Crimmins v Stevedoring Industry Finance Committee (1999) 74 ALJR 1

The liability of public authorities is considered in detail in this article, especially the state of the law following the High Court decision in *Crimmins*. In that case a statutory authority was held liable for the Plaintiff's contraction of Mesothelioma due to its negligent failure to affirmatively act to prevent the damage from occurring.

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Councils and public authorities have been held liable for acts of misfeasance for many years. In the United Kingdom the leading case with respect to this issue for a long time was *East Suffolk Catchment Board v Kent*[1].

In that case, damage was caused by floodwaters entering the plaintiff's land as a result of the forces of nature. The Board exercised its powers and effected repairs so as to abate the flooding. These were carried out in an incompe-

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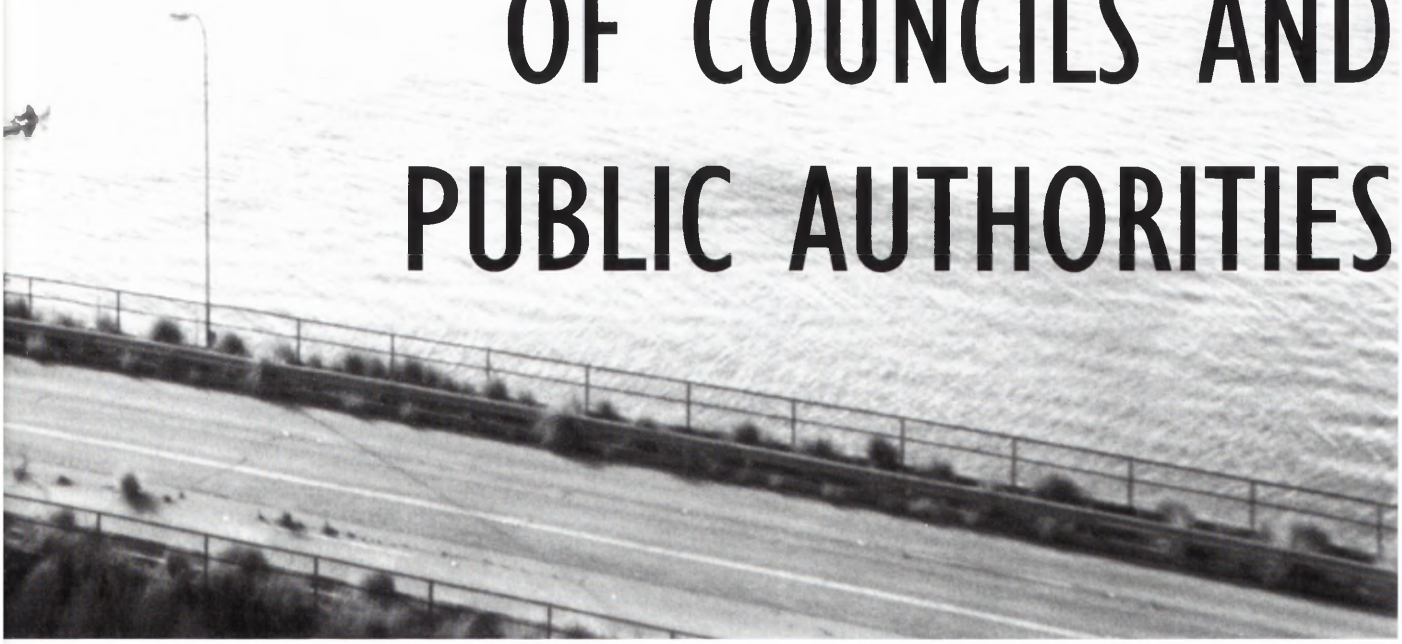
THE LIABILITY IN NEGLIGENCE OF COUNCILS AND PUBLIC AUTHORITIES



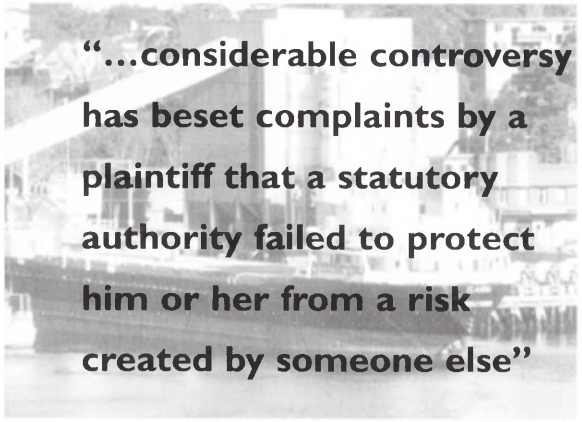
tent fashion, but did not increase the damage, which would have been caused to the plaintiff's land in any event, even if the Board had not intervened. The plaintiff's claim failed because the House of Lords held that the Board owed a duty of care with respect to negligent actions when exercising its powers, not with respect to a failure to exercise a power. The Board's conduct merely failed to benefit the plaintiff and did not make it worse.

In Australia, it has long been held that when statutory powers are conferred they must be exercised with reasonable care.[2] An analogous principle applies where a statutory authority is the occupier of premises and is subject to a statutory duty to manage and control them for the benefit of the public. In such a case it owes the entrants to those premises the usual duty to take reasonable care to make the premises safe.[3] Also, if such a body has caused the Plaintiff loss because of misleading statements,[4] or performed an act which caused the Plaintiff physical damage,[5] it can be made liable in the same way as an ordinary Defendant.

Further, an authority may by its conduct place itself in a position that attracts a duty of care. An example is when an authority in the exercise of its function has created a danger, thereby subjecting itself to a duty of care for the safety of persons who may be imperiled by that danger. This duty may be discharged by the exercise of statutory power given to it to prevent damage or harm, or by the giving of a warning.[6] Damage caused by the conduct of a statutory authority in the above examples has been held to be com- ▶

pensable as constituting conduct amounting to an act of misfeasance on the part of the authority.

However, considerable controversy has beset complaints by a plaintiff that a statutory authority failed to protect him or her from a risk created by someone else or a naturally occurring risk. In such cases the plaintiff claims that the authority owes a duty of affirmative action to protect him or her from injury, and thus is responsible for its omission to perform the act in question. Courts have been unwilling to render an authority liable in these situations and have devised formulae to limit a plaintiff's right of recovery for damages for the authority's non-feasance.



Rationale for restricting liability

Public authorities are created to discharge specified statutory functions. They have limited resources and do not have complete freedom of choice on how to spend them. Consequently it may be unreasonable to impose liability for inaction by an authority when its power to act is restricted by legislation.

Moreover, the imposition of liability in such circumstances could infringe the doctrine of the Separation of Powers. Legislation creating statutory bodies usually invests them with a wide discretion as to how these powers are to be exercised. A duty to act in every case would impose an unrealistic burden. That being so, it can be said that if Parliament did not see fit to impose a duty by statute, why should the courts do otherwise?[7]

Also, a statutory authority must make policy decisions about how to make the best use of its resources, and to hold it liable for failure to act may amount to a review of a decision to use its resources. Viewed from this perspective, this could amount to an intrusion by the private law of torts into the public domain of administrative law.[8]

The trend of previous decisions

Despite these policy considerations courts in the United Kingdom and in Australia have attempted to satisfy claims for compensation for damage incurred as a result of the non-feasance of a public authority in deserving cases. As a result, differing and changing tests identifying the touchstones of liability in such cases were formulated by Australian and UK courts resulting in considerable uncertainty. Consequently, this process has led this area of law to be criticised as *"unsatisfactory and unsettled..."*[9]

United Kingdom decisions have been strongly influenced by administrative law concepts. Thus, in *Anns v Merton London Borough Council*[10] the House of Lords had to decide whether a local authority's power to inspect buildings could give rise to tort liability for negligence when failure to inspect or a negligent inspection meant that a defect in the foundations went unnoticed.

The House of Lords held that the authority was under a duty to give proper consideration as to whether there should be an inspection or not. Further, once an inspection had been undertaken, a plaintiff complaining of negligence must prove that the action being taken was not within the limits of a bona fide discretion being exercised before s/he can rely on a common law duty of care.

However, a distinction between policy and operational decisions was accepted. A common law duty of care could only come into existence once one was outside the legitimate area of discretion and policy.

Thus, if in the exercise of a statutory power a public authority made a decision on grounds of public policy, the reasonableness of which the court considered it could not assess, and that decision was intra vires, no action for negligence could lie. But if the decision were ultra vires, an action for negligence would lie if the decision did not raise policy decisions, which the court could not adjudicate, and was in fact an operational decision.

An example of the application of this principle can be found in the Canadian case of *City of Kamloops v Nielsen*[11]. In that case the Council decided to exercise its discretion not to enforce an order requiring a builder to stop building work until he fulfilled a condition as to the foundations. One reason for this was because the building owner was an alderman and the builder's father. The decision not to enforce the order was ultra vires and a subsequent purchaser was awarded damages for the cost of repairing the house and for economic loss.

The increased scope for liability by an authority which was created by *Ann's Case* has been diminished by a reformulation by the House of Lords of the applicable test in *Stovin v Wise*.[12] In that case, Lord Hoffmann stated that when deciding whether an authority owed a duty of care for acts of non-feasance, a minimum pre-condition was, first, whether it would in the circumstances have been irrational not to have exercised a statutory power, so that there was in effect a public duty to act, and second, whether there were exceptional circumstances for holding that the policy of the statute required compensation to be paid to persons who incurred loss because the power was not exercised.[13]

In Australia, the High Court has in part followed the lead from *Ann's* and accepted the validity of the policy/operational distinction,[14] but some justices developed a further relevant criterion for the determination of liability namely the factor of reliance.

Mason J espoused the notion of "general reliance" which held sway in many cases,[15] but was finally rejected in *Pyrenees Shire Council v Day*[16]. This notion held that past practice or conduct by an authority may give rise to reasonable reliance by a plaintiff that the authority will take care to avoid injury to that plaintiff (e.g. in the case of an air traffic controller). However, in *Pyrenees* the majority regarded this notion as being an artificial legal fiction which displaced legislative intention as a criterion of liability.[17]

Although Brennan CJ in *Pyrenees* formulated a variation of the administrative law test adopted by the House of Lords in *Stovin*, namely that liability may lie for failure to exercise statutory powers in circumstances where it would be irrational not to have exercised the power, so that in effect there was a public law duty to act,[18] his view was not shared by other justices. Kirby J relied upon the three-stage formulation for negligence found in *Caparo*.[19] Consequently, after *Pyrenees* there was considerable uncertainty about the correct test to be applied before liability for non-feasance by an authority could be established

The High Court's decision in *Crimmins*

In this conceptually uncertain milieu the decision of the High Court in *Crimmins*[20] provides guidance. In that case, the respondent Stevedoring Finance Committee succeeded the Australian Stevedoring Industry Authority ("the Authority") which was established under the *Stevedoring Industry Act* 1956 (Cth) ("the Act") and was required to regulate stevedoring functions throughout Australia.

The statutory function of the Authority as expressed in s17 (1) of the Act included:

(a) *to regulate the performance of stevedoring operations;*

(i) *to regulate the conduct of waterside workers in and about... wharves and ships;*

(k) *to train, or arrange for the training of, persons in stevedoring operations;*

(l) *to investigate means of improving, and to encourage employers to introduce methods and practices that will improve, the expedition, safety and efficiency with which stevedoring operations are performed.*

(o) *encourage safe working in stevedoring operations and the use of articles and equipment including clothing, designed for the protection of workers engaged in stevedoring operations, and where necessary, to provide waterside workers with articles and equipment designed for that purpose.*

(p) *To obtain and publish information relating to the stevedoring industry;*

In order to fulfill these statutory functions, the Authority was given power to *"...make such orders, and do all such other things, as it sees fit."*[21] However, the legislation required that, except to the extent which the Authority considered to be essential for the proper performance of its regulatory function, limitations were not to be imposed upon employers with respect to the control of waterside workers by them.[22]

In regulating stevedoring operations, the Authority assigned workers for work in accordance with the needs of employers. The workers had no say in their placement for work. All workers were registered with the Authority and received their pay and other benefits from it. However, once assigned to an employer they were subject to the employer's directions and authority, and the Authority had no further control over such matters.

Between April 1961 and November 1965, the Plaintiff was a registered waterside worker at the Port of Melbourne. During that time he was assigned to work with stevedoring companies and unload, from time to time, asbestos cargo. As a result of inhaling asbestos fibres, he was diagnosed with mesothelioma in 1997, which caused his death in 1998. His executor maintained the action.

The plaintiff succeeded in establishing a breach of a duty of care when the matter was heard before Eames J of the Victorian Supreme Court and a jury returned a sizeable verdict in his favour. However, the defendant successfully appealed to the Court of Appeal.

The plaintiff took the matter to the High Court where his appeal was allowed by a majority of five to two. The Majority comprised Gleeson CJ, Gaudron, McHugh, Kirby, and Callinan JJ, and the minority Gummow and Hayne JJ.

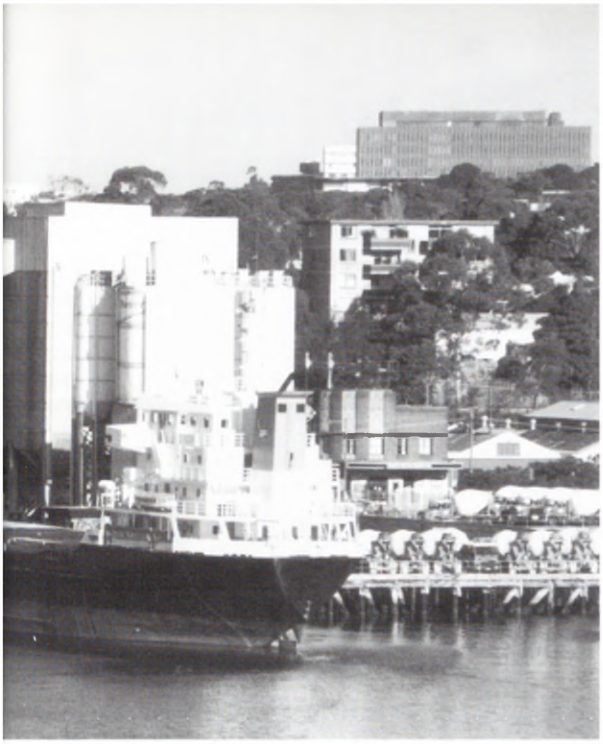
In the High Court, and at first instance, the plaintiff alleged that from 1956 to 1977, the Authority was under a continuing duty of care to exercise its powers, duties and functions to take reasonable care to avoid foreseeable risks of injury to his health while he was engaged in stevedoring operations in the Port of Melbourne.

"...one of the issues was whether the Authority owed a common law duty of care to the Plaintiff for acts of omission"

The allegations were wide enough to encompass a claim for the negligent exercise of statutory powers. However, the plaintiff's case was conducted on the basis that the Authority owed him a duty of affirmative action. The particulars of negligence pleaded various instances of failure to act. It was alleged that the Authority failed to disseminate information (encourage, warn, train or publish), that it failed to inspect, failed to prohibit, failed to provide equipment, and failed to make orders.

By virtue of these omissions, it was alleged that the Authority failed to discharge its statutory function of encouraging safe working in stevedoring operations.[23] Thus, one of the issues before the High Court was whether the Authority owed a common law duty of care to the Plaintiff for acts of omission, namely, a duty of care for non-feasance. The reasons of the majority indicate a reformulation of acceptable criteria for the determination of this issue.

Gaudron J stated that the correct analysis was to view the statutory powers as being exercised *"...in the milieu of the common law."*[24] She found that that



the plaintiff was vulnerable to injury by reason of the hazardous and casual nature of his employment, which precluded the development of any long-standing employer-employee relationship in which the plaintiff's health and welfare could be secured. She also noted that the Authority ought to have known from its own inspectors the frequency with which and the degree to which waterside workers were exposed to asbestos.

Her Honour concluded that by reason of these findings the Authority was subject to a duty *"...to take those steps, short of making binding orders, which, in the circumstances, a reasonable authority with its powers and resources would have taken to avoid a foreseeable injury as a result of exposure to asbestos..."*[25]

McHugh J, with whom Gleeson J agreed, formulated a number of tests for whether, in a novel case, a duty of care of affirmative action was owed by a statutory authority. These included the following principles:

1) *Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? If no, then there is no duty*
2) *By reason of the defendant's statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from risk of harm? If no, then there is no duty.*
3) *Was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard him or herself or those interests from harm? If no, then there is no duty.*
4) *Did the defendant know, or ought the defendant to have known of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, then there is no duty.*
5) *Would such a duty impose liability with respect to the defendant's exercise of "core policy making" or quasi-legislative functions? If yes, then there is no duty.*
6) *Are there any other supervening reasons in policy to deny the existence of a duty of care (e.g. the imposition of a duty is inconsistent with the statutory scheme, or the case is concerned with pure economic loss, and the applications of the principles in the field deny the existence of a duty?) If yes, then there is no duty.*[26]

McHugh J found that in the present case the criteria enumerated by him as to the existence of a duty of care applied and there were no policy considerations negating that conclusion. He was particularly compelled to this conclusion by the fact that the Authority directed the waterside workers where they had to work and that failure to obey such a direction would lead to disciplinary action and possibly deregistration.[27]

McHugh J acknowledged that the making of orders which the Act described as having "the force of law" (s20) indicated that these were legislative in nature and came within the *"core-policy"* exemption. However, he did not consider that this exhausted the Authority's powers. Although the Authority's powers were limited, nothing in the Act prohibited it from taking steps to eliminate, so far as reasonably practical, the risk of harm to waterside workers.

Kirby J, as in *Pyrenees*, adopted the three-stage test in *Caparo*.[28] He said that the questions to be asked to decide whether there was a duty of care were whether the damage to the plaintiff was foreseeable, whether the relationship between the plaintiff and the defendant was reasonably proximate, and whether it was just and equitable to impose a duty of care.

In this case, the forseeability test was satisfied because as early as 1960, the Authority was distributing literature concerning the dangers of inhalation of dust and of diseases caused by exposure to dust. There was sufficient proximity between the Authority and the plaintiff because, although it was not his employer, it had a multi-relationship with workers, which included inspection of loading and unloading of ships with safety in mind.

Although Kirby J took into account the existence of policy factors militating against the existence of a duty of care in this case, (including the fact that the Act recognized the primary duty of an employer to an individual worker, and financial strain to the Committee) he reached the view that countervailing considerations concerning the particular vulnerability of persons like the deceased plaintiff, the inability of the plaintiff to obtain access to specialised expertise and knowledge, and the resources available to the Authority as an agency of the Commonwealth to provide clothing and articles for the safety and protection of workers, were to be given greater weight. Consequently, His Honour decided that there were no policy factors, to negate the existence of a duty and therefore concluded that a duty of care existed in this case.

Callinan J concluded that the Authority was subject to a duty to take reasonable care for the plaintiff in the workplace because of evidence of control (such as rostering and re-rostering workers, deciding whether the work was properly performed and whether a worker should be disciplined) and identified the provisions of the Act which gave the Authority a right to control workers. He stated that although the Act gave power to the Authority to regulate the industry by legislation, the Authority was authorised to interfere in the working conditions of workers by designing and requiring appropriate safety measures. ▶

Future Directions

The reasons of the majority in *Crimmins* reveal different tests for liability. However, a multi-factorial approach requiring consideration of many different factors is evident. A statement of claim will have to be carefully pleaded to take into account the various factors considered important by the justices who formed the majority.

One consequence of the approach by the majority is that *Crimmins* has taken the law away from the administrative law model of the United Kingdom approach and the views of Brennan CJ in *Pyrenees*, and has swept away legal fictions such as the doctrine of general reliance. It has brought considerations of fairness and equity to play to a greater extent than in the United Kingdom. In adopting this approach the High Court has brought this area into line with its formulation of tests for determining duties of care in cases involving pure economic loss.[29]

Except for McHugh J, the justices do not deal with questions of constructive knowledge of potential harm to plaintiffs. This is likely to prove to be a matter of major importance because difficult problems of proof will probably beset a Plaintiff seeking to establish actual knowledge by the defendant authority that its acts or omissions could harm a Plaintiff.

If the views of McHugh J are applied with respect to the question of notice, the theory of constructive notice could only be relied on by a plaintiff if s/he can establish that the defendant authority had an obligation to seek out the requisite information, in all the circumstances. Thus, the plaintiff would have to establish a clear case if an argument on this issue is likely to succeed.

Also, the distinction between misfeasance and non-feasance is likely to continue to play an important role in proceedings brought against statutory authorities, because the Court in *Crimmins* accepted the validity of this distinction. Regrettably, this will open the door to technical and often artificial distinctions.

Not all cases which involve the failure to do something should be classified or treated as omission cases. Sometimes the omission may have occurred in the course of some activity so that it is more properly viewed as positive misfeasance. For example McHugh J in *Crimmins*[30] stated that in directing the waterside workers to places of work, the Authority was exercising its power to give directions in aid of its statutory powers and consequently owed a duty to those workers to exercise such powers with reasonable care. Thus failure to direct a worker to a place which provided a safe working environment could be construed as an act of misfeasance

The concept of "vulnerability" has emerged as a common theme in the majority judgments. As explained by McHugh J a duty of care is designed to protect a plaintiff who has no or little capacity to protect himself or herself. Consequently, it seems more likely that a duty of care will be spelt out where this factor is present.

One further consequence of *Crimmins* arises from the view of Gaudron J that any duty of care imposed on a statutory authority for the exercise or non-exercise of its powers or functions is confined to the taking of steps *"...that a reasonable authority with the same powers and resources would have taken in the circumstances."*[31]

One practical consequence of Gaudron J's formulation is that a plaintiff alleging a duty of care against an authority would be required to prove that it had the resources to take action to avoid the injury claimed to have been caused by the authority's negligence. Also, a defendant could rely upon its inability, by reason of insufficient resources, to comply with the alleged duty of care.

Although Gaudron J's views have not gained general acceptance, it may be that Her Honour's remarks will be cited in future cases.

One can surmise therefore that *Crimmins* will provide a source of debate in this area of law and in due course the High Court will again be asked to consider concepts which will assist in determining the existence of a duty of care for acts of non-feasance.

Footnotes:

1. (1941) AC 74
2. *Caledonian Collieries Ltd v Speirs* (1956-57) 97 CLR 202, 220; *Sutherland Shire Council v Heyman* (1984-85) 157 CLR 424, 436 (Gibbs CJ) 458 (Mason J) 479 (Brennan J)501 (Deane J); *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 391-2 (Gummow J); *Crimmins v Stevedoring Industry Finance Committee* (2000) 74 ALJR 1, 6 (Gaudron J)
3. *Nagle v Rottnest Island Authority* (1993) 177 CLR 423, 430
4. *Shaddock & Associates Pty Ltd v Parramatta City Council* (No 1) (1981) 150 CLR 225; *Welton v North Cornwall District Council* (1997) 1 WLR 570.
5. *Wyong Shire Council v Shirt* (1980) 146 CLR 40
6. *Shire of Sutherland* (supra) Mason J 460; *Pyrenees* (supra) 391-392 (Gummow J)
7. *East Suffolk Catchment board v Kent* (supra) at 103
8. *Crimmins v Stevedoring Industry Finance Authority* (1999) 74 ALJR 1, 42 per Kirby J who explains this consideration.
9. *Romeo Conservation Commission of the Northern Territory* (1998) 192 CLR 431,436
10. (1978) AC 728; (1977) 2 WLR 1024; see also *Dourest Yacht & Co LTD v Home Office* (1970) AC 1004.
11. (1984)10 D.L.R.(4th) 641
12. (1996) 3 AER 801
13. (supra) at 828
14. *Southland Shire Council v He-man* (1985) 157 CLR 424, Gibbs CJ (442), Mason J (469), Deane J (500)
15. *Parameter City Council v Lutz* (1988) 12 NSWLR 293; *Alec Finlayson PTA Ltd v Armidale City Council* (1994) 51 FCR 378; *Northern Territory v Deutscher Klub* (Darwin) Inc (1994) 84 LGERA 87; *Hicks v Lake Macquarie City Council* (No 2) (1994) 123 FLR 71, on appeal decided on different issues (1998) 192 CLR 330; *Romeo v Conservation Commission of Northern Territory* (supra)
16. (1997-8) 192 CLR 330.
17. Brennan CJ at 345, Gummow J at 387-388, Kirby J at 411-412
18. at 347
19. (1990) 2 AC 605, 617-618
20. (supra)
21. s18 of the Act.
22. s17(2) of the Act.
23. McHugh J at 14; s17(o) of the Act
24. (1999) 74 ALJR 1,at 7
25. at 11
26. at 19
27. at 21
28. at 60
29. *Perre v Apand* (1999) 73 ALJR 1190
30. (supra) at 13
31. at 11