees v Gibbs* (1866) LR 1 HL 93, 124–5, 128.

[50] Finn, above n 13 ; *Greiner v ICAC* (1992) 28 NSWLR 125, 159.

[51] [1720] EngR 48; (1720) 1 Br 153; 1 ER 481.

[52] See generally Donald Thomas (ed), *The Public Conscience — State Trials* (1971) vol 2, 74–157.

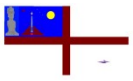










[53] The terms of the Letters Patent are more fully described in *Huggins v Bainbridge* (1740) Willes 241; 125 ER 1152, 1152–53. That case concerned the attempt to sell the office to Bainbridge — an attempt which failed because the *Sale of Offices Act, 1551* prohibited the sale of offices of justice.

[54] *R v Huggins* [1744] EngR 1285; (1730) 1 Barn 396; 94 ER 267.

[55] Paul Finn, 'Public Officers: Some Personal Liabilities' (1977) 51 *Australian Law Journal* 313.

[56] See *A v Heyden* [1984] HCA 67; (1984) 156 CLR 532, 580–1; Paul Lordon, *Crown Law* (1991) 564–5.

[57] (1783) 3 Dougl 327, 332; 99 ER 679, 681.

[58] Mathew Goode, 'Offences of a Public Nature' [1992] AdelLawRw 3; (1992) 14 *Adelaide Law Review* 103, 114; see also Finn, above n 55, 313, 315–6; Paul Finn, 'Official Misconduct' (1978) 2 *Criminal Law Journal* 307.

[59] See Frederic Maitland, *The Forms of Action at Common Law* (1997) 54–5.

[60] *Commonwealth v Mewett* (1997) 191 CLR 471, 543; *M v Home Office* [1993] UKHL 5; [1994] 1 AC 377, 408–10; *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689; *National Harbours Board v Langelier* (1969) 2 DLR (3d) 81; *Nelles v Ontario* (1989) 60 DLR (4th) 103, 617–8, 620; William Wade, 'The Crown, Ministers and Officials: Legal Status and Liability' in Maurice Sunkin and Sebastian Payne, above n 5

25–8; Holdsworth, above n 12, 650–2; George Robertson, *The Law and Practice of Civil Proceedings by and Against the Crown and Departments of the Government* (1908) 638–40.

[61] See Oliver W Holmes, 'Agency' (1891) 4 *Harvard Law Review* 345, 356–7, 361–2. For this purpose the admissions of the deputy were admissible against the office holder: *Yabsley v Doble* [1792] EngR 2897; (1698) 1 Ld Raym 190; 91 ER 1023.

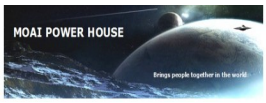
[62] *Rowning v Goodchild* [1746] EngR 454; (1772) 2 Black W 906; 96 ER 536.

[63] See John Comyns, *Comyns's Digest of the Laws of England* (4th ed, 1800) vol 1, 226–7, 274, 279 ff. As to negligence, see below n 77.

[64] As to the duties of a sheriff to execute the writ of *fieri facias* (directing the sheriff to seize and sell the defendant's property to satisfy a money judgment), see P Walton, 'Execution Creditors — Almost the Last Rights in Insolvency' (2003) 32 *Common Law World Review* 179.

[65] See *Stimson v Farnham* (1871) LR 7 QB 175; *Warne v Varley* [1795] EngR 4198; (1795) 6 TR 443; 101 ER 639.

[66] *William v Mostyn* [1838] EngR 303; (1838) 4 M & W 145; 150 ER 1379. See Mark Aronson and Harry Whitmore *Public Torts and Contracts* (1982) 152–3; Parker, above n 15, 260 ff. Contrast the liability of a

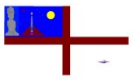










gaoler for escape which required proof of negligence: see Parker, above n 15, 77. As to negligence, see below n 77

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[67] Albert Kiralfy, *The Action on the Case* (1951) 34–40, 133–5; Robert Watkins, *The State as a Party Litigant* (1927) 44–8; Paul Finn, 'A Road Not Taken: The Boyce Plaintiff and Lord Cairns Act' (1983) 57 *Australian Law Journal* 493, 493–5.

[68] See RC Evans, 'Damages for Unlawful Administrative Action: The Remedy for Misfeasance in Public Office' (1982) 31 *International and Comparative Law Quarterly* 640, 640–3; John Baker, *An Introduction to English Legal History* (3rd ed, 1990) 490. The similarity between the common law tort and the common law criminal offences considered above is not simply a coincidence. At the relevant time tort and crime were closely related: see David Friedman, 'Comment: Beyond the Tort/Crime Distinction' (1996) 76 *Boston University Law Review* 103.

[69] (1703) 6 Mod 45; 87 ER 810 (also [1790] EngR 55; 2 Ld Raym 938; 92 ER 126).

[70] It has been suggested that Holt CJ also required malice as an element of the wrong: see *NT v Mengel* (1996) 185 CLR 307, 356–7. It is not apparent to the writer that he did. See, for example, his dissent in *Lane v Cotton* [1792] EngR 1376; (1701) 1 Ld Raym 646; 91 ER 1332.

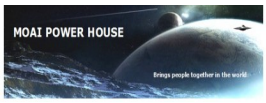
[71] (1704) 1 Brown 62; [1703] EngR 37; 1 ER 417.

[72] (1828) 5 Bing 92, 107; [1828] EngR 701; 130 ER 995, 1000. See also Eyre CB in *Sutton v Johnstone* (1786) 1 TR 494, 509; [1786] EngR 18; 99 ER 1215, 1224, '[e]very breach of a public duty, working wrong and loss to another, is an injury and actionable'. See also the Crown's submissions in *Tobin v R* [1864] EngR 21; (1864) 16 CB (NS) 310, 330; [1864] EngR 21; 143 ER 1148, 1156 and in *Mersey Docks Trustees v Gibbs* [1866] EngR 174; (1866) 11 HLC 686, 694–8; [1866] EngR 174; 11 ER 1500, 1504–05. See also Amnon Rubenstein, *Jurisdiction and Illegality* (1965) 135–9; *Chichester v Marine Board of South Australia* [1910] SALawRp 3; [1910] SALR 22, 29. Aronson and Whitmore, above n 66, 125 treat these cases as early examples of breach of statutory duty.

[73] Consequently where the duty was owed by 'the county' it could not be enforced: see *Russell v Men of Devon* [1788] EngR 226; (1788) 2 TR 667; 100 ER 359. This case was subsequently misunderstood as establishing a distinction between misfeasance and malfeasance in respect of highway authorities: see *Brodie v Singleton Shire Council* [2001] HCA 29; (2001) 206 CLR 512, 564–565, 590–91, 607–13.

[74] See *Everett v Griffiths* [1921] 1 AC 631; *In re McC* [1985] 1 AC 528; *Rajski v Powell* (1987) 11 NSWLR 522; Abimbola Olowofoyeku, *Suing Judges: A Study in Judicial Immunity* (1993) 9–32. Although the immunity certainly extended to the tort of breach of public duty, it was not limited to that tort. It extended to other torts such as defamation.

[75] Again, the immunity was not limited to the historic tort: see *Sirros v Moore* [1975] QB 118, 132, 138; *Gallo v Dawson (No 2)* [1992] HCA 44; (1992) 109 ALR 319; *Canada Trust Co v Stolzenberg* [1997] 4

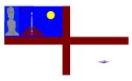










All ER 983, 988–9; *Mann v O'Neill* [1997] HCA 28; (1997) 191 CLR 204; *Re East* [1998] HCA 73; (1999) 196 CLR 354, 365–6; *Gazley v Lord Cooke of Thorndon* [1999] 2 NZLR 668, 671, 678–81, 683–5; Robert Sadler, 'Judicial and Quasi–Judicial Immunities: A Remedy Denied' [1982] MelbULawRw 15; (1982) 13 *Melbourne University Law Review* 508; Abimbola Olowofoyeku, 'State Liability for the Exercise of Judicial Power' (1998) *Public Law* 444; Susan Kneebone, *Tort Liability of Public Authorities* (1988) 259–83; Olowofoyeku, above n 74, 33–78. It is noted that this continued operation of this immunity in the UK may be affected by the European Convention on Human Rights: see Helen Scott and NW Barber, 'State Liability under Francovich for Decisions of National Courts' (2004) 120 *Law Quarterly Review* 403.

[76] See *Cullen v Morris* [1816] EngR 45; (1819) 2 Stark 577, 587; [1816] EngR 45; 171 ER 741, 744. The facts of Cullen are remarkably similar to those of *Ashby v White* notwithstanding the different approach taken. See also *Tozer v Child* [1857] EngR 236; (1857) 7 El & Bl 377; 119 ER 1286. In Evans, above n 68, 643 it is argued, apparently on the basis of Tozer, that malice was an essential element of the tort even for ministerial acts.

[77] Finn, above n 13, 22–3. Some care needs to be taken with the word 'negligence' in this context. At various times the word seems to have been used to refer to any omission to act, or more generally to nonfeasance, rather than to negligence as now understood: see John Wigmore, 'Responsibility for Tortious Acts: Its History — III' (1894) 7 *Harvard Law Review* 441, 453–4.

[78] See, for example, Blackburn J in *Coe v Wise* (1864) 1 B&E 440, 461; [1864] EngR 476; 122 ER 894, 902.

[79] Apparently the description was first used by Mansfield J in the 1759 case of *R v Cowle* (1759) 2 Burr 834, 855–6; [1825] EngR 266; 97 ER 587, 599.

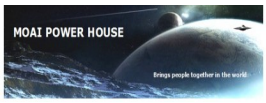
[80] Perhaps the more difficult question is not why these writs were described as 'prerogative writs', but why others were not included. For example, the writ of error: see S A de Smith, 'The Prerogative Writs' (1951) 11 *Cambridge Law Journal* 40, 54; Standish Grady and Colley Scotland, *Law and Practice on the Crown Side of the Queen's Bench* (1844) 332 ff. Similarly, the writ of scire facias: see James Pfander, 'Sovereign Immunity and the Right to Petition: Towards a First Amendment Right to Pursue Judicial Claims Against the Government' (1997) 91 *Northwestern Law Review* 899, 915–6; Holdsworth, above n 12, 344.

[81] See generally Edward Jenks, 'The Prerogative Writs in English Law' (1923) 32 *Yale Law Journal* 523; De Smith, above n 80; Louis Jaffe and Edith Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Law Quarterly Review* 345.

[82] This was of some importance in the English colonies where the superior courts invariably exercised the jurisdiction of Kings Bench: see Garry O'Connor, 'Rule Maker and Judge: Minnesota Courts and the Supervisory Power' (1997) 23 *William Mitchell Law Review* 605, 608–11.

[83] James Pfander, 'Jurisdiction Stripping and the Supreme Court's Power to Supervise Inferior Tribunals' (2000) 78 *Texas Law Review* 1433, 1443–5 (footnotes omitted).

[84] Jaffe and Henderson, above n 81, 359–61.

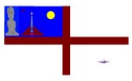










[85] See Grady and Scotland, above n 80, 219, 249–56 giving, as examples, cases where mandamus was issued against private companies (such as canal companies, or railway companies) to compel the performance of statutory or public duties. However, where the duty was entirely a private duty, mandamus did not go: see *The King v White* (1704) 3 Salked 232; [1795] EngR 3627; 91 ER 795 contrast *The Queen v Raines* (1708) 3 Salked 233; [1795] EngR 3635; 91 ER 796; John Shortt *Informations Mandamus and Prohibition* (1887) 231.

[86] Leslie Stein, 'Mandamus' in Leslie Stein (ed), *Locus Standi* (1979) 82 ff; Bradley Clanton, 'Standing and the English Prerogative Writs: The Original Understanding' (1997) 63 *Brooklyn Law Review* 1001, 1043–7.

[87] *R v Bank of England* (1780) 2 Dougl 524, 526; 99 ER 334, 335. See also Chitty, above n 17, 338–9; Henderson, above n 18, 140–42.

[88] See Sir William Blackstone, Commentaries on the Laws of England, Vol 3 (1783 ed) 110; see also *Commonwealth of Kentucky v Dennison* [1860] USSC 13; 65 US 66 (1861) 97.

[89] *Commissioner of State Revenue (Vict) v Royal Insurance Aust Ltd* [1994] HCA 61; (1994) 182 CLR 51, 81, 88.

[90] See Blackstone, above n 88, 111–14.

[91] Frederick Short and Francis Mellor, *The Practice on the Crown Side of the Kings Bench Division of His Majesty's High Court of Justice* (2nd ed, 1908) 252 ff; Shortt, above n 85, 427–34, 439–40.

[92] Louis Jaffe, 'Standing to Secure Judicial Review: Public Actions' (1961) 74 *Harvard Law Review* 1265, 1274; Shortt, above n 85, 441–6. Contrast Clanton, above n 86, 1009–20 who argues that a person seeking the writ had to establish some interest. Given the discretionary nature of the remedy the two positions are not necessarily inconsistent. What is clear is that a stranger to the proceeding in the inferior court could seek prohibition.

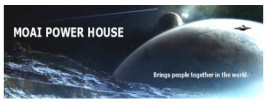
[93] Blackstone, above n 88, 111–14. Even today Dan Dobbs, *Law of Remedies: Damages Equity Restitution* (2nd ed, 1993) 165 treats mandamus, prohibition and habeas corpus as specialised types of injunction which could be granted by King's Bench.

[94] By statute these included some quasi judicial officers eg, by 7 Geo III c 39 s 15 decisions of the Poor Law Commissioners, and by 1 Vict c 78 s 44 some decisions of Borough Councils: see Grady and Scotland, above n 80, 137–9.

[95] De Smith, above n 80, 46–8; Henderson, above n 18, 83–101.

[96] [1675] EngR 382; (1642) March NR 196; 82 ER 473; Henderson, above n 18, 101–6; 182–6.

[97] The remedy was also available for the failure of inferior courts to perform statutory administrative functions which could be described as 'jurisdictional': see Henderson, above n 18, 154–8.

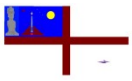










[98] See *Re McBain; Ex parte Catholic Bishops* [2002] HCA 16; (2002) 209 CLR 372, 417–23, 463–5; Jaffe and Henderson, above n 81, 355–9; Grady and Scotland, above n 80, 128–9.

[99] Sir William Blackstone, Commentaries on the Laws of England, Vol 4 (1783 ed) 21. Given that the purpose of the writ was to review judicial proceedings it is doubtful whether strangers could apply for the writ: see Clanton, above n 86, 1020–32.

[100] For example, when the county of Derby failed to comply with the militia Acts of 1757, 1765 and 1769 the King issued the writ of mandamus against the justices of the county to require them to raise their statutory quota of men: Holdsworth, above n 12, 156.

[101] See, for example, R French, 'The Equitable Geist in the Machinery of Administrative Justice' [2003] AIAdminLawF 18; (2003) 39 *Australian Institute of Administrative Law Forum* 1.

[102] *R v Transport Secretary; Ex parte Factortame Ltd* [1989] UKHL 1; [1990] 2 AC 85,145; see discussion in I Spry, *Equitable Remedies: Injunctions & Specific Performance* (6th ed, 2000) 346–7.

[103] See William Wade, 'Injunctive Relief Against the Crown and Ministers' (1991) 107 *Law Quarterly Review* 4.

[104] Subject to the exclusive jurisdiction of Exchequer in relation to revenue matters: see *Priddy v Rose* [1817] EngR 665; (1817) 3 Mer 86; 36 ER 33.

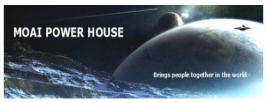
[105] *Court of Chancery Act 1841* (UK) 5 Vict c 5.

[106] [1830] EngR 784; (1830) 4 Sim 13; 58 ER 6. See also, for example, *Priddy v Rose* [1817] EngR 665; (1817) 3 Mer 86,102; [1817] EngR 665; 36 ER 33,39; *Ellis v Rose* [1833] EngR 703; (1833) 6 Sim 214; 58 ER 574. There were a number of cases after 1842 where the Court of Chancery granted injunctions against public officers in relation to their official functions: see for example, *AG v The Guardians of the Poor of Southampton* [1849] EngR 644; (1849) 17 Sim 6; 60 ER 1028; *AG v Andrews* [1850] EngR 695; (1850) 2 Mac & G 225; 42 ER 87. In *Ellis v Earl Grey* [1833] EngR 703; (1833) 6 Sim 214; 58 ER 574 the Court of Chancery had granted an injunction against the Lords of Treasury to prevent them paying moneys to the wrong party.

[107] [1901] AC 561, 573–4. See also *Bombay & Persia Steam Navigation Co v MacLay* [1920] 3 KB 402, 406.

[108] The jurisdiction to grant a stand–alone, binding declaration of right is now seen as being within the inherent jurisdiction of a superior court: see *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564, 581–2. As such the remedy may not properly be described as 'equitable', being a remedy also available from a common law court.

[109] See Lord Woolf and Jeremy Woolf, *Zamir & Woolf — The Declaratory Judgment* (3rd ed, 2002) 10. The remedy was thought to be limited to consequential relief until changes to the English Rules of Court in 1883 (later adopted elsewhere).

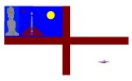










[110] For a general discussion of the administrative arrangements for the collection of these revenues and of the practices of the Court of Exchequer in relation to them, see Geoffrey Gilbert, *An Historical View of the Court of Exchequer and of the King's Revenues* (1738) and see Bryson, above n 114, 32–159.

[111] Holdsworth, above n 15, 238–42 and see Chitty, above n 17, 244 as to the jurisdiction of the Court of Exchequer to determine any matter affecting the revenues (even involving only private parties) at the request of the Monarch.

[112] The jurisdiction of the Court of Exchequer in relation to revenue officers was exclusive: see *Bereholt v Candy* [1718] EngR 69; (1718) Bunbury 34; 145 ER 585; *Scott v Shearman* (1775) 2 Black W 977, 979; [1746] EngR 271; 96 ER 575, 576–7; *Nanaimo Community Hotel v Board of Referees* [1945] 3 DLR 225, 252–3.

[113] See, for example, *Score v Lord Admiral* (1709) Park 273; 145 ER 777.

[114] Seldon Society, *Cases Concerning Equity and the Courts of Equity 1550–1660* (2001) vol 1, xxii–xxxvii; Maitland, above n 59, 64; WH Bryson, *The Equity Side of the Exchequer* (1976) 25–7. Dicey commented '[t]he ordinary civil jurisdiction of the Court of Exchequer rested upon the … absurd fiction that the plaintiff in an action was a debtor to the King and, owing to the injury or damage done him by the defendant, was unable to pay his debt to the King': Albert V Dicey, *Law and Public Opinion in England* (2nd ed, 1914) 91.

[115] See, for example, *AG v White* (1733) 2 Comyns 433; [1792] EngR 157; 92 ER 1146. The writ authorised the interlocutory seizure of the debtor's lands, goods or body so as to secure payment if the debt was subsequently established.

[116] See *Murray v The Hoboken Land and Improvement Co* [1855] USSC 37; 59 US 272 (1855), 277–8; Robertson, above n 60, 189 ff.

[117] Finn, above n 55, 313, 316 ftn 36.

[118] Robertson, above n 60, 234 ff.

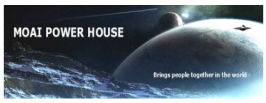
[119] See, eg, *AG & Hogskins v Dr Guedon* (1676) Hardres 371; 145 ER 503.

[120] See, eg, *Earl of Devonshire Case* [1572] EngR 431; (1607) 11 Co Rep 89a; 77 ER 1266.

[121] See, eg, *The King v Clark* 1 Comyns 388; [1792] EngR 2559; 92 ER 1124; *In re Westminster Land Tax Commissioners* (1747) Parker 74; 145 ER 717; *King v Radley* [1801] EngR 344; (1801) Forrest 150; 145 ER 1142.

[122] See, eg, *King v Incledon* (1811) Wight 369, 385; [1811] EngR 271; 145 ER 1294, 1300.

[123] See, eg, *Deare v AG* [1835] EngR 55; (1835) 1 Y & C Ex 197, 208–9; 145 ER 80, 85.

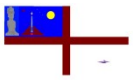










[124] Holdsworth, above n 15, 239.

[125] See above n 5.

[126] Holdsworth, above n 12, 342–7; Austalian Law Reform Commission, *The Judicial Power of the Commonwealth* (2001) 461–73.

[127] Blackstone, above n 5, 245.

[128] Ibid 270.

[129] *Crown v Dalgety & Co Ltd* [1944] HCA 2; (1944) 69 CLR 18, 39; *Western Australia v Bond Corporation Holding Ltd* (1991) 5 WAR 40, 63.

[130] *Chief Secretary (NSW) v Oliver Food Products* (1959) 60 SR (NSW) 435, 444.

[131] *Commonwealth v Anderson* [1960] HCA 85; (1960) 105 CLR 303, 312, 318–21; PSAC, *Local 660 v CBC* (1976) 66 DLR (3d) 760; Australian Law Reform Commission, *The Judicial Power of the Commonwealth* (2001) 475–85.

[132] *Commonwealth v Northern Land Council* (1991) 103 ALR 267, 288; Lordon, above n 56, 207.

[133] *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534, 538, 557–8, 567; *Wentworth v AG (NSW)* [1984] HCA 70; (1984) 154 CLR 518, 526–7; *R v Scott* [1993] FCA 398; (1993) 42 FCR 1, 11–12, 29–30; Lordon, above n 56, 215.

[134] Duncan Fairgrieve, *State Liability in Tort* (2003) 8.

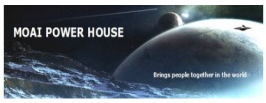
[135] See William Holdsworth, *A History of English Law Vol 9* (3rd ed, 1944) 13–22; William Holdsworth, 'The History of Remedies against the Crown' (1922) 38 *Law Quarterly Review* 141, 147–56; Chitty, above n 17, 339–52; Maitland, above n 10, 482–4; Lordon, above n 56, 319.

[136] Chitty, above n 17, 345–6.

[137] Pfander, above n 80, 912, 940; Chitty, above n 17, 346–52; Watkins, above n 67, 16–30; Susan Randall, 'Sovereign Immunity and the Uses of History' (2002) 81 *Nebraska Law Review* 1, 28–30 contrast Holdsworth (1944), above n 135, 40.

[138] *Petition of Rights Act 1860* (UK) 23 and 24 Vict c 34; Robertson, above n 60, 331 ff.

[139] The inquest of office was a procedure by which the appropriate Crown officers (usually the sheriff or the escheator) initiated proceedings in Chancery seeking an order that the Crown was entitled to certain property.

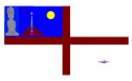










[140] Holdsworth (1944), above n 135, 22–8; Chitty, above n 17, 352–73; Watkins, above n 67, 14–16; Pfander, above n 80, 912–14; Holdsworth (1922), above n 135, 158–61.

[141] *The King v Hornby* (1700) 5 Mod 30; 87 ER 500 (reference should also be made to the report at Skinner 601; [1728] EngR 402; 90 ER 270); Holdsworth (1944), above n 135, 32–9; Holdsworth (1922), above n 135, 283–90.

[142] See also Blackstone, above n 88, 256–7; *Alden v Maine* [1999] USSC 62; 527 US 706 (1999) 770; contrast Chitty, above n 17, 355 citing Lord Somers in the *Banker's Case* as to which, see 87 ER 500, 519 nn(a).

[143] *Chisolm v Georgia* [1793] USSC 2; 2 US 419 (1793) 437–42; contrast *Tobin v R* [1864] EngR 21; (1864) 16 CB (NS) 310; 143 ER 1148.

[144] *Pawlett v Attorney General* (1688) Hardres 465; 145 ER 550. See Holdsworth (1922), above n 135, 280–3; Watkins, above n 67, 35–7; Bryson, above n 114, 5; contrast *NSW v Commonwealth (No 3)* [1932] HCA 12; (1932) 46 CLR 246, 266 which seems to misunderstand the cases cited. Following *Paulett* the law remained unclear as to what was the appropriate procedure for obtaining such an injunction: see Holdsworth (1944), above n 135, 31–2; Chitty, above n 17, 210–11, 296–7.

[145] *Taylor v AG* [1837] EngR 708; (1834) 8 Sim 413; 59 ER 164; *Clayton v AG* (1834) 1 Coop temp Cott 87; [1834] EngR 794; 47 ER 766; *Dyson v AG* [1911] 1 KB 410; *R v Employment Secretary; Ex parte EOC* [1994] UKHL 2; [1995] 1 AC 1, 34–5; Law Reform Committee of South Australia, *Proceedings by and Against the Crown* (1987; 104th Report); Andrew Harding, *Public Duties and Public Law* (1989) 150 ff.

[146] See *IRC v Rossminster* [1979] UKHL 5; [1980] AC 952; *R v Sec State for Transport; Ex parte Factortame Ltd* [1989] UKHL 1; [1990] 2 AC 85, 143–50; *Blyth District Hospital Inc v South Australian Health Commission* (1988) 49 SASR 501, 503–6; Peter Hogg and Patrick Monahan, *Liability of the Crown* (3rd ed, 2000) 31.

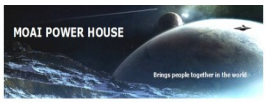
[147] *Thomas v R* (1874) LR 10 QB 44; *Commonwealth v Northern Land Council* (1991) 103 ALR 267, 288.

[148] *R v Powell* [1841] EngR 155; (1841) 1 QB 352; 113 ER 1166. As a practical matter prohibition or certiorari were also not available against the King, but this followed from the limited reach of those writs. Both writs were directed to judicial functions, which the King did not perform personally: see Robertson, above n 60, 123 ff.

[149] See above n 131.

[150] See Law Reform Commission (NSW), *Proceedings By and Against the Crown* (LRC 24, 1976) 135–6; Tom Cornford, 'Legal Remedies Against the Crown and its Officers Before and After M' in Maurice Sunkin and Sebastian Payne (eds), above n 5

233, 235; Holdsworth (1922), above n 135, 293–6; Edwin Borchard, 'Government Liability in Tort' (1924) 34 *Yale Law Journal* 1; Louis Jaffe, 'Suits Against Governments and Officers: Sovereign Immunity' (1963)

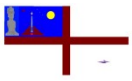










77 *Harvard Law Review* 1; Herbert Barry, 'The King Can do no Wrong' (1925) 11 *Virginia Law Review* 349; George Pugh, 'Historical Approach to the Doctrine of Sovereign Immunity' (1953) 13 *Louisiana Law Review* 476.

[151] Law Reform Commission (NSW), *Proceedings By and Against the Crown* (LRC 24; 1976) 13. See, eg, *Feather v The Queen* [1865] EngR 205; (1865) 122 ER 1191, 1205; Lordon, above n 56, 327 ff; Fairgrieve, above n 134, 10.

[152] (1843) 1 Ph 305; 41 ER 648.

[153] The rule is now well entrenched. In *Matthews v Ministry of Defence* [2003] UKHL 4; [2003] 1 AC 1163, 1169 Lord Bingham said

[f]ew common law rules were better established or more unqualified than that which precluded any claim in tort against the Crown, and since there could be no wrong of which the claimant could complain (because the King could do no wrong) relief by petition of right was not available.

This is to be contrasted with the modern Australian position discussed below.

[154] Wade, above n 60, 23, 25–6; see also Maitland, above n 10, 484.

[155] See William Anson, 'The Cabinet in the 17th and 18th Centuries' (1914) *English Historical Review* 56, 57–8.

[156] Arthur Berriedale Keith, *The British Cabinet System 1830–1938* (1939) see especially 28; A Aspinall and Anthony Smith, *English Historical Documents Vol XI 1783–1832* (1959) 86–95.

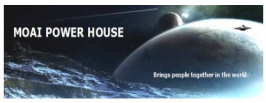
[157] See Maitland, above n 10, 390–4.

[158] Bradley Selway, 'Mr Egan, the Legislative Council and Responsible Government' in Adrienne Stone and George Williams (eds), *The High Court at the CrossRoads* (2000) 56–8; Chester, above n 5, 76–84; Hanham, above n 26, 24 ff. However, it would be in error to think that during this period the Monarch was an agent of the Cabinet: see Aspinall and Smith, above n 156,158–86 on the veto by George III of catholic emancipation.

[159] See B B Schaffer, 'The Idea of the Ministerial Department: Bentham, Mill and Bagehot' (1957) 3 *Australian Journal of Politics and History* 60.

[160] Chester, above n 5, 221 ff; Hanham, above n 26, 347–56. For example, in relation to the Board of Trade: see Parris, above n 34, ch 3; Finn, above n 13, 12; and see Richard Johnson, 'Administrators in Education Before 1870' in Gillian Sutherland (ed), *Studies in the Growth of Nineteenth Century Government* (1972) 33, 110 ff.

[161] Schaffer, above n 159, 60; William Anson, above n 155, 60; Maitland, above n 10, 202–3, 393–4; Lyon, above n 16, 273.

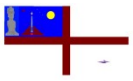










[162] Maitland, above n 10, 430–1; John Stevens, *The Royal Treasury of England* (1725) i–xvi; Wade, above n 23, 186–211.

[163] See Bradley Selway, *The Constitution of South Australia* (1997) 124 ff.

[164] Chester, above n 5, 14–16, 61–4.

[165] Chester, above n 5, 64–6. As to the problems with these arrangements, see DL Keir, 'Economic Reform, 1779–1787' (1934) 50 *Law Quarterly Review* 368, 380–1. For example, the public officer was entitled to the interest on the moneys in the accounts held by him or her: see Chester, above n 5, 169–70.

[166] Chester, above n 5, 178 ff; *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* [1993] HCA 12; (1993) 176 CLR 555, 575. One other reform which was of significant constitutional importance, although it does not concern this article, was the increasing reliance by the government on debt as a means of funding major expenditure and the increasing use of the Bank of England as the central body to provide any credit that the government required.

[167] See *R v Adams* [1848] EngR 440; (1848) 2 Ex 299; 154 ER 506.

[168] The introduction of a civil list in the colonies served a different purpose from in England. In the colonies the civil list distinguished between colonial and imperial expenditure: see Hugh Roberts and Ivan Mescher, 'The Premier Constitution: Legislative Power in New South Wales since 1855' (1992) 3 *Public Law Review* 90, 96–7.

[169] 1 Wm & M sess 2 c 2; see Maitland, above n 10, 306–11.

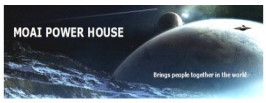
[170] Chester, above n 5, 58–64, 169–220; *Exchequer & Audit Departments Act 1866* (UK).

[171] See Chester, above n 5, 185–91; Maitland, above n 10, 430–7. There was a period in the late 18th and early 19th century where the difference between the receipts surrendered to the government in return for the civil list and the receipts that had to be paid into the Consolidated Fund had the practical effect that the Ministry had effective control over significant funds which were not subject to parliamentary control: see Wade, above n 23, 212–43.

[172] Chester, above n 5, 197–208. Over time it has resulted in the increase of the power of the Treasury over the rest of government.

[173] *Chisolm v Georgia* [1793] USSC 2; (1793) 2 US 419, 445; Pitt Cobbett, ''The Crown' as Representing 'the State'' (1903) 1 *Commonwealth Law Review* 23, 28–9; W Harrison Moore, 'The Crown as Corporation' (1904) 20 *Law Quarterly Review* 351, 352–3, 357–62.

[174] The term was not in fact used until the 1850s: Chester, above n 5, 298–9. Before that time any distinction between central and regional government may be misleading: see above. However, the reforms operated differently in relation to each and it is convenient to consider them separately for this purpose.

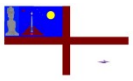










[175] See Paul Johnson, *The Birth of the Modern: World Society 1815–1830* (1991) 395. John Bowle, *The English Experience* (1971) 366 refers to the increasing size and complexity of the Treasury, of the Customs and Excise Office and of the Admiralty and the War Office. The initial reforms were focused on those agencies. The reforms did not extend to the navy or the military.

[176] Angus Calder, *Revolutionary Empire* (1998) 292.

[177] DL Keir, 'Economical Reform, 1779–1787' (1934) 50 *Law Quarterly Review* 368; see Joseph Jacob, *The Republican Crown* (1996) 84–6. In any event, the creation of the Consolidated Fund meant that payment by fees could not continue as it had.

[178] Chester, above n 5, 134–40.

[179] *Sale of Offices Act 1809*, 49 Geo 3, c 126 which extended the 1551 Act (discussed above) to most offices appointed by the King, by Secretaries of State and by other officers. Even so the sale of commissions in the Army was still permitted until 1871 when it was prohibited by Royal Warrant. One reason why the sale of military commissions was retained at least until the death of the Duke of Wellington was that the practice had his support. The Duke's view was that the necessity to buy commissions 'brought into the service men of fortune and character': Christopher Hibbert, *Wellington — A Personal History* (1997) 369–70.

[180] Lyon, above n 16, 343; John Willis, *The Parliamentary Powers of English Government Departments* (1933) 11–12.

[181] See Chester, above n 5, 166–8. For example, as to the Home Office, see J Cannon (ed), *The Oxford Companion to British History* (1997) 212; Johnson, above n 175, 391.

[182] Johnson, above n 175, 390 and see also at 341–2 describing the operation of the Colonial Office in the early 19th century; see also Chester, above n 5, 282–3.

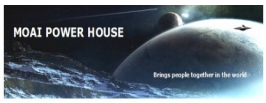
[183] Chester, above n 5, 286 ff.

[184] A Civil Subaltern, *Civil Service Report – Observations upon the Report by Sir CE Trevelyan KCB and Sir Stafford Northcote Bart on the Organization of the Permanent Civil Service* (1854) 11 quoting from the 'Morning Post' newspaper. See also Chester, above n 5, 286 ff.

[185] In sociological terms, that bureaucracy more closely conformed to the Weberian 'ideal–typical bureaucracy': see above n 2.

[186] Finn, above n 13, 15.

[187] Stafford Northcote and C Trevelyan, *Report on the Organisation of the Permanent Civil Service* Parliamentary Papers, Sessional Papers, Vol XXVII, Paper 1713 (1854).

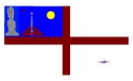










[188] Ibid 22–3.

[189] For a general description of the reforms see Jacob, above n 177, 86–9; C Northcote Parkinson, *The Law* (1979) 91–6; Hanham, above n 26, 314–38. As to the specific steps in the process of reform from 1854–1871, see J Donald Kingsley, *Representative Bureaucracy* (1944) 71–7.

[190] There were at least two exceptions. One was the Foreign Office: see Valerie Cromwell and Zara Steiner, 'The Foreign Office Before 1914: A Study in Resistance' in Gillian Sutherland (ed), *Studies in the Growth of 19th Century Government* (1972) 167 ff; Kingsley, above n 189, 125 ff. The other was the provision of 'in house' legal services: see Theodore Plucknett, *A Concise History of the Common Law* (5th ed, 1956) 230; Kingsley, above n 189, 135–6. For the history of the organisation of legal services to UK Departments and agencies, see Gavan Drewry, 'Lawyers in the UK Civil Service' (1981) 59 *Public Administration* 15. Of course, central government was further reformed as its role and its size continued to expand. For example, as to the further reforms in England in the 20th century, see Jacob, above n 177, 84–221.

[191] Finn, above n 13, 14–5.

[192] See Dicey, above n 114, 307.

[193] See *Poor Law Amendment Act 1834* (UK) 4 & 5 Wm 4, c 76.

[194] *Public Health Act 1848* (UK) 11 & 12 Vict, c 63; *Nuisances Removal and Diseases Prevention Act 1848* (UK) 11 & 12 Vict, c 123.

[195] *County Police Act 1839* (UK) 2 & 3 Vict, c 93; *County & Borough Police Act 1856* (UK) 19 & 20 Vict, c 69. For example, in 1835 the Treasury began to meet half the costs of criminal prosecutions and of the movement of convicts — costs which, until then, had been borne by the counties or by officers or by private individuals — see Chester, above n 5, 374.

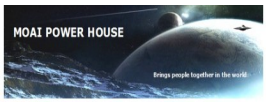
[196] See Chester, above n 5, 355–61.

[197] 5 & 6 Wm 4, c 76; see Lyon, above n 16, 326–8; Maitland, above n 10, 359–63. Separate legislation was enacted dealing with the government of London, culminating in the *London Government Act*, 1899 (UK). In Hanham, above n 26, 372 ff the reforms of regional government are described as establishing 'local self government'.

[198] Dicey, above n 114, 186–7.

[199] *Local Government Act 1888* (UK) 51 & 52 Vict, c 41; Lyon, above n 16, 360–2; Maitland, above n 10, 492–501.

[200] (1883) 9 LR App Cas 61.

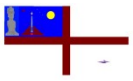










[201] [1889] 22 QBD 484.

[202] Ibid 490–2.

[203] Alastair Davidson, *The Invisible State* (1991) 91 ff.

[204] Finn, above n 13.

[205] As to the use of statutory corporations in Australia, see *Re Residential Tenancies Tribunal; Ex parte Defence Housing Authority* (1997) 190 CLR 410, 471; Paul Finn, 'The State Corporation' (1999) 3 *Flinders Journal of Law Reform* 1; Roger Wettenhall**,** 'Corporations and Corporatisation: An Administrative Perspective' (1995) 6 *Public Law Review* 7; Finn, above n 13, 3.

[206] (1701) 1 Comyns 100; [1792] EngR 1375; 92 ER 981 (see also [1792] EngR 1376; 1 Ld Raym 646; 91 ER 1332). The case was followed in *Whitfield v Lord de Despencer* [1778] EngR 78; (1778) 2 Cowp 754; 98 ER 1344 apparently on the basis that superior officers were not vicariously liable for the torts of inferior officers: 'The case of the post-master … is like all other public officers … who were never thought liable for any negligence or misconduct of the inferior officers in their several departments'

(Lord Mansfield at 755–756; 1350). This is clearly wrong. Sheriffs, gaolers and others were liable for the misconduct of inferior officers and of their own employees: see above.

[207] What power the Crown had to grant an exemption from liability was not explained. It has been accepted for at least 400 years that the Crown cannot confer any such immunity: see *A v Heyden* [1984] HCA 67; (1984) 156 CLR 532, 580–581; Robertson, above n 60, 640.

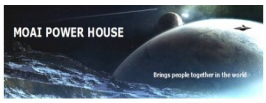
[208] What difference this made in terms of legal analysis was not explained.

[209] Unless the inferior officers were deputies this reasoning seems correct as far as it goes. However, it does not answer the question whether the Post–Masters General had a duty to ensure that the mail was delivered: see below.

[210] [1906] 1 KB 178.

[211] Under s 42 of the *Telegraph Act 1863* (UK) 26 & 27 Vict, c 112 telegraph companies were liable for all 'accidents, damages and injuries' occasioned by their works. The companies were nationalised by the *Telegraph Act 1868* (UK) 31 & 32 Vict, c 110. Section 2 of that Act provided that the term 'the company' in the 1863 Act should be read as the Post–Master General. On the face of it the Post-Master General's liability was a primary liability under s 42 of the *Telegraph Act 1863.* On the face of it the case had nothing to do with vicarious liability.

[212] [1906] 1 KB 178, 194.

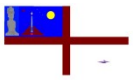










[213] See Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, Discussion Paper No 64 (2000) 331–45; Cornford, above n 150, 233, 239–40.

[214] (1843) 1 Ph 305; 41 ER 648.

[215] See *Tobin v R* [1864] EngR 21; (1864) 16 CB (NS) 310; 143 ER 1148.

[216] Ibid 349; 1163.

[217] [1865] EngR 205; (1865) 6 B&S 257; 122 ER 1191.

[218] *Southern Centre of Theosophy v South Australia* (1979) 21 SASR 399, 405.

[219] This reasoning is based upon the 'master tort' theory of vicarious liability: see *Feather v R* [1865] EngR 205; (1865) 6 B&S 257; 122 ER 1191, 1204–5. That theory has now been rejected: see *NSW v Lepore* [2003] HCA 4; (2003) 212 CLR 511, 611; Hogg and Monahan, above n 146, 6–7, 65–6; Susan Kneebone, *Tort Liability of Public Authorities* (1998) 319–22; Holdsworth (1944), above n 135, 38–9.

[220] [1876] 1 AC 632.

[221] Ibid 640–2, 646, 652, 656, 659. As is noted in Robertson, above n 60, 353 the *Patents and Designs Act 1907* (UK) expressly provided that officers and servants of the Crown could be sued personally for breach by them of a patent given by the Crown.

[222] Ibid 652. See Sidney Low, *The Governance of England* (revised ed, 1915) 255: 'The Crown of England is a convenient working hypothesis'.

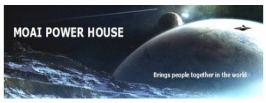
[223] Maitland above n 5, 131. See also Jacob, above n 177, 47–54.

[224] A point reinforced in a paper by W Harrison Moore, 'The Crown as Corporation' (1904) 20 *Law Quarterly Review* 351. See also Bradley Selway, 'The Constitutional Role of the Queen of Australia' (2003) 32 *Common Law World Review* 248, 249–55.

[225] [1977] UKHL 2; [1978] AC 359.

[226] See Allison, above n 4, 75–81; *WA v Watson* [1990] WAR 248, 266. The word 'State' has more than one meaning. In this context it is used to refer to the government and to comprise in particular the institutions and persons who exercise the executive power of government. This is the sense in which the word is used by Braddick, above n 11, 11 ff; Kenneth Dyson, *The State Tradition in Western Europe* (1980) 43–4. Used in this sense the word 'State' connotes a concrete description of executive government.

[227] [1990] WAR 248, 268.

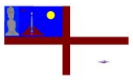










[228] See McHugh JA (as he then was) in *Suttling v Director General of Education* (1985) 3 NSWLR 427, 450 who distinguished between the act of the Director General and that of the Governor or Ministers. The latter were the acts of the Crown for the purpose of the 'dismissal at pleasure' rule; the acts of the Director General were not. See also Kirby P at 436.

[229] See Allison, above n 4, 80–1. The confusion is manifest in the policies reflected in the development of the *Crown Proceedings Act 1947* (UK)*:* see Jacob, above n 177, 64 ff.

[230] Pitt Cobbett, 'The Crown as Representing the State' (1903) 1 *Commonwealth Law Review* 23, 25, 27–8. See also Watkins, above n 67, 11–3.

[231] For a general discussion of these problems, see Nicholas Seddon, 'The Crown' (2000) 28 *Federal Law Review* 245.

[232] There is one exception. It was held in *Mostyn v Fabrigas* [1774] EngR 104; (1774) 1 Cowp 161, 173–4; [1774] EngR 104; 98 ER 1021, 1021–28 that colonial Governors enjoyed an immunity in tort. This immunity was subsequently limited to 'acts of State': see *Hill v Bigge* [1841] EngR 1186; (1841) 3 Moore PC 465; 13 ER 189; *Musgrave v Pulido* (1879) 5 LR App Cas 102; see also *Chisolm v Georgia* [1793] USSC 2; (1793) 2 US 419, 446.

[233] (1907) 23 *Law Quarterly Review* 12. See also Gleeson Robinson, *Public Authorities and Legal Liability* (1925) 16–33; Glanville Williams, *Crown Proceedings* (1948) 20–8; WG Friedmann, 'Legal Status of Incorporated Public Authorities' (1948) 22 *Australian Law Journal* 7; Harry Street, *Governmental Liability* (1975) 28–30; Herbert V Evatt, *The Royal Prerogative* (1987) 239–45; Seddon, above n 231

, 245, 249–53; Australian Law Reform Commission, *Judicial Power of the Commonwealth*, Report No 92 (2001), 541–52.

[234] Williams, above n 233

, 21 ff.

[235] [1915] 1 KB 45, 53.

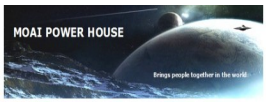
[236] [1943] 1 KB 478.

[237] [1948] P 33.

[238] Ibid 44.

[239] *Tyne Improvement Commissioners v Armement Anversois S/A ('The Brabo')* [1949] AC 326, 342.

[240] See Short and Mellor, above n 91, 202–4; Shortt, above n 85, 225; Harding, above n 145, 86 ff.

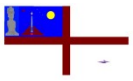










[241] [1907] HCA 31; (1907) 4 CLR 1497.

[242] Ibid 1512–13.

[243] *M v Home Office* [1993] UKHL 5; [1994] 1 AC 377, 416–17.

[244] *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 351, 372, 386–7, 404, 419–21; *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135, 145–6. However, other remedies are available to enforce the duties of Governors.

[245] See *Stanbury v Exeter Corporation* [1905] 2 KB 838; *Fisher v Oldham Corporation* [1930] 2 KB 364.

[246] See *The Brabo* [1949] AC 326 discussed above.

[247] See, eg, *Resi Corporation v Sinclair* [2002] NSWCA 123; (2002) 54 NSWLR 387, 401–8 as to the immunity of a statutory authority from suit; *Townsville Hospitals Board v Townsville City Council* [1982] HCA 48; (1982) 149 CLR 282, 288–92 as to whether a statutory authority is bound by a statute which does not bind 'the Crown'.

[248] See, eg, *Bropho v WA* [1990] HCA 24; (1990) 171 CLR 1. In relation to the presumption that the Crown was not bound by the general words in a statute the majority at 15–16 make the point,

The rule presents no real problem of principle in so far as it operates to express a presumption that statutory provisions do not apply to the actual person of the Sovereign. … The extension of the benefit of the rule to Crown or governmental instrumentalities or agents may, of itself, offend notions of parity.

[249] Loughlin, above n 5, 39; see also John Allison, 'Theoretical and Institutional Underpinnings of a Separate Administrative Law' in Michael Taggart (ed), *The Province of Administrative Law* (1997) 78–9.

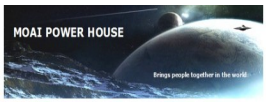
[250] Dyson, above n 226

, 210–11; Allison, above n 4, 77–9. This is to be contrasted with the European tradition: see Robert Thomas, 'Continental Principles in English Public Law' in Andrew Harding and Esin Orucu (eds), *Comparative Law in the 21st Century* (2002) 121, 133 (cited with approval by McHugh and Gummow JJ in *Re Minister for Migration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 24).

[251] *Sue v Hill* [1999] HCA 30; (1999) 199 CLR 462, 498.

[252] *Sue v Hill* [1999] HCA 30; (1999) 199 CLR 462, 500–1; Selway, above n 223, 260–1.

[253] See *AG (BC) v AG (Canada)* (1889) 14 AC 295; *Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick* [1892] AC 437, 444. Relevant expenses had to be met from the appropriate Treasury: *St Catherine's Milling and Lumber Co v Queen* (1888) 14 AC 46, 60. The various polities within

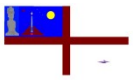










the federation could enter into enforceable contracts and transfer property to each other and they could sue each other: *AG (BC) v AG (Canada)* (1889) 14 AC 295.

[254] The title of the Chapter is 'The Judicature'. It provides generally for federal judicial power.

[255] *Sue v Hill* [1999] HCA 30; (1999) 199 CLR 462, 501–2. The meaning of this juristic entity may nevertheless be changeable depending upon the context: see *Re Minister for Immigration and Muticultural Affairs; Ex parte Goldie* [2004] HCA 27; (2004) 206 ALR 380, 384 [23].

[256] [1996] HCA 32; (1996) 189 CLR 253, 291.

[257] (1997) 191 CLR 471.

[258] See, eg, Glynn in *Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne 1898 (II)* 1654.

[259] See the discussion in Bradley Selway, 'All at Sea — Constitutional Assumptions and the Executive Power of the Commonwealth' (2004) 31 *Federal Law Review* 495.

[260] Selway, above n 224

, 266–73.

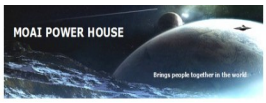
[261] Selway, above n 163, 152.

[262] Finn, above n 55, 314. It excluded those that did not hold a 'position', such as those employed on weekly or daily rates of pay. Applying even the broad definition of public office is often difficult — the meaning will often be dictated by the context: see *R v Rogers; Ex parte Lewis* (1878) 4 VLR 334, 368; *R v McCann* [1998] 2 Qd R 56 and see *Sita Qld Pty Ltd v Qld* (1999) 162 ALR 18.

[263] See Brian Napier, 'Office and Office-Holder in British Labour Law' in Franz Gamillscheg and Ors (eds), *In Memoriam Sir Otto Kahn-Freund* (1980) 593 ff.

[264] Employment in the public service in Australia has been regulated by statute since the late 19th century: see Gregory McCarry, *Aspects of Public Sector Employment Law* (1988) 3–5. The three main features of these statutory schemes were central control; common recruitment and a career service: see Richard Spann, *Government Administration in Australia* (1979) 255. In England, on the other hand, the civil service has generally been regulated by the exercise of prerogative powers: see *R v Lord Chancellor's Department; Ex parte Nangle* [1992] 1 All ER 897; W Ivor Jennings, *The Law and the Constitution* (3rd ed, 1948) 179–83.

[265] See *Dunn v R* [1896] 1 QB 116; *Fletcher v Nott* [1938] HCA 25; (1938) 60 CLR 55, 67; John Mitchell, *The Contracts of Public Authorities* (1954) 32–52; Enid Campbell, 'Termination of Appointments to Public Office' [1996] FedLawRw 1; (1996) 24 *Federal Law Review* 1; Peter Hogg, *Liability of the*

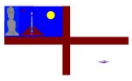










Crown (1st ed, 1971) 150–8; Lordon, above n 56, 95–6, 308 ff. The reasoning in *Dunn* is based upon a misunderstanding of the case law on the appointment and termination of public officers: see above n 35 and see Holdsworth, above n 12, 56. McHugh JA (as he then was) in *Suttling v Director General of Education* (1985) 3 NSWLR 427, 444–7 explained *Dunn* as being based entirely upon policy considerations. Certainly those considerations are referred to in the reasons for the decision. However, it is not obvious that policy considerations can justify the result in *Dunn*: see *McClelland v Northern Ireland General Health Services Board* [1957] 1 WLR 594, 612–3.

[266] *Worthington v Robinson* (1897) 75 LT 446.

[267] *Deynzer v Campbell* [1950] NZLR 790.

[268] *Kaye v AG (Tas)* [1956] HCA 3; (1956) 94 CLR 193.

[269] (1985) 3 NSWLR 427; on appeal [1987] HCA 3; (1987) 162 CLR 427.

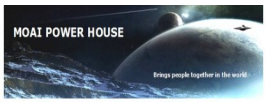
[270] *R v Lord Chancellor's Department; Ex parte Nangle* [1992] 1 All ER 897.

[271] See *Enever v The King* [1906] HCA 3; (1906) 3 CLR 969 (police constables); *Baume v Commonwealth* [1906] HCA 92; (1906) 4 CLR 97, 110–12, 122–3 (customs officers); *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* [1986] HCA 34; (1986) 160 CLR 626 (shipping pilots); *Cubillo v Commonwealth* [1999] FCA 518; (1999) 163 ALR 395, 443–4; Aronson and Whitmore, above n 66, 23–6. The history of this development is outlined in S Churches, 'Bona Fide Police Torts and Crown Immunity' [1980] UTasLawRw 5; (1980) 6 *University of Tasmania Law Review* 294; see also Susan Kneebone, 'The Independent Discretionary Function Principle and Public Officers' [1990] MonashULawRw 11; (1990) 16 *Monash University Law Review* 184, 198.

[272] Selway, above n 163, 156; contrast *Konrad v Victorian Police* [1999] FCA 988; (1999) 165 ALR 23, 45–53.

[273] *State Chamber of Commerce and Industry v Commonwealth* [1987] HCA 38; (1987) 163 CLR 329, 347, 351–353, 369; *O'Connor v South Australia* (1976) 14 SASR 187, 188–9; *Rajski v Powell* (1987) 11 NSWLR 522, 530–31. This would still seem to be the case under most Crown Proceedings Acts where the definition of 'Crown' usually does not include judicial officers. Consequently where it is alleged that a Judge has committed a tort the relevant suit should be against the Judge personally. Usually the government would indemnify the relevant judicial officer.

[274] *State Chamber of Commerce and Industry v Commonwealth* [1987] HCA 38; (1987) 163 CLR 329, 347, 351–3, 369. However, the definition of 'the Crown' in the relevant Crown Proceedings Act usually includes Ministers. They may also be treated as 'the State' or 'the Commonwealth' under the *Judiciary Act 1903* (Cth). Consequently the primary (rather than vicarious) liability of the relevant juristic entity may include the tortious acts of a Minister.

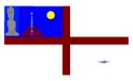










[275] In Australian governments those within this group would usually include at least the Electoral Commissioner, the Auditor General, the Solicitor General, the Ombudsman and the Director of Public Prosecutions.

[276] See Paul Finn, *Fiduciary Obligations* (1977) 8–14.

[277] For example, see Finn, above n 55, 313; Paul Finn, above n 275, 14; Peter Hall, *Investigating Corruption and Misconduct in Public Office* (2004) 7–13.

[278] In *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51; (2002) 210 CLR 438, 481 Kirby J refers to the purported trust relationship as a 'metaphor'.

[279] It should not be forgotten, of course, that there are many mechanisms for the enforcement of public duty that do not involve the courts. There are political and administrative mechanisms that also have a role — maybe a greater one. See, for example, the role of the Attorney General within government: Bradley Selway, 'The Different Role of the Australian Attorney General' (2002) 13 *Public Law Review* 263, 271–2.

[280] See *Question of Law Reserved (No 2 of 1996)* [1996] SASC 5674; (1996) 67 SASR 63; *R v Dytham* [1979] QB 722; *R v Bowden* [1995] 4 All ER 505; Hall, above n 277

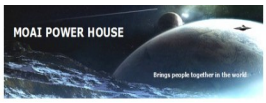
, 18 ff. See also *Herscu v The Queen* (1991) 173 CLR 296; *R v McCann* [1998] 2 Qd R 56 dealing with statutory offences.

[281] *Question of Law Reserved (No 2 of 1996)* [1996] SASC 5674; (1996) 67 SASR 63, 78, 87–8; *R v Dytham* [1979] QB 722.

[282] See Finn, above n 55, 313.

[283] See Finn, above n 67, 494–5; Finn, above n 13, 184 fn 67. Some specialised elements of the tort continued to be applied in England and Australia, such as the duty of a Sheriff to execute a writ: see Aronson and Whitmore, above n 66, 125. However, even in these specialised areas the relevant duty is now likely to be considered in the context of the tort of negligence: see, for example, Vanstone J in *Huggins v State of South Australia* [2004] SASC 16.

[284] Judicial reasoning in some later cases would still seem to echo the 18th century tort: see, eg, *Rogers v Dutt* [1860] EngR 938; (1860) 13 Moo PC 209, 236–8; [1860] EngR 938; 15 ER 78, 88–9. Some commentators even in relatively recent times have continued to recognise the tort: see Rubenstein, above n 72, 135–9. The tort may still have some application in the US where a distinction is made between the liability of government officers for 'ministerial' and 'legislative' (or discretionary) acts: see *Westfall v. Erwin* [1988] USSC 7; (1988) 484 US 292; *Bogan v Scott-Harris* [1998] USSC 17; (1998) 523 US 44; Floyd Mechem, *A Treatise on the Law of Public Offices and Officers* (1890) 441, 444 ff; Ronald Cass, 'Damage Suits against Public Officers' (1981) 129 *University of Pennsylvania Law Review* 1110, 1119–25; W Keeton, D Dobbs, R Keeton and D Owen, *Prosser and Keeton on Torts* (5th ed, 1984) 1060.

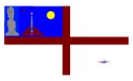










[285] [1966] HCA 49; (1966) 120 CLR 145.

[286] Ibid 156.

[287] Ibid 153.

[288] See, eg, *Dunlop v Woollahra Municipal Council* [1981] 1 NSWLR 76, 82; *Munnings v Australian Government Solicitor* [1994] HCA 65; (1994) 68 ALJR 169, 171.

[289] (1995) 185 CLR 307.

[290] Ibid 348.

[291] The difference in approach can be highlighted by comparing the respective approaches in *Henly v The Mayor & Burgesses of Lyme* [1828] EngR 701; (1828) 5 Bing 92; 130 ER 995 and in *East Suffolk Rivers Catchment Board v Kent* [1940] AC 74. The facts of both cases were similar. *Henly* was decided by considering whether there had been a breach of a public duty. *East Suffolk Catchment Board* was decided by considering whether the Board or its employees had been negligent.

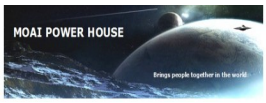
[292] It would appear that the tort was developed for the purpose of enforcing the obligations imposed by private statutes: see *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 458–61. However, there are some cases where the tort is discussed in a manner reminiscent of cases discussing the tort of breach of public duty. For example, in *Maguire v Corporation of Liverpool* [1905] 1 KB 767, 782–3 it is at least suggested that where a public statutory duty would be enforceable by criminal proceedings then an action will lie at the suit of a subject suffering injury. The Court of Appeal reached the illogical conclusion that there could be no liability in damages for breach of a statutory duty unless the duty was enforceable by criminal proceedings. The case involved a highway authority.

[293] See *Hague v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58; *Byrne v Australian Airlines* (1995) 185 CLR 410, 424–5; KM Stanton, 'New Forms of the Tort of Breach of Statutory Duty' (2004) 120 *Law Quarterly Review* 324. As to the artificiality of any search for parliamentary intent in this context: see *Byrne v Australian Airlines* (1995) 185 CLR 410, 458–61; *Crimmins v Stevedoring Finance Committee* [1999] HCA 59; (1999) 200 CLR 1, 59–60; Fairgrieve, above n 134, 36–41.

[294] *O'Connor v SP Bray Ltd* [1937] HCA 18; (1937) 56 CLR 464, 477–8; *Crimmins v Stevedoring Finance Committee* [1999] HCA 59; (1999) 200 CLR 1, 59. Given that the creation of such a statutory right of action by the Commonwealth Parliament has jurisdictional consequences under Chapter III of the *Constitution* there may be an expectation that the creation of a private right of action by federal legislation would be done expressly: *Byrne v Australian Airlines* (1995) 185 CLR 410, 458–61; *Crimmins v Stevedoring Finance Committee* [1999] HCA 59; (1999) 200 CLR 1, 59.

[295] *Hague v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58.

[296] *Wentworth v Woollahra Municipal Council* [1982] HCA 41; (1982) 149 CLR 672; Finn, above n 67. However, such a plaintiff can obtain declarations and injunctions: see below.

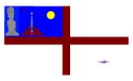










[297] See *Three Rivers DC v Bank of England* [2003] 2 AC 1, 189–90; *Northern Territory v Mengel* (1995) 185 CLR 307, 355; Susan Kneebone, 'Misfeasance in a Public Office after Mengel's Case' (1996) 4 *Tort Law Review* 111, 120; David Baker, 'Maladministration and the Law of Torts' [1985] AdelLawRw 22; (1986) 10 *Adelaide Law Review* 207, 242; Evans, above n 68, 640–43. On the other hand there is some dicta to suggest that the tort was developed in the 19th century by analogy with the tort of malicious prosecution: see *Grainger v Hill* [1838] EngR 365; (1838) 5 Bing (NC) 212; 132 ER 769.

[298] See *Sanders v Snell* (1998) 196 CLR 329, 346–7; *Three Rivers DC v Bank of England* [2003] 2 AC 1, 190–6, 219–23; James Bailey, 'Misfeasance in Public Office: The Tort Defined' (2001) 16 *Banking & Finance Law Review* 317, 324–2; Susan Kneebone, above n 297

, 121–34; Evans, above n 68, 644–55; Tina Cockburn, 'Personal Liability of Government Officers in Tort and Equity' in Bryan Horrigan (ed), *Government Law and Policy* (1998) 342–64; Fairgrieve, above n 134, 87–95. However, at least in Australia, malice has been redefined to mean the intentional infliction of harm: see Tina Cockburn and Mark Thomas, 'Personal Liability of Public Officers in the Tort of Misfeasance in Public Office' (2001) 9 *Torts Law Journal* 80, 98–103.

[299] See *Martin v Watson* [1996] AC 74; *Gregory v Portsmouth City Council* [2000] UKHL 3; [2000] 1 AC 419; *Grivan v Brooks* (1997) 69 SASR 532; Megan Smith, 'Malicious Prosecution' (1996) 70 *Australian Law Journal* 970.

[300] See Robert FV Heuston and RA Buckley, *Salmond and Heuston on the Law of Torts* (20th ed, 1992) 379; *James v Commonwealth* [1939] HCA 9; (1939) 62 CLR 339, 374; *Rookes v Barnard* [1964] UKHL 1; [1964] AC 1129, 1205. The existence or otherwise of such a tort was left open in *Northern Territory v Mengel* (1995) 185 CLR 307.

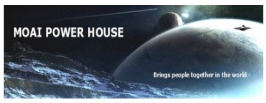
[301] *Jamieson v Black* [1993] HCA 48; (1993) 177 CLR 574; *Hillman v Black* [1996] SASC 5941; (1996) 67 SASR 490, 503–5, 511–12; *Taylor v Serious Fraud Office* [1997] 4 All ER 887, 900–1; *Stanton v Callaghan* [1998] EWCA Civ 1176; [1998] 4 All ER 961, 971–84, 985–91; *Mahon v Rahn (No 2)* [2000] 4 All ER 41, 68; *Darker v Chief Constable of the West Midlands Police* [2000] UKHL 44; [2001] 1 AC 435, 446–9, 450–2, 456–61, 463–70.

[302] (1997) 191 CLR 471, 541–52.

[303] See Bradley Selway, 'The Source and Nature of the Liability in Tort of Australian Governments' (2002) 10 *Tort Law Review* 14, 32–7.

[304] [2003] HCA 47; (2003) 200 ALR 403, 407–11 [10]–[26], 419–20 [59]–[63], 439–40 [141]–[144].

[305] I have discussed these changes in Bradley Selway, 'The Constitution of the UK: a Long Distance Perspective' (2001) 30 *Common Law World Review* 3. As to the effect upon 'public torts' see: *Darker v Chief Constable of the West Midlands Police* [2000] UKHL 44; [2001] 1 AC 435, 455; *D v East Berkshire NHS Trust* [2003] EWCA Civ 1151; [2003] 4 All ER 796, 816–24; Michael Harris, 'Education and Local Authorities' (2001) 117 *Law Quarterly Review* 25, 28; Basil Markesinis, J-B Auby, D Coester-Waltjen and S

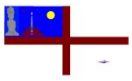










Deakin, *The Tortious Liability of Statutory Bodies* (1999) 96–104, 115–6; Scott and Barber, above n 75, 403.

[306] [1993] UKHL 5; [1994] 1 AC 377.

[307] See Hogg and Monahan, above n 146, 31.

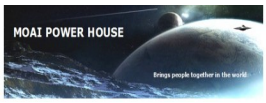
[308] Woolf and Woolf, above n 109, 277–80.

[309] See *City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135, 145–6, 157–8; David Wright, 'The Role of Equitable Remedies in the Merging of Private and Public Law' (2001) 12 *Public Law Review* 40; Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238. These developments have been more restricted in England where Rules of Court have limited the extent to which equitable remedies can be pursued.

[310] See *Manna Hill Resources Pty Ltd v South Australia* [2001] SASC 124; (2001) 82 SASR 18. For example, the continued operation of the rule limiting the availability of the prerogative writs against the Governor has not limited the extension of the substantive law to the Governor e.g. the duty to afford a fair hearing. That duty can be enforced by declaratory proceedings or in collateral proceedings: see *R v Toohey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170; *South Australia v O'Shea* [1987] HCA 39; (1987) 163 CLR 378, 386, 416; *South Australia v Tanner* [1989] HCA 3; (1989) 166 CLR 161, 174. On the other hand, in *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51; (2002) 210 CLR 438, 455–6 Gaudron, Gummow and Hayne JJ treat the question whether a decision can be set aside by reason of the acts of persons other than the decision maker as being a question to be determined having regard to the historical reach of certiorari for fraud.

[311] See *Egan v Willis* [1998] HCA 71; (1998) 195 CLR 424, 438–9; *St George's Healthcare NHS Trust v S* [1998] EWCA Civ 1349; [1999] Fam 26, 58–62; *ABC v Lenah Game Meats* (2001) 208 CLR 199, 241; *Electricity Supply Assoc v ACCC* [2001] FCA 1296; (2002) 189 ALR 109, 139 [122], 140 [131]. The courts cannot engage in 'merit review': see *Ainsworth v CJC* [1992] HCA 10; (1991) 175 CLR 564; *Foster v Minister of Justice & Customs* [1999] FCA 687; (1999) 164 ALR 357, 359–60. In Australian federal jurisdiction there must be a 'matter': *Re McBain; Ex parte Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372.

[312] There are limitations upon the right of the Crown (through the Attorney General) to restrain future breaches of the criminal law: see Selway, above n 163, 83. Even where the proceedings are instituted by the Attorney General or where he or she grants a fiat, there may still not be a 'matter' for the purposes of federal jurisdiction: see *Re McBain; Ex parte Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372. If a fiat is not granted it may be necessary to establish a 'special loss': see *Boyce v Paddington BC* [1903] 1 Ch 109; *Wentworth v Woollahra Municipal Council* [1982] HCA 41; (1982) 149 CLR 672, 680; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund* [1998] HCA 49; (1998) 194 CLR 247, 256; *Electricity Supply Association of Australia v ACCC* [2001] FCA 1296; (2001) 189 ALR 109, 142; Finn, above n 67, 571; Baker, above n 297

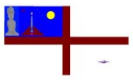










, 240–2; Harding, above n 145, 149 ff. See also Kevin Lindgren 'Standing and the State' in Paul Finn (ed), *Essays on Law and Government Vol 2* (1996) 269–74; HE Renfree, *Executive Power of the Commonwealth* (1984) 208.

[313] There may be statutory restrictions on obtaining an injunction against the Crown in such circumstances: see *Enfield City Corporation v Development Assessment Commission* (1997) 69 SASR 99, 115.

[314] In *O'Reilly v Mackman* [1983] UKHL 1; [1983] 2 AC 237, 255 Lord Denning drew a distinction between public law remedies (namely the prerogative writs) and private law remedies (torts and equity), suggesting that the private law remedies had only been developed in relation to public duties to overcome the limitations upon the availability of the prerogative writs. As discussed above, this is not a correct understanding of the historical position.

[315] Mark Aronson, Bruce Dyer and Mark Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 15–6.

[316] See discussion in ibid 731–2.

[317] See *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co* [1924] 1 KB 171, 192–5; Rubenstein, above n 72, 98–103.

[318] See, eg, *R v Woodhouse* [1906] 2 KB 501; SA de Smith, *Judicial Review of Administrative Action* (1st ed, 1959) 272.

[319] See, eg, *R v Local Government Board* (1882) 10 QBD 309, 321. However, the general thrust of authority even well into the 20th century still limited the writs to the exercise of judicial power: see *R v Electricity Commisisoners; Ex parte London Electricity Joint Committee Co* [1923] 1 KB 171, 205; H Curlewis, D John Edwards and W Sanderson, *The Law of Prohibition* (1910).

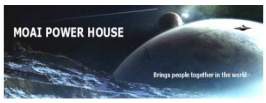
[320] [1963] UKHL 2; [1964] AC 40.

[321] See *O'Reilly v Mackman* [1983] UKHL 1; [1983] 2 AC 237, 279; Clive Lewis, *Judicial Remedies in Public Law* (2nd ed, 2000) 173–4. The issue may still be open in Australia: see Aronson, Dyer and Groves, above n 315

, 702–6.

[322] *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1951] EWCA Civ 1; [1952] 1 KB 338; Rubenstein, above n 72, 91–4.

[323] See the discussion by Callinan J in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 521–2 and 524–5 and 533–5 as to the historical differences between certiorari on the one hand and mandamus and prohibition on the other in relation to 'jurisdictional error'.

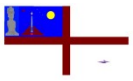










[324] [1968] UKHL 6; [1969] 2 AC 147.

[325] See Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action — The Search Continues' (2002) 30 *Federal Law Review* 217, 222–6. Contrast Aronson, Dyer and Groves, above n 315

, 104.

[326] See *R (Daly) v Home Secretary* [2001] UKHL 26; [2001] 2 AC 532, 546–7; contrast *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502, 517–20 [65]–[77]. As to the significance of the changes in England: see generally Paul Craig, 'The Court, the Human Rights Act and Judicial Review' (2001) 117 *Law Quarterly Review* 589; Dawn Oliver *Constitutional Reform in the United Kingdom* (2003) 97–101.

[327] See *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, 178–9.

[328] Selway, above n 325

; Aronson, Dyer and Groves, above n 314, 166.

[329] See John Basten, 'Constitutional Elements of Judicial Review' (2004) 15 *Public Law Review* 187.

[330] See *Re Refugee Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82, 92–3.

[331] See Allison, above n 4, 125–8.

[332] See, eg, Michael Keating, 'Sovereignty and Plurinational Democracy: Problems in Political Science' in Neil Walker (ed), *Sovereignty in Transition* (2003) 192 ff; Alfred van Staden and Hans Vollard, 'The Erosion of State Sovereignty: Towards a Post-territorial World' in Gerard Kreijen (ed), *State, Sovereignty and International Governance* (2002) 165 ff.

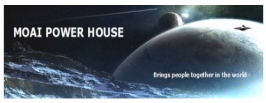
[333] Of course, the extent and nature of government liability could be further clarified: see the Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, Report No 92 (2001) 497.

[334] See, eg, the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

[335] See, eg, the *Administrative Appeals Tribunal Act 1975* (Cth).

[336] See the comments in *Director General of Education v Suttling* [1987] HCA 3; (1986) 162 CLR 427, 437–8 that '[t]o the extent that the statute governs the relationship it is idle to inquire whether there is a contract which embodies its provisions'.

[337] See *Kiao v West* [1985] HCA 81; (1985) 159 CLR 550, 567.

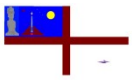










[338] Contrast Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2004) 15 *Public Law Review* 202, 216–19.

[339] *Wik Peoples v Queensland* (1996) 187 CLR 1, 182–3.

[340] See Bradley Selway, 'The Use of History and Other Facts in the Reasoning of the High Court of Australia' [2001] UTasLawRw 5; (2001) 20 *University of Tasmania Law Review* 129, 148–55.
