High Court of Australia

Bropho v Western Australia [1990] HCA 24; (1990) 171 CLR 1 (20 June 1990)

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BROPHO v. WESTERN AUSTRALIA [1990] HCA 24; (1990) 171 CLR 1
F.C. 90/027

Statute

High Court of Australia
Mason C.J.(1), Brennan(2), Deane(1), Dawson(1), Toohey(1), Gaudron(1) and McHugh(1) JJ.

CATCHWORDS

Statute - Crown - Whether bound - Implication - Prohibition of destruction of aboriginal sites and objects - Operation upon Crown servants and agents - Aboriginal Heritage Act 1972 (W.A.), ss. 6, 10, 17, 18.

HEARING

1990, March 1, 2; June 20. 20:6:1990
APPEAL from the Supreme Court of Western Australia.

DECISION

MASON C.J., DEANE, DAWSON, TOOHEY, GAUDRON AND McHUGH JJ. The appellant, Robert **Bropho**, instituted proceedings in the Supreme Court of Western Australia against the respondents, the State of Western Australia and the Western Australian Development Corporation. His action was founded upon provisions of the Aboriginal Heritage Act 1972 (W.A..) ("the Act"). In it, he sought a declaration that certain land in Perth, which may conveniently be referred to as "the Swan Brewery Site", is "situated within an Aboriginal site or sites to which Section 5 (of the Act) applies" and an injunction restraining the respondents "from using or permitting to be used" the Swan Brewery Site or any land within the alleged Aboriginal site or sites "for the erection of walls or buildings or digging or tunnelling or in any way altering the Aboriginal site". The respondents applied for orders striking out the statement of claim and dismissing the action. Master White made such orders on the ground that the provisions of the Act did not bind the Crown. The Full Supreme Court (Malcolm C.J. and Brinsden J.; Wallace J. dissenting) dismissed an appeal from the Master's orders. The appeal to this Court is from the judgment and orders of the Full Court.

2. The assumed facts for the purposes of the proceedings to strike out, and of this appeal, are the facts

alleged in the statement of claim. They may be shortly stated. Mr. **Bropho** is a person of Aboriginal descent for whom the alleged Aboriginal sites are "sacred, ritual and/or ceremonial sites of importance and special significance within the meaning given to those terms" in the Act. The respondent Western Australian Development Corporation ("the Corporation") is a corporation created by the Western Australian Development Corporation Act 1983 (W.A.) with the broad general object or function of promoting "the development of economic activity in Western Australia" by a variety of means (s.9). Its powers are wide. They include power to improve, develop or alter property (s.10(2)(g)) and power "to form or establish, or participate in the formation or establishment of, any business undertaking" (s.10(2)(h)). Section 4(3) expressly provides that the Corporation is an agent of the Crown in right of the State and, subject to a presently irrelevant qualification, enjoys the status, immunities and privileges of the Crown.

3. The Swan Brewery Site is within an "area coloured pink" on a map which was annexed to the writ of summons filed in the action. Within that coloured area:

"are Aboriginal sites including two Aboriginal sites named Goonininup also known as Godininup and the Waugal Dreaming Track also known as Gooniyalup which are registered pursuant to the Aboriginal Heritage Act and numbered S2126 and S2204 respectively. Goonininup occupies and is wholly contained in the area coloured pink. The Waugal Dreaming Track occupies the whole of the area coloured pink and extends beyond it along the Swan River foreshore from Spring Street Perth to Saint George's College Crawley" (statement of claim, par.2).

agency of" the respondent Corporation, it has commenced and threatens to continue "to carry out extensive tunnelling and excavation and (to) erect buildings roadways and a car park upon the site and (to) alter the lie of the land". The statement of claim alleges (par.5) that all those actual or threatened activities are "contrary to Section 17" of the Act in that they "constitute excavation, damage and/or alteration to an Aboriginal site or sites without the authority of the Trustees of the Museum constituted under the (W.A.) Museum Act 1969 or the consent of the responsible Minister following ... a recommendation of the Trustees to the Minister pursuant to Section 18" of the Act. Affidavit evidence, which was led before the Master and not disputed, established that the land area of Western Australia consists of ninety-three per cent Crown land and seven per cent private freehold land. Of the ninety-three per cent which is Crown land, forty-three per cent is the subject of Crown leases or licences while the remaining fifty per cent is what was described as "Vacant Crown land".

4. The general legislative purpose which the Act was intended to achieve is summarized in its long title as being "to make provision for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants, or associated therewith, and for other purposes incidental thereto". Section 4 of the Act defines an "Aboriginal site" as meaning a place to which the Act applies by operation of s.5. Section 5 provides that the Act "applies to", among other places --

> "(a) any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;
> (b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of

> Aboriginal descent;
> (c) any place which, in the opinion of the Trustees, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State".

By s.6, the Act applies "to all objects, ... irrespective of where found or situated in the State, which are or have been of sacred, ritual or ceremonial significance to persons of Aboriginal descent, or which are or were used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people past or present" (emphasis added). Sections 7 and 8 respectively preserve certain traditional rights and interests and provide for the availability of places or objects for traditional use. Section 11 provides that, subject to the Minister, the responsibility for the administration of the Act is vested in the Trustees appointed under the provisions of the Museum Act 1969 (W.A.). Section 9 authorizes delegation by the Trustees of powers and duties in relation to a particular place or object to a representative body of persons of Aboriginal descent with a special traditional and current interest in that place or object.

5. Section 10(1) of the Act reads as follows:

> "It is the duty of the Minister to ensure that so far as is reasonably practicable all places in Western Australia that are of traditional or current sacred, ritual or ceremonial significance to persons of Aboriginal descent should be recorded on behalf of the community, and their relative importance evaluated so that the resources available from time to time for the preservation and protection of such places may be co-ordinated and made effective" (emphasis added).

Section 14 provides that, except as required by the provisions of the Act, compensation is not payable to any person by reason of the fact that the property in, and the right to possession, occupation or use of, any place or object is vested in the Museum on behalf of the Crown.

6. Part IV of the Act is headed "Protection of Aboriginal Sites". It commences with s.15 which requires any person who has knowledge of the existence of anything in the nature of Aboriginal burial grounds, symbols or objects of sacred, ritual or ceremonial significance, or of any other place or thing to which the Act applies, to report the existence thereof to the Trustees. Section 16 provides that, subject to s.18, the right to excavate or to remove anything from an Aboriginal site is reserved to the Trustees. The Trustees may authorize the entry upon and excavation of an Aboriginal site and the examination or removal of any thing on or under the site in such manner and subject to such conditions as they may direct. Section 17 is the critical section for the purposes of the present case. It provides:

> "A person who --
> (a) excavates, destroys, damages, conceals or in any way alters any Aboriginal site; or
> (b) in any way alters, damages, removes, destroys, conceals, or who deals with in a manner not sanctioned by relevant custom, or assumes the possession, custody or control of, any object on

> or under an Aboriginal site,
> commits an offence unless he is acting with the
> authorization of the Trustees under section 16 or the
> consent of the Minister under section 18."

Section 18(1) and (2) provide:

> "(1) For the purposes of this section, the expression
> 'the owner of any land' includes a lessee from the Crown,
> and the holder of any mining tenement or mining privilege,
> or of any right or privilege under the Petroleum Act 1967,
> in relation to the land.
> (2) Where the owner of any land gives to the Trustees
> notice in writing that he requires to use the land for a
> purpose which, unless the Minister gives his consent under
> this section, would be likely to result in a breach of
> section 17 in respect of any Aboriginal site that might
> be on the land, the Trustees shall, as soon as they are
> reasonably able, form an opinion as to whether there is any
> Aboriginal site on the land, evaluate the importance and
> significance of any such site, and submit the notice to the
> Minister together with their recommendation in writing as to
> whether or not the Minister should consent to the use of the
> land for that purpose, and, where applicable, the extent to
> which and the conditions upon which his consent should be
> given."

Section 18(5) and (6) provide for appeal by an aggrieved owner from a decision of the Minister.

7. Section 19 of the Act establishes the procedure by which an Aboriginal site recommended to the Minister may be declared a protected area. Section 19(6) is in the following terms:

> "An Aboriginal site may be declared to be a protected
> area whether or not it is on land that is in the ownership
> or possession of any person or is reserved for any public
> purpose."

It is common ground that there is no declaration of an Aboriginal site as a protected area which is of relevance for the purposes of the present appeal.

8. There has been no suggestion in the present case that it is beyond the constitutional competence of the Western Australian Parliament to subject the Crown in right of that State to the relevant provisions of the Act. The basis upon which the learned Master and a majority of the Full Court held that those provisions did not apply to the activities of the respondents was the entrenched presumption that a statute does not bind the Crown. Obviously, the conduct which it is alleged that the respondents have commenced and threaten to continue must be carried out by individuals on their behalf. It is common ground that that conduct would, but for the claimed inapplicability to the Crown of the relevant statutory provisions, have contravened the provisions of s.17 of the Act. That being so, the only issue between the parties on this appeal is whether the provisions of s.17 apply either to the Crown or to instrumentalities or individuals acting on its behalf.

9. The rule that statutory provisions worded in general terms are to be construed as prima facie

inapplicable to the Crown was initially confined to provisions which would have derogated from traditional prerogative rights (see, e.g., Street, "The Effect of Statutes upon the Rights and Liabilities of the Crown", University of Toronto Law Journal, vol.7 (1948), 357; Hogg, Liability of the Crown, 2nd ed. (1989), at pp 202, 242-243) or, alternatively, was said to be subject to very broad exceptions in that it did not apply if the intention of the statute was to provide "for the public good", or "the advancement of religion and justice", or "to give a remedy against a wrong" or to prevent fraud or "tortious usurpation" (see, e.g., Sydney Harbour Trust Commissioners v. Ryan [1911] HCA 64; (1911) 13 CLR 358, at pp 365-366). It has, however, been clearly accepted in more recent cases in the Court that the rule is of general application (see, in particular, The Commonwealth v. Rhind [1966] HCA 83; (1966) 119 CLR 584, at p 598; Bradken Consolidated Ltd. v. Broken Hill Proprietary Co. Ltd. [1979] HCA 15; (1979) 145 CLR 107; China Ocean Shipping Co. v. South Australia [1979] HCA 57; (1979) 145 CLR 172; and see also, as to the United Kingdom, Lord Advocate v. Dumbarton District Council (1989) 3 WLR 1346, at p 1366; as to the United States of America, Corpus Juris Secundum, vol.82, p 554; and cf., as to Canada, Interpretation Act, RSC 1985, c.I-21, s.17 and the discussion in the judgment of Stephen J. in the China Ocean Shipping Co. Case, at pp 216-221). In Madras Electric Supply Corporation Ltd. v. Boarland (1955) AC 667, at p 694, Lord Keith of Avonholm expressed the view that the rule is not "just a rule of statutory construction" but reflects a prerogative power of the Crown to override "words in a statute capable of applying" to it. This notion of a prerogative to override the provisions of a duly enacted statute was rejected by Lord MacDermott (at p 685) and Lord Reid (at pp 687-688) in Madras and, as Lord Reid intimated (at p 687), is quite contrary to the whole course of British constitutional development since 1688 (see, also, A. v. Hayden [1984] HCA 67; (1984) 156 CLR 532, at pp 580-581, and Lord Advocate v. Dumbarton District Council, at pp 1357-1360. It certainly has no place in the law of this country where it has been consistently accepted that the rule that legislative provisions worded in general terms are prima facie inapplicable to the Crown is a rule of statutory construction which identifies a presumption to be applied in ascertaining the relevant legislative intent (see, e.g., R. v. Sutton [1908] HCA 26; (1908) 5 CLR 789, at pp 795, 800, 805-806; Minister for Works (W.A.) v. Gulson [1944] HCA 27; (1944) 69 CLR 338, at pp 347 and 359). Being a judge-made rule of construction, the presumption which the rule embodies may be supplemented, modified or reversed by legislative provision (see, e.g., Acts Interpretation Act 1931 (Tas.), s.6(6); The Acts Interpretation Act of 1954 (Q.), s.13; Acts Interpretation Act 1924 (N.Z.), s.5(k); Interpretation Act, RSBC 1979 (British Columbia), c.206, s.14 ; Interpretation Act 1981 (Prince Edward Island), c.18, s.14). It is not suggested, however, that there is any such legislative provision applicable in the present case.

10. 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 presumption is not, however, confined to the Sovereign herself but extends to confer prima facie immunity in relation to the activities of governmental instrumentalities or agents acting in the course of their functions or duties as such. As Diplock L.J. commented in British Broadcasting Corporation v. Johns (1965) Ch 32, at pp 78-79:

> "The modern rule of construction of statutes is that the Crown, which today personifies the executive government of the country and is also a party to all legislation, is not bound by a statute which imposes obligations or restraints on persons or in respect of property unless the statute says so expressly or by necessary implication. ...
> (T)he executive functions of sovereignty are of necessity performed through the agency of persons other than the Queen herself. Such persons may be natural persons or, as has been increasingly the tendency over the last hundred years,

fictitious persons - corporations."

11. Again, the rule gives rise to no significant problem of principle to the extent that it expresses a bare presumption that the general words of a statutory provision do not extend to bind "servants or agents of the executive government ... in relation to acts which they do or property which they own or occupy exclusively in that capacity" (ibid., at p 81). The extension of the benefit of the rule to Crown or governmental instrumentalities or agents may, of itself, offend notions of parity. That consideration apart, there are some grounds for arguing that a presumption that, in the absence of a contrary intention, general words in a statutory provision either do or do not include such instrumentalities and agents is desirable, both in the interests of brevity of legislation and as an aid to statutory construction. Be that as it may, the consistent recognition of such a presumption has undoubtedly created a firm factual foundation for it.

12. The problem of principle in relation to the rule lies in judicial statements of its content and operation which have tended to discount the significance of its character as an aid to statutory construction and to treat it as if it were an inflexible principle which, in the absence of express reference to the Crown, precludes a statute from binding the Crown unless a test of "necessary implication", which "is not easily satisfied", is applied and satisfied (see, e.g., Brisbane City Council v. Groups Projects Pty. Ltd. [1979] HCA 54; (1979) 145 CLR 143, at p 167; Province of Bombay v. Municipal Corporation of Bombay (1947) AC 58, at p 61). It is true that the phrase "necessary implication" has often been used in this context in the flexible and non-technical sense of requiring little more than that an intention to bind the Crown can be discerned when the words of the statute are construed in the general context of the subject matter, disclosed policy and mischief to be redressed (see, e.g., Roberts v. Ahern [1904] HCA 17; (1904) 1 CLR 406, at p 418; Minister for Works (W.A.) v. Gulson, at pp 358, 367). That use of the phrase "necessary implication" does not, however, conform with the weight of more recent authority which has given the phrase, as used in this context, the character of a formularized test. Thus, it has been authoritatively stated that "necessary implication" means that it "must be manifest, from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound" (see, e.g., Brisbane City Council, at p 167; Province of Bombay, at p 61; Premchand Nathu and Co. Ltd. v. Land Officer (1963) AC 177, at pp 188-189; China Ocean Shipping Co., at pp 199, 221, 240). In determining whether the test of "manifest from the very terms of the statute" is satisfied, it is permissible to take account of the statute's apparent purpose. Even there, however, an eye of the needle test has been applied: it must be possible to affirm "that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound" (Province of Bombay, at p 63, emphasis added; and see, also, Brisbane City Council, at p 169; China Ocean Shipping Co., at p 200). That last-mentioned test is obviously a very stringent one which is likely to be satisfied only in the case of a statute dealing with a special subject which, of its nature, necessarily involves the Crown (e.g. a statute dealing with proceedings for excess of governmental power: cf. Alberta Government Telephones v. Canadian Radio-television and Telecommunications (1989) 61 DLR (4th) 193, at p 233).

13. One can point to other "rules of construction" which require clear and unambiguous words before a statutory provision will be construed as displaying a legislative intent to achieve a particular result. Examples of such "rules" are those relating to the construction of a statute which would abolish or modify fundamental common law principles or rights (see, e.g., Benson v. Northern Ireland Road Transport Board (1942) AC 520, at pp 526-527), which would operate retrospectively (see, e.g., Maxwell v. Murphy [1957] HCA 7; (1957) 96 CLR 261, at p 267), which would deprive a superior court of power to prevent an unauthorized assumption of jurisdiction (see, e.g., Magrath v. Goldsbrough, Mort and Co. Ltd. [1932] HCA 10; (1932) 47 CLR 121, at p 134) or which would take away property without compensation (Attorney-General v. De Keyser's Royal Hotel [1920] UKHL 1;

(1920) AC 508). The rationale of all such rules lies in an assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear. Thus, the rationale of the presumption against the modification or abolition of fundamental rights or principles is to be found in the assumption that it is "in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used" (Potter v. Minahan (1908) [1908] HCA 63; 7 CLR 277, at p 304, and see, also, Ex parte Walsh and Johnson; In re Yates [1925] HCA 53; (1925) 37 CLR 36, at p 93). If such an assumption be shown to be or to have become ill-founded, the foundation upon which the particular presumption rests will necessarily be weakened or removed. Thus, if what was previously accepted as a fundamental principle or fundamental right ceases to be so regarded, the presumption that the legislature would not have intended to depart from that principle or to abolish or modify that right will necessarily be undermined and may well disappear.

14. For so long as "the Crown" encompassed little more than the Sovereign, his or her direct representatives and the basic organs of government, there may well have been convincing reasons for an assumption that a legislative intent that general statutory provisions should bind the Crown and those who represent it would be either stated in express terms or made "manifest from the very terms of the statute". The basis of an assumption to that effect lay in a mixture of considerations: regard for the dignity and majesty of the Crown; concern to ensure that any proposed statutory derogation from the authority of the Crown was made plain in the legislative provisions submitted for the royal assent; and, the general proposition that, since laws are made by rulers for subjects, a general description of those bound by a statute is not to be read as including the Crown (see The Attorney-General v. Donaldson (1842) 10 M and W 117, at pp 123-124 [1842] EngR 747; (152 ER 406, at pp 408-409); British Broadcasting Corporation v. Johns, at p 78). Thus, Lord Campbell C.J. could, in Moore v. Smith (1859) 5 Jur NS 892, at p 893, speak of the rule of construction as:

> "... a sacred maxim that the Crown is not bound by an act of Parliament, unless it is quite clear, from the language employed, that the Legislature contemplated including the Crown, and her Majesty, in giving her royal assent, assented that the Crown should be bound, and was fully aware that she was giving her assent to be subject to the provisions of the statute."

15. Whatever force such considerations may continue to have in relation to legislative provisions which would deprive the Crown "of any part of (the) ancient prerogative, or of those rights which are ... essential to (the) regal capacity" (see per Griffith C.J., Sydney Harbour Trust Commissioners v. Ryan, at p 365), they would seem to have little relevance, at least in this country, to the question whether a legislative provision worded in general terms should be read down so that it is inapplicable to the activities of any of the employees of the myriad of governmental commercial and industrial instrumentalities covered by the shield of the Crown. So to say is not to assert the possibility of drawing a clear and fixed distinction between functions which are properly or essentially governmental and those which are not (cf. per Windeyer J., Ex parte Professional Engineers' Association [1959] HCA 47; (1959) 107 CLR 208, at p 275). It is simply to point to the fact that the historical considerations which gave rise to a presumption that the legislature would not have intended that a statute bind the Crown are largely inapplicable to conditions in this country where the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour and where it is a commonplace for governmental commercial, industrial and developmental instrumentalities and their servants and agents, which are covered by the shield of the

Crown either by reason of their character as such or by reason of specific statutory provision to that effect, to compete and have commercial dealings on the same basis as private enterprise. It is in that contemporary context that the question must be asked whether it is possible to justify the preservation in our law of an inflexible rule which, in the absence of express reference, requires a reading down of the general words of a statute to exclude the Crown (and its instrumentalities and agents) unless it is "manifest from the very terms of the statute" that it was the legislative intent that the Crown should be bound and which, in ascertaining whether such a legislative intent is manifest, allows account to be taken of the purpose of the statute only if it is possible to affirm that that purpose must be "wholly frustrated" unless the Crown is bound.

16. There seems to us to be but one real argument of substance favouring the preservation of such an inflexible and stringent rule. It lies in the weight of authority. There are undoubtedly decisions and statements of the highest authority which, while falling short of endorsing Lord Campbell C.J.'s description of such a rule as a sacred one, support its recognition as a fundamental and rigid rule of construction. On the other hand, there has been a growing tendency to question the appropriateness of the rule to modern circumstances (see, e.g., State of West Bengal v. Corporation of Calcutta (1967) AIR (SC) 997, at pp 997-998) and to confine its applicability either by limitation of its scope (e.g. to statutory provisions which would affect the Crown "to its prejudice": see Madras Electric Supply Corporation Ltd., at p 685, but cf. Lord Advocate v. Dumbarton District Council, at p 1366) or by engrafted exceptions from or qualifications to its operation (see, e.g., Alberta Government Telephones v. Canadian Radio-television and Telecommunications, at pp 235ff.). That tendency is not surprising in the context of the range of modern governmental activities and of recent developments in the approach to statutory construction. Indeed, the contemporary approach to statutory construction, with its added emphasis on legislative purpose (see, e.g., Kingston v. Keprose Pty. Ltd. (1987) 11 NSWLR 404, at pp 421-424) and permitted reference to a range of extrinsic materials for the ascertainment of that purpose (see, e.g., Acts Interpretation Act 1901 (Cth), s.15AB; Interpretation Act 1984 (W.A.), s.19; Hoare v. The Queen [1989] HCA 33; (1989) 167 CLR 348, at p 360), has added an element of anachronism to a judicial confinement of the permissible basis for discerning a legislative intent that the Crown be bound to what is "manifest from the very terms of the statute" (cf. Cross, Statutory Interpretation, 2nd ed. (1987), p 187). On the other hand, there is considerable superficial appeal in the argument that the effect of past recognition of the rule is that it can be assumed that the legislature would ordinarily have proceeded on the basis that legislation would be construed conformably with the rule and that, accordingly, any intention to bind the Crown or any of its instrumentalities or agents would be made manifest by express words or by "necessary implication" in the sense explained. Close examination reveals however that that argument is unconvincing when advanced as the foundation of the rule in a stringent and unqualified form. The reason why that is so is that the expansion of the identity and the activities of governmental instrumentalities and agents and the operation of statutory provisions subjecting such instrumentalities and agents to the effect of general legislative provisions defining the obligations of subjects (see, e.g., Judiciary Act 1903 (Cth), s.64) have made it inevitable that there are not infrequent occasions where it is the legislative intent to bind all persons indifferently but where the legislature has not adverted to the possible need to single out the Crown or those acting on its behalf for distinct mention. In such cases, the existence of the rule is likely to divert attention from the need to formulate legislative intent rather than found an accurate assumption of a legislative intent that general words are not intended to bind the Crown and its instrumentalities or agents. The various Criminal Codes and general criminal law statutes, which contain no express general provision to the effect that they apply to servants of the Crown acting in the course of their duties as such, provide obvious examples of such legislative provisions. It could scarcely be said to be "manifest from the very terms" of those Codes or statutes that it was the legislative intent that they would bind employees and agents of the Crown or that the inapplicability of their provisions to such persons would wholly frustrate their purpose. It is, however, clear that it simply would not occur to any legislature of this country that a failure to indicate by express words or necessary implication that the

provisions of a Criminal Code or general criminal statute were applicable to servants of the Crown in the course of their duties as such would result in a situation where Crown servants were placed beyond the reach of the ordinary criminal law in so far as they were acting with the authority of the Crown (see, generally, A. v. Hayden; Olmstead v. United States [1928] USSC 133; (1928) 277 US 438, at p 485).

17. Once it is recognized that the rule does not, of itself, provide an impregnable foundation for its own observance, there can remain no basis in principle for unqualified insistence upon the rule as an inflexible one, with the stringent implications which recent cases have accorded it. In other words, once it is accepted that a legislative intention to bind the Crown may be disclosed notwithstanding that it could not be said that that intention was "manifest from the very terms" of the statute or that the purpose of the statute would otherwise be "wholly frustrated", fundamental principle precludes confinement of the general words which the legislature has used in a way which will defeat that intention. 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. If such a legislative intent does appear from the provisions of a statute when so construed, it must necessarily prevail over any judge-made rule of statutory construction including the rule relating to statutes binding the Crown. Indeed, even if such a rule of statutory construction had been laid down in completely unqualified and mandatory terms by legislative provision, it would necessarily give way to the provisions of a subsequent enactment which, notwithstanding the earlier provision, disclosed a contrary legislative intent since the subsequent enactment would represent a pro tanto repeal or amendment of the earlier provision.

18. It follows from what has been said above that considerations of principle preclude recognition of an inflexible rule that a statute is not to be construed as binding the Crown or Crown instrumentalities or agents unless it manifests a legislative intent so to do either by express words or by "necessary implication" in the limited and stringent sense explained above. If such a legislative intent appears when the relevant legislative provision is construed in a context which includes the presumption against the Crown and its instrumentalities or agents being so bound, that legislative intent must, as a matter of principle, prevail. That being so, earlier judicial statements to the effect that it must be manifest from the very terms of the statute itself that it was the legislative intent that the general words of a statute should bind the Crown, or that it must be apparent that the purposes of the statute would be wholly frustrated unless the Crown were bound, should be read as applying to the context of the particular statutory provisions involved in the cases in which they were made. Such statements should no longer be seen as precluding the identification of such a legislative intent in other circumstances or as warranting the overriding of a legislative intent which can be discerned in the provisions of a statute when construed in context.

19. The effect of the foregoing is not to overturn the settled construction of particular existing legislation. Nor is it to reverse or abolish the presumption that the general words of a statute do not bind the Crown or its instrumentalities or agents. It is simply to recognize that a stringent and rigid test for determining whether the general words of a statute should not be read down so as to exclude the Crown is unacceptable. In that regard, it should be remembered that the view that the rule of construction is not "inflexible, but is merely a presumption in favour of a particular meaning" was supported by statements of authority in this country at the time when the Province of Bombay Case was decided by the Privy Council (see, e.g., Minister for Works (W.A.) v. Gulson, at p 358).

20. On the other hand, it must be acknowledged that, in the period since the Province of Bombay Case, the tests of "manifest from the very terms of the statute" and "purposes of the statute being otherwise wholly frustrated" came to be established as decisive of the question whether, in the absence of express reference, the general words of a statute bind the Crown. That being so, it may be necessary, in construing a legislative provision enacted before the publication of the decision in the

present case, to take account of the fact that those tests were seen as of general application at the time when the particular provision was enacted. If, however, a legislative intent that the Crown be bound is apparent notwithstanding that those tests are not satisfied, that legislative intent must prevail.

21. In the case of legislative provisions enacted subsequent to this decision, the strength of the presumption that the Crown is not bound by the general words of statutory provisions will depend upon the circumstances, including the content and purpose of the particular provision and the identity of the entity in respect of which the question of the applicability of the provision arises. If, for example, the question in issue is whether the general words of a statute should be construed in a way which would make the Sovereign herself or himself in the right of the Commonwealth or of a State liable to prosecution and conviction for a criminal offence, the presumption against a legislative intent to that effect would be extraordinarily strong (cf. Canadian Broadcasting Corporation v. Attorney-General for Ontario (1959) SCR 188, at pp 204-205). On the other hand, if the question in issue is of the kind involved in the present case, namely, whether the employees of a governmental corporation engaged in commercial and developmental activities are bound by general provisions designed to safeguard places or objects whose preservation is of vital significance to a particular section of the community, the presumption against the applicability of general words to bind such employees will represent little more than the starting point of the ascertainment of the relevant legislative intent. Implicit in that is acceptance of the propositions that, notwithstanding the absence of express words, 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 in that it may, for example, not apply directly to the Sovereign herself or to a Crown instrumentality itself as distinct from employees or agents. Always, the ultimate questions must be 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.

22. In accordance with the then state of authority, the Full Court of the Supreme Court in the present case approached the question whether the provisions of s.17 of the Act bound the Crown on the basis that it must be answered in the negative unless it was apparent that the purposes of the Act would otherwise be wholly frustrated. As the dissenting judgment of Wallace J. demonstrates, it is arguable that even that stringent test was satisfied. It is, however, unnecessary that we pursue that question. In view of what has been said above, it suffices to say that, regardless of whether that precise test be satisfied, there can be discerned in the Act a clear legislative intent that the general words of s.17 should apply to employees and agents of governmental instrumentalities such as the Corporation in the course of their duties as such. We turn to explain why that is so.

23. There is no difficulty in discerning in the provisions of the Act a legislative intent that those provisions apply generally to Crown land and to objects on such land. The duty of the Minister to ensure that "all places in Western Australia" that are of Aboriginal significance be recorded was clearly intended to extend to all land, regardless of its ownership. Section 6 of the Act makes explicit the legislative intent that the Act applies to all objects "irrespective of where found or situated in the State". Section 18(1) plainly proceeds on the basis that the Act applies to Crown land in that it provides that, for the purposes of that section, the expression "the owner of any land" includes a lessee from the Crown in a context where there would be no point in a provision to that effect unless the Act applied to Crown land since the operation of s.18 is to permit the Minister's consent to be obtained to acts which would otherwise contravene s.17. Indeed, in a context where ninety-three per cent of Western Australian land is Crown land and approximately fifty per cent of Western Australian land is what is described as "Vacant Crown land", the Act would be extraordinarily ineffective to achieve its stated purpose of preserving Western Australia's Aboriginal sites and objects if it applied only in respect of the comparatively small proportion of the State which is not Crown land.

24. In the context of the clear applicability of the provisions of the Act to Crown land, the conclusion that it was the legislative intent that the general words of s.17 should apply indifferently to natural persons in Western Australia, including government employees, is all but inevitable. True it is that there is a presumption that general words do not bind the Crown and that one must pay due regard to the perception at the time s.17 was enacted that that presumption would only be rebutted by satisfaction of the "manifest from the very terms of the statute" or "otherwise wholly frustrated" tests. Nonetheless, and even assuming that those tests be not satisfied in the present case, consideration of the subject matter and disclosed policy and purpose of the Act seems to us to make it apparent that it was not the legislative intent that the activities of government employees, be they bulldozer drivers, demolition workers or dynamiters, acting in the course of their duties, should be excluded from s.17's prohibition of destroying or damaging Aboriginal sites or objects without the authorization of the Trustees or the consent of the Minister. Construed in context, the general words of the provisions of s.17 disclose a clear legislative intent that they not be read down so as to be inapplicable to government employees in the course of their duties as such. That being so, a government employee who engages in conduct of the proscribed kind will be guilty of an offence against the section.

25. It is unnecessary, for the purposes of the present appeal, to consider whether the provisions of s.17 of the Act are directly applicable to the Corporation in the sense that the Corporation is itself also liable to prosecution and conviction for an offence against the section committed by its employees or agents in the course of their duties as such. Once the conclusion is reached that the provisions of s.17 are applicable to employees of the Corporation in the course of their duties, it is apparent that the Corporation has no power to authorize its employees or others to carry out activities of the type proscribed by the section. Nor has the Crown in right of the State of Western Australia any such power. That being so, the appellant is entitled, if the facts alleged in the statement of claim are established on the hearing as the only relevant facts, to the declaratory and injunctive relief which he seeks against the respondents.

26. The appeal should be allowed. The orders of the Full Court of Western Australia should be set aside and, in lieu thereof, it should be ordered that the appeal to that Court be allowed and that the orders of the Master striking out the appellant's statement of claim and dismissing his action should be set aside. The respondents should pay the appellant's costs of the proceedings before the Master and of the appeals to the Full Court and to this Court.

BRENNAN J. I should begin by stating what I understand by the question whether the Crown is bound by the provisions of s.17 of the Aboriginal Heritage Act 1972-1987 (W.A.) ("the Act"). Only a natural person can be a principal offender of an offence created by s.17 which, relevantly, prohibits a person from excavating, destroying, damaging, concealing or in any way altering any Aboriginal site. More precisely, to adopt the language of s.7(a) of The Criminal Code of Western Australia, only a natural person can be a "person who actually does the act or makes the omission which constitutes the offence". Clearly s.17 of the Act and s.7(a) of the Code do not purport to impose criminal liability on the Crown as a principal offender: the provisions, whether singly or in combination, simply do not apply to the Crown. In this respect, s.17 is to be distinguished from s.18 of the Re-establishment and Employment Act 1945 (Cth) which was considered in Cain v. Doyle [1946] HCA 38; (1946) 72 CLR 409. Under that statute, only an employer could be the principal offender and the question was whether the Crown, as the employer of a protected person, could be a principal offender of the offence of terminating the employment of a protected person. The view was taken that the defendant in that case, a servant of the Crown, could not be convicted as an aider or abettor unless the Crown were guilty of an offence. It was held that the principle that the Crown is not liable to be sued criminally for a wrong had not been displaced by the general words of the statute creating the offence and that there is "the strongest presumption against attaching to a statutory provision a meaning which would amount to an attempt to impose upon the Crown a liability of a criminal nature": per Dixon J. at p 424.

In this case, if it were possible for the Crown to be a party to an offence under s.17, it could only be as a secondary party made liable under s.7(b), (c) or (d) of The Criminal Code for an offence actually committed by its servant or agent. But pars (b), (c) and (d) of s.7, which are part of a provision codifying the law relating to parties to criminal offences, are not expressed, and cannot be taken to intend, to impose on the Crown criminal liability for an offence actually committed by a servant or agent. Moreover, it is beyond the power of the Crown to authorize a servant or agent to commit an offence and any attempt to confer authority to do so in fact is void in law. As Griffith C.J. said in Clough v. Leahy [1904] HCA 38; (1904) 2 CLR 139, at pp 155-156:

> "If an act is unlawful - forbidden by law - a person who does it can claim no protection by saying that he acted under the authority of the Crown."

See A. v. Hayden [1984] HCA 67; (1984) 156 CLR 532, at pp 580-582. Keeping in mind that there is no criminal liability imposed on the Crown by s.17, and no power in the Crown to dispense its servants or agents from criminal liability, the meaning of the proposition that s.17 does not bind the Crown can be perceived. In the present context, the proposition does not mean that servants or agents of the Crown acting within the scope of the authority given by the Crown are exempt from the prohibitions contained in s.17; those prohibitions do not extend to conduct in which servants or agents of the Crown engage when acting within the scope of that authority. The proposition, if it applies, does not exempt persons from criminal liability: it excludes conduct from the scope of a prohibition which is expressed in general terms.

2. In the present context, the presumption is not calculated to avoid the imposition on the Crown of any liability or duty which the statute seeks to impose on the public generally; it is calculated to remove activities of the servants and agents of the Crown - that is, of the Executive Government - from the operation of a criminal law of general application.

3. To adopt in such a context a stringent formulation of the presumption (such as that found in Brisbane City Council v. Group Projects Pty. Ltd. [1979] HCA 54; (1979) 145 CLR 143, at pp 167, 169, and in Province of Bombay v. Municipal Corporation of Bombay (1947) AC 58, at pp 61,63) would be to confer on the activities of the Executive Government an extremely wide exemption from the operation of the general criminal law. It can be conceded that Parliament must have intended that the Executive Government should be exempt from some provisions of the general criminal law, but Parliament can hardly have intended to exempt all activity engaged in on the Government's authority from the general criminal law unless the stringent conditions referred to in the Brisbane City Council and Bombay cases are satisfied. Historically, the courts distinguished between some areas of Crown activity which have and some which have not been immune from affection by statutory provisions of general application: see Sydney Harbour Trust Commissioners v. Ryan [1911] HCA 64; (1911) 13 CLR 358, per Griffith C.J. at p 365. True it is, as Professor Friedmann pointed out ("Public Welfare Offences", (1950) 13 Modern Law Review 24, at pp 31,32), that the language in which the distinction was expressed in earlier times is not satisfactory for contemporary application, but I would respectfully agree with the majority that it is appropriate to determine the scope of the exemption of Crown activity by reference to all the circumstances which might legitimately reveal the actual or imputed intention of the legislature or assist in imputing to the legislature an intention which it might reasonably have formed had the legislature adverted to the question. Thus the presumption cannot be put any higher than this: that the Crown is not bound by statute unless a contrary intention can be discerned from all the relevant circumstances. As the Court must determine whether the legislature intended (or would have intended had the question been addressed) that the statute should affect the activities of the Executive Government, the circumstances which properly relate to that question must be considered. Those circumstances include the terms of the statute, its subject matter, the nature of the mischief to be redressed, the general purpose and effect of the statute, and the nature of the

activities of the Executive Government which would be affected if the Crown is bound.

4. This was the approach taken by this Court in Roberts v. Ahern [1904] HCA 17; (1904) 1 CLR 406 where a defendant, charged with the offence that he had carted away nightsoil from a post office "without a licence from and without having given such security as is required by the local authority", successfully raised the plea that he was acting as a servant of a contractor with the Crown. The Court pointed to the numerous institutions under the control of the Executive Government and the unlikelihood "that the legislature should have intended to subject the Executive Government to the uncontrolled discretion of a local authority with regard to the sanitary arrangements of such institutions": p 418.

5. In the present case, the legislature can hardly be taken to have intended to exempt the management of Crown lands throughout the State from the regime of protection prescribed by s.17. To read down s.17 to exclude Crown lands would eviscerate the Act, for 93% of the State is Crown land and 50% of the State is vacant Crown land. Apart from the management of Crown lands, there is no activity of the Executive Government which might be affected by the operation of s.17 of such a kind as to warrant the conclusion that Parliament intended that the provisions of s.17 should not apply to it.

6. I would add a brief mention as to the effect of the reasons for judgment in this case upon the interpretation of statutes earlier enacted. In my respectful opinion, it would be a legal fiction to impute to the legislatures of this country or to their parliamentary counsel an intention fluctuating with the changing formulations of the presumption by the courts of this country and of England. The question whether the Crown is bound by a statute arises ordinarily in reference to statutes enacted without conscious animadversion to the strength of the presumption and, if it be right to look at all the relevant circumstances to determine what the intention of the legislature was or to determine what intention ought fairly to be imputed to the legislature when it enacts a statute in the future, equally it must be right to look at all the relevant circumstances when interpreting a statute enacted in the past.

7. I would allow the appeal and I agree with the order proposed.

ORDER

Appeal allowed with costs.

Set aside the orders of the Full Court of the Supreme Court and in lieu thereof order that the appeal to that Court be allowed with costs.

Set aside the orders of Master White striking out the appellant's statement of claim and dismissing his action and in lieu thereof order that the summons brought by the respondents be dismissed with costs.
