

CROWN IMMUNITY (EXECUTIVE IMMUNITY QUESTIONS):

Issue: Can x claim crown immunity?

Rules:

- **Presumption:** Presumption that statutory provisions are prima facie not applicable to the Crown (Bropho). Before Bropho the test for Crown immunity was stringent, in order to rebut this presumption express words were required but now the presumption is a mere starting point. It is easier to rebut the presumption when the Crown is engaging in clearly commercial activities (Bropho).
- **Necessary Implication rebuttal:** Where the statute is ineffective if the Crown is not bound then by necessary implication the Parliament did not intend to exclude the Crown from the reach of the law (Bropho- 93% of land was Crown-owned)
- **History:** The considerations for why the Crown has immunity are largely inapplicable to the realities of today when the executive government and its activities reach into almost aspect of life (Bropho).
- **Crown?**
 - The sovereign, the executive government and the instrumentalities of the executive government (can be companies- like in Bropho), servants of the Crown.
 - **Crown instrumentality:** Look if agent of the Crown and the functions it carries out.
- **Clear statement:**
 - **To bind Crown in all its capacities.** (then it is clear that some intent but must often determine how far it goes- which Crown to bind).
 - Between states: Consider the divisibility of the Crown (Sue v Hill); generally, it will be able to bind across states. Can potentially distinguish from Bropho if between two states as there it was within one state.
- **Override of immunity:** the original jurisdiction of the HCA- look to justiciability. But if officer of Cth and mandamus or injunction (75v CC).

Application:

- Determine if the entity is Crown.
- If clear statement, consider if can bind that crown too.
- If no clear statement, consider the effect of the law without binding the Crown and the intent of Parliament.

Bropho (1990):

- " Ultimately, question is 'whether the presumption against the Crown being bound has, in all the circumstances, been rebutted, and if it has, the extent to which it was the legislative intent that the particular act should bind the Crown and or those covered by the prima facie immunity of the Crown.'"
- 'an Act may, when construed in context, disclose a legislative intent that **one of its provisions will bind the Crown while others do not** and that a disclosed legislative intent to bind the crown may be qualified I that it may, for example, not apply directly to the Sovereign himself or to a Crown instrumentality itself as distinct from employees or agents'
- **Don't abolish the rule and presumption but clarify them:** 'Such a legislative intent must, of course, be found in the provisions of the statute – including its subject matter and disclosed purpose and policy – when construed in a context which includes permissible extrinsic aids'.

PUBLIC INTEREST LITIGATION/STANDING/BEING INVOLVED IN PROCEEDINGS:

Issue: Can they bring action? / Does x have standing to bring action? / Can they be involved in proceedings?

Rules: In order to bring action in the Australian Courts x has to have standing.

- **Test:** X must have a special interest in the subject matter of the action, a greater interest than that of a general member of the public (Kuczborski). It must be more than a mere emotional or intellectual interest in the matter (Kuczborski).
Special interest: if you are in breach of a provision of a statute, duty, right or liability at stake if not then no matter to be raised.
- **Rationale:** The special interest requirement is to prevent too high a number of litigation in the courts. It is an aspect of separation of powers so as the Courts are not seen as judging political action. Compare to the Latin American system of tutela.

If X has no standing it can at the discretion of the Court become involved in the following ways:

- **Amicus Curiae:** “Friend of the Court” Supposed to provide disinterested advice to the court on a point of law, it is not required to show any special interest. To assist the court in a way that it would not get otherwise. (often it is Amnesty International and the like so not really disinterested) (discretion of the court)
 - **Intervenor:**
 - Human Rights Commissioner can intervene in certain types of cases, if concerning human rights essentially. Has to be given leave of the court (likely to get it). S11(o) of the Australian Human Rights Commission Act.
 - Or attorney generals can act as intervenors in matters of the constitutional law.
 - **McKenzie Friend:** A McKenzie friend has no right to appear as an advocate, or to address the court on behalf of the unrepresented litigant. The role of such a person is confined to providing assistance and advice to the unrepresented litigant in conducting the case. Probably do not need leave of court.
- **Attorney General:**
- Attorney General can appear in special circumstances to represent the public interest (in Constitutional matters- even attorney general from another state can have standing) s78A Judiciary Act 1903 (below)
 - ❖ “Judiciary Act 1903 s78A:(1) The Attorney-General of the Commonwealth may, on behalf of the Commonwealth, and the Attorney-General of a State may, on behalf of the State, intervene in proceedings before the High Court or any other federal court or any court of a State or Territory, being proceedings **that relate to a matter arising under the Constitution or involving its interpretation.**”
 - Attorney Generals can also issue a fiat
 - Attorney General does not have to have special interest, can pass on a fiat to others.

Application: Determine the special interest and then look at the other options (mention them even if standing looks likely but not certain.

Conclusion: If no standing then the Court has no authority to look to the merits of the matter.

Cases:

Kuczborski (2014):

Focus on the primary aspect of the crime or if it is a secondary consequence of committing a crime (sentencing), if the secondary consequence then do not have standing unless you are actually subject to the sentencing. Needs to be an element of the crime.